A JAILHOUSE LAWYER'S MANUAL

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Chapter 1:
How to Use the *JLM*

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CHAPTER 1

HOW TO USE THE *JLM*

A. General Comments

If you have been convicted of a crime and sentenced to prison, *A Jailhouse Lawyer's Manual* (the "*JLM*") is for you. It contains information about challenging your conviction or your sentence, your rights while you are in prison, and different ways to obtain an early release from prison.

The *JLM* contains thirty-six Chapters. You should begin by reading Chapters 2, 5, and 6. These Chapters teach you the basics of understanding and using legal materials. You can also look in the Table of Contents for the subject or subjects that are related to your concerns.

The Appendices at the end of the *JLM* are also important. Appendices I and II contain the addresses of the federal courts and state courts in New York. Appendix III is a list of addresses for District Attorneys' offices in New York. Appendix IV contains a list of several organizations that help prisoners. Appendix V contains a dictionary of legal terms used in the *JLM*.

The *JLM* discusses only those areas of law that relate to prisoners' rights. To learn about the law relating to other matters—such as automobile accidents or apartment leases—you will need to look elsewhere. Chapter 2, "Introduction to Legal Research," explains how to research these and other areas of law in your prison law library.

Similarly, although the *JLM* explains the procedures you can use to attack your conviction, it does not explain many other areas of the law, such as the constitutional limits on the power of the police to search you, to seize evidence from you, or to arrest you. The *JLM* does not describe the limits on a grand jury's power to indict you, or the limits on what the prosecutor can say to the jury or ask witnesses or defendants during the trial. If you have been convicted of a crime, these are areas of law that you will probably need to know more about to determine whether your conviction was lawful. The most important rules in these areas of the law derive from the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution, and court rulings declaring what these amendments mean in relation to cases like your own. The best way to learn about Fourth, Fifth, and Sixth Amendment issues is to research them in the library using the skills you will learn by reading Chapter 2 of the *JLM*.

In general, it is always a good idea to seek the assistance of a lawyer in pursuing any legal action. But it is often not possible to get professional legal assistance—at least at first. If you do not have a lawyer, the *JLM* can help you initiate a legal action on your own, or interest a lawyer in your case. Even if you have a lawyer, the *JLM* will be helpful because no one is more concerned about your rights and needs than you. If you know what your lawyer should be doing, what papers he or she should be filing, and what questions he or she should be asking, you will be better able to actively participate in your case. You might even be able to help your lawyer with some of the work. Remember, in criminal appeals and most other actions, very strict time limits exist. Learn these time limits and make sure your attorney files all necessary papers on time.

Two final suggestions about using the *JLM*: use it cautiously and share it. *Use it cautiously because it may contain statements that are out-of-date by the time you read them* and because it may take years of litigation before you can vindicate your rights in court. To make sure that a statement, statute, or holding is not out-of-date, follow the steps described in Chapter 2, which explain "Shepard's" and "pocket-parts." Never forget that an incorrect or weak legal argument may waste a valuable opportunity to challenge a violation of your rights.

Share the *JLM* because there are not enough to go around. Share it also because you will benefit from others' understanding and assertion of their rights. One prisoner's victory in court may bring about changes in prison conditions that will improve life for all prisoners, including you.

B. How to Use the *JLM* to Learn About the Law

If you are not a jailhouse lawyer and you want to learn the basic tools of the jailhouse lawyer, begin by reading Chapter 2, "Introduction to Legal Research." If at all possible, read Chapter 2 in the law library and look at each book the Chapter mentions. Do not expect to understand all of Chapter 2 the first time you read it. It often takes law students many months before they understand how all of the different research tools work. The key to learning how to do legal research is practice.

The next step is to read Chapter 6, which introduces you to basic legal documents and to the most common types of legal proceedings. After you have read Chapters 2 and 6, you will be able to understand how the research for the memorandum in Chapter 6 was done and why the memorandum was written. From this point on, it is simply a question of refining your skills and broadening your familiarity with the law. The best way to do this is to read the remainder of the *JLM*.

If you come across a word in the *JLM* that you do not understand, refer to Appendix V. If the word is not explained there, use the legal dictionary in your prison's law library.

If you already know how to do legal research but have a specific problem, look at the Table of Contents to see which sections may be applicable to your problem. If you need to determine your rights in an area covered by the *JLM*, like religious freedom or temporary release programs, read the appropriate Chapter and then *confirm what it states through research in the library.* This is done by finding the part(s) of the Chapter discussing your problem and then writing down the cases or statutes that are cited in the footnotes. If these authorities are cases, read the cases and then Shepardize them; if they are statutes, find the statutes, check their pocket-parts to make sure that they have not been repealed or amended, and then look at the "notes of decisions" in the pocket-parts to see if they have been recently interpreted by the courts. Although terms like "Shepardize" and "notes of decisions" may seem strange to you right now, Chapter 2 will explain them. You should make sure to read all the Chapters that might contain information on any part of your case.

You should read Chapter 5 if you have a serious problem and you think you require relief (help) from a court. This Chapter directs you to other Chapters that explain the kinds of legal proceedings you can use. Again, verify and update anything cited in the *JLM* that you plan to use in your case. Outdated and incorrect cases or statutes will jeopardize your chances of winning or may delay the process.

If no Chapter in the *JLM* discusses your problem, you will have to start from the beginning, using the legal research skills that you will learn by reading Chapter 2. It is also possible that one of the Chapters in the *JLM* discusses a similar problem. If this is the case, it may be helpful to start your research by reading some of the cases or statutes cited in that Chapter.

C. How to Use the *JLM* When Filing a Lawsuit

Once you have decided that your rights have been violated or that you have a valid claim and you want to go to court, you should turn to the sample legal papers in Chapters 9, 16, and 17 (and Chapters 10, 20, and 22 for New York State Prisoners). Each of these Chapters discusses a different kind of lawsuit and provides examples of the legal papers that you must send to the court in order to initiate the suit. These legal papers are called "forms" because you can use the basic language provided in the sample form and fill in the blanks with the facts that apply to your case. For example, Chapter 9, "Appealing Your Conviction or Sentence," contains the types of papers you will need to start a criminal appeal.

It is important that you do not tear these sample legal papers out of the *JLM* and do not copy them word for word. If you tear them out and try to send them to a court, or if you simply copy them and then send your copy to a court, the court will either throw them out or send them back to you. In order to use these forms, you must read the first part of the Chapter that discusses how to use them. Then follow the footnotes contained in each legal paper. These tell you exactly how to prepare your own version.

After you have written your version of the legal papers, you must make copies of what you have written. Each Chapter tells you how many copies you will have to make. Then you will have to mail the original plus several copies to a court. Appendices I and II explain to which court the papers should be sent. You may also have to send copies to the District Attorney. Appendix III contains the mailing addresses of all of the District Attorneys in New York. Most prisons have photocopying machines. If your prison does not, you can copy your papers by retyping or rewriting them.

Chapters 4 and 9 also explain how to request a court-appointed lawyer to pursue your case. When you make this request—by filing "poor person's" or *in forma pauperis* papers—you can also ask the court to assume the responsibility for "serving" all of your papers on your opponents and to allow you to proceed without paying court fees up front. Under the Prison Litigation Reform Act ("PLRA"), prisoners may be required to pay court-filing fees in full. The full cost of the fees will be deducted gradually from your prison account. For a fuller discussion of the PLRA and how it affects your rights, read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

D. How to Use the *JLM* if You Are Not Imprisoned in New York State

Many of the Chapters in the *JLM* discuss the law as it exists in New York State. If you are not a prisoner in the state of New York, these laws do not apply to you. You must find out what laws and regulations your state or municipality has issued. Similarly, cases decided by New York state courts that are described in the *JLM* do not apply directly to non-New York state prisoners.

If you are unable to find materials dealing with the laws and regulations of your state in the *JLM*, do not be discouraged. The *JLM* is valuable for prisoners outside of New York for several reasons. First, many of the Chapters discuss laws that affect prisoners outside of New York. Several Chapters have parts on, or are entirely devoted to, the law of states other than New York. In addition to Chapters in the *JLM* that address state law outside of New York, you may find information on the laws and regulations affecting you in the State Supplements. Currently, State Supplements are being written for prisoners in Texas, California, and Louisiana state prisons, with plans to write supplements for other states in the coming years. If you are a state prisoner in Texas, California, or Louisiana, these supplemental books will provide you with information on the state laws and regulations affecting your rights, especially when they are different from the laws discussed in the main *JLM*. The *JLM* is also valuable for prisoners outside of New York, Texas, California, and Louisiana for two other reasons. First, as you will learn in Chapter 2, decisions by the United States Supreme Court discussed in the *JLM* apply to all prisoners throughout the nation. Second, by reading the Chapters in the *JLM* you will learn how to effectively research the laws of your own state. Chapter 2 gives you the skills to become an excellent jailhouse lawyer no matter what state law applies to you.

Although this book does not always present you with the exact answer you need, it teaches you how to get the answer on your own. Wherever you are imprisoned, you can use your new-found skills to protect your rights and advance your interests. A careful reading of the Chapters that relate to your problem will allow you to think like a lawyer and to analyze your problem from a legal perspective. Knowing how to think this way is very important because what matters most is not what remedies you think best, but the remedies to which you are entitled by law.

A JAILHOUSE LAWYER'S MANUAL

Chapter 2:
Introduction to Legal Research

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CHAPTER 2

INTRODUCTION TO LEGAL RESEARCH*

A. Introduction

To be an effective "jailhouse lawyer," you must understand both how the judicial system is organized, and how to find and use the law so that you can work within that system. This Chapter will first explain the structure of the courts that make up the judicial system. Then, this Chapter will discuss how you can research the law in your prison library. Legal research is important in helping you understand your rights under the law, so that you can present your position to a court clearly and effectively.

Before you research the law, you will need to know the powers and functions of the court where you will make your argument. Different types of courts have different powers, and hear different types of arguments. For example, the argument you make in a trial court may not be appropriate in an appellate court. Part B of this Chapter describes how the judicial system is organized and will help you understand the different powers that courts have at each level of the system. Part C explains basic legal research and provides an outline for how to develop legal arguments. Part D provides the general rules for how to cite cases and statutes in documents that you submit to a court. Part E suggests next steps you should take after you complete your legal research, such as double-checking that all your cases are up-to-date and have not been overruled.

B. An Overview of the Court System

In order to move your case successfully through the judicial system, you need to understand the system's basic structure. Some courts will only hear cases that have to do with a certain subject matter. Other courts will only hear specific types of legal proceedings (such as an appeal), or will only hear cases from a certain geographic area. So before you file a case, you have to make sure that you are filing it with the correct court. Courts are responsible for determining what a law means. There are two types of law: law created by a legislature, and law created by judges on a court. Understanding this basic structure will help you be an effective jailhouse lawyer.

1. The Court System

The American judicial system is made up of two types of courts: trial courts and appellate courts. In trial courts lawyers put evidence before a judge or jury, who decides the facts of the dispute. *Criminal trials* determine the guilt or innocence of the accused, while *civil cases* determine whether the defendant is *liable* (responsible for damages or wrongs) to the plaintiff. (In civil cases, one party sues another party for a *remedy*.) *Appellate courts* review the legal conclusions of trial courts for errors. If the appellate court finds legal errors, it may order a new trial. The major difference between trial and appellate courts is that the trial courts decide issues of fact (did person A hit person B with a baseball bat?), while appellate courts generally will only check to make sure that the trial court correctly applied the law to the facts that the trial court found (if person A did hit person B, was it an assault?). Appellate courts will rarely interfere with the facts that have been found by the trial court. (If the trial court decided person A did hit person B, the appellate court will generally accept that as true.) Appellate courts will normally only consider arguments about the law, and not about the facts.[1]

Most states and the federal system have two levels of appellate courts. The "intermediate" appellate court[2] is often called the Court of Appeals in the state system and the *Circuit Court of Appeals* in the federal system. The higher level of appeal, normally the "court of last resort," is often called the Supreme Court. If you are a criminal defendant, than you usually have an automatic right to appeal your conviction or

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* This Chapter was revised by Susan Maples based on previous versions by Kristin Heavey, Jennifer Parkinson, Paul Quinlan, William H. Knight, Andrew Cameron, and Patricia A. Sheehan.

1. Normally, appellate courts will overturn factual findings of a trial court only if there was no evidence presented at trial to support the trial court's factual finding.

2. The first level of appellate court is called an "intermediate" appeal court because it is between the trial court below and the higher appellate court above.

sentence to the intermediate appellate court.[3] You can only appeal to a higher appellate court if that court agrees to hear your case. Usually, higher appellate courts only grant appeals to cases that raise new legal issues. The typical court structure is shown below in Figure 1.

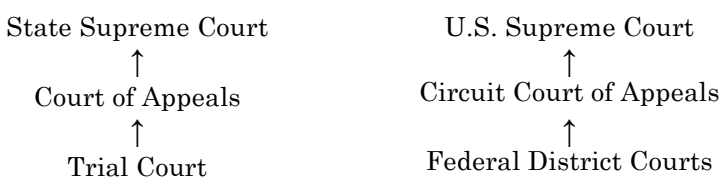

Figure 1: Typical Organization of State and Federal Courts. (For a more detailed diagram, see the inside front and back covers of the *JLM*).

Some states have different names for their courts, but the basic organization remains the same.[4] The organization of the federal system is similar to that of the states. Every state and the District of Columbia has its own system of courts. Each court system only handles cases in its *jurisdiction*. Jurisdiction is the area over which a court has the power to resolve disputes and enforce its decisions. Some courts have jurisdiction only over certain subject matter, and some courts only have jurisdiction over certain territory. Both of these types of jurisdictions are discussed below.

(a) Subject Matter Jurisdiction

Courts are divided into state and federal courts. Federal courts only have jurisdiction over cases that involve the U.S. Constitution or a law passed by the U.S. Congress (called a "federal statute").[5] State courts are generally free to deal with any matter (i.e., a state court can decide a dispute that has to do with a state law or a federal law). Defendants often prefer to bring their case in federal court, if possible, because federal courts can often hear cases more quickly than state courts.

In addition to the distinction between state and federal law, some courts are further limited in the subject matter of law they may consider. For example, the New York City Criminal Court can only hear non-felony criminal cases; the Federal Tax Court can only hear tax cases.[6]

(b) Territorial Jurisdiction

Courts are also limited to hearing cases from particular regions. For example, the Criminal Court of New York City can only hear cases about crimes that took place in New York City. Similarly, the federal court for the Eastern District of New York is restricted to hearing cases about incidents arising in Long Island, Queens, Brooklyn, and Staten Island. So even if a case is within a court's subject matter jurisdiction, the court cannot hear the case unless it also took place in the court's territorial jurisdiction.

Appellate courts also have limited geographic jurisdiction. Each federal Circuit Court of Appeals represents a specific geographic region; the regions are numbered and may include more than one state. The following are the twelve Circuit Courts and the states (and territories) that are in their jurisdiction:

First Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island;
Second Circuit: Connecticut, New York, and Vermont;
Third Circuit: Delaware, New Jersey, Pennsylvania, and the Virgin Islands;
Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, and West Virginia;

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3. Prosecutors, on the other hand, can only rarely appeal.

4. For example, New York State has a more complicated court structure, but it still follows the basic pattern of other states. In New York, the trial court is called the Supreme Court. The intermediate appellate courts are called the Appellate Division, which is subdivided into four regional Departments; each Department has jurisdiction over different parts of the state. The highest court is called the Court of Appeals. For more details on the organization of the New York State court system, see the diagrams on the inside back cover of the *JLM*.

5. U.S. Const. art. III, § 2. The § symbol means section. Additional federal statutes also provide original jurisdiction in federal district court for civil cases that concern the "Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2008). You can also file a civil complaint in federal district court if you and the other party are citizens of different states and the dispute involves more than $75,000. 28 U.S.C. § 1332 (2008).

6. Handeland v. Comm'n of Internal Revenue, 519 F.2d 327, 329 (9th Cir. 1975) ("The basic jurisdiction of the Tax Court ... is now limited to … Federal income, estate, and gift taxes").

Fifth Circuit: Louisiana, Mississippi, and Texas;[7]
Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee;
Seventh Circuit: Illinois, Indiana, and Wisconsin;
Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota;
Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the Northern Mariana Islands;
Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming;
Eleventh Circuit: Alabama, Florida, and Georgia;
D.C. Circuit: District of Columbia.

The U.S. Supreme Court is the highest appellate court in the federal judicial system and is the final court of appeal for all federal cases. The Court can also hear criminal appeals from the highest appellate state court, but only if those cases involve constitutional questions or issues of federal law.[8] If a case does not have a federal legal issue, then the state Supreme Court is the court of last resort for criminal cases that began in the state court system.

Understanding the position and powers of different courts will help to make sure that you file your case in a court that has the power to hear it, and has the power to grant you the remedy you are asking for. If you know the limited jurisdiction of various courts, you will also know if a court has acted beyond its powers. For example, if you were convicted of assault in the Federal Tax Court, the conviction is invalid because that court is only authorized to hear tax cases; convicting someone of assault would exceed its subject matter jurisdiction. Similarly, if you were convicted of a crime in the Criminal Court of New York City but the offense took place outside the City of New York, then the court would not have jurisdiction over the case.

2. The Basis of Judicial Decision Making: What is "The Law"?

(a) Types of Law: Constitutions, Statutes, and Case Law

Judges make decisions based on law. Your goal as a jailhouse lawyer is to convince the judge that the law supports your arguments. There are three sources of law: (1) constitutions; (2) legislation (also called "*statutes*" or "statutory law"); and (3) case law (previous decisions made by judges). Judges weigh each source of law in the following order: constitutions are more persuasive (more convincing to the court) than legislation, and legislation is more persuasive than case law. Figure 2 lists the sources of law from most to least persuasive.

U.S. Constitution (strongest authority, most persuasive)
↓
Federal legislation
↓
State constitutions
↓
State legislation
↓
Case law from appellate courts
↓
Case law from trial courts (weakest authority, least persuasive)

Figure 2: Hierarchy of Sources of Law

Part C of this Chapter will describes how to find the relevant law(s) for your case. Before you start researching, though, it is important that you understand how the different kinds of law work together.

A constitution is the supreme law of the jurisdiction. The United States Constitution is the supreme law of the United States. Each state also has a constitution; if a state constitution and the U.S. constitution are in conflict, a court will follow the U.S. constitution.[9]

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7. Before Oct. 1, 1981, the 5th Circuit included all of the states that are now in the 5th Circuit plus all of the states now in the 11th Circuit.

8. As explained in Part B(1)(a) of this Chapter, federal law includes matters involving the Constitution, a federal statute, or a treaty.

9. U.S. Const. art. VI.

The second type of law, legislation, refers to laws passed by a legislature (by the U.S. Congress for federal law and state legislatures for state law). Legislation is the typical form in which laws are enacted. Finally, case law is the law that results when a court decides a case. The following section provides additional information on case law.

(b) Case Law: How to Use Legal Precedents

In deciding a case, the court is making law in two ways. First, the court determines what the law says about the dispute between the parties directly involved in the case. More broadly, this decision will also affect other people because the court's resolution of the issues in the case forms *precedent* for other similar cases: the case becomes an example, and sets out a rule that other judges will follow in similar cases. When a court is deciding a case, it will look at how other courts decided similar issues in the past, and will follow those examples (those precedents). Courts rely on earlier, similar cases, to determine how a current case should be resolved. This process is called "stare decisis," which means "already decided." ***The greater the similarity between the cases, the stronger the precedent.*** Therefore, it is very important to find out whether issues in your case have already been decided by your court or other courts. These other cases can help you predict how a judge would rule in your case. You can also see what arguments were successful in other cases, so that you can use those arguments to succeed in your case. If you find arguments that hurt your case, you will need to rebut (argue against) them before the court.

If you find precedent cases that support your arguments, you will try to show the court that your case is sufficiently similar to the previous cases so that the conclusions in those cases should be followed in your case. For example, suppose that you have been placed in solitary confinement because you complained to a newspaper reporter about prison conditions. You should look for a precedent case that ruled that the prison cannot punish a prisoner, or put a prisoner in solitary confinement, for similar complaints. If you find such a case, your next step is to convince the court that you were placed in solitary confinement because of your complaints, and not for a different, valid reason. Then, you should use the rulings in the precedent cases to argue that your case should be decided in the same way.

If the precedent case works against you, you will have to convince the court that your case is different enough that the judge should not follow the precedent. This is called "distinguishing" a case.[10] One way you can distinguish your case is to show that there were factual differences between your case and the earlier cases. A superficial (or insignificant) difference like the following will not help your case: "that case involved them, but my case involves me." A useful distinction is one that casts doubt on whether the precedent should be applied in your case. For example, it would be useful to demonstrate that the facts are so different that the cases are not really the same: "in that case the defendant didn't get a speedy trial because he fired his lawyers three times when they were ready to go to trial, but my trial has been delayed over and over through no fault of my own."

It is important for you to note that not all precedent cases are equally persuasive. If the case was decided by a judge on the same court as your judge, or by an appellate court above your court, the precedent case is very strong. In effect, the earlier case defined the law in your particular jurisdiction. A lower court must follow the higher court's precedent, or risk almost certain reversal by the higher court. The court that created the precedent is also unlikely to overrule itself without extremely good reasons. Precedents from the same court or from the appellate court above it are sometimes called "controlling precedents."[11] Additionally, a case decided in the United States Supreme Court is controlling precedent for all other courts. Courts rarely refuse to follow controlling precedents. However, in some instances, older controlling precedents may carry less weight when applied to a modern case. Furthermore, precedents can be overruled (and therefore become

10. Ignoring the case is not a good idea because the other side will likely use it against you in its arguments.

11. Certain state court systems are structured to require trial courts to consider the decisions of all appellate courts within the state as controlling. For example, New York's first level appellate courts are called the Appellate Division. The Appellate Division is divided into four Departments. An appellate decision from any Department is controlling for all trial courts within the state, unless the trial court's own Appellate Division rules otherwise. Stewart v. Volkswagen of Am., Inc., 181 A.D.2d 4, 7, 584 N.Y.S.2d 886, 889 (2d Dept. 1992) (rev'd on other grounds by Stewart v. Volkswagen of Am., Inc., 81 N.Y.2d 203, 613 N.E.2d 518, 597 N.Y.S.2d 612 (N.Y. 1993)); Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664, 476 N.Y.S.2d 918, 919–20 (2d Dept. 1984). But see People v. Salzarulo, 168 Misc. 2d 408, 411, 639 N.Y.S.2d 885, 887 (Sup. Ct. N.Y. County 1996) (holding that while other departments are "entitled to have their rulings accorded great respect and weight," trial courts are only bound by the appellate court in their Judicial Department).

useless) if a higher court believes a lower court made an incorrect decision, or if the legislature passes a law that invalidates a court's decision. It is therefore very important to make sure the precedent you have found is still good law (i.e., has not been overruled).

Precedents from other jurisdictions are valuable but are not controlling (so your judge is not obligated to follow the precedent case). A case from another jurisdiction sets out the law in that court, but not necessarily for your court. Still, the reasoning in the case might persuade your judge, especially if no court in your jurisdiction has ruled on the legal issue. For instance, if most courts in other states have decided an issue in the same way, those out-of-state decisions can still provide a suggestion for how your state should decide the issue.

Chapter 6 of the *JLM*, "An Introduction to Legal Documents," will discuss the legal papers you need to provide to a court. These documents are very important; they should be written clearly and persuasively, and should have no errors. Before you write any papers, however, you will need to figure out your most compelling or convincing arguments and find cases to support those arguments. Finding precedent cases is an extremely important part of your research because those cases will reveal which arguments were successful with other courts, and which arguments were not. Cases from higher precedent courts, and cases that are very similar to yours, carry the greatest weight and will help your case the most. You should search for similar cases not only in your jurisdiction but also in other jurisdictions (even though cases from your own jurisdiction will be much more persuasive). You will also need to distinguish any precedent cases that do not support your argument, as discussed above. Finally, you should also consider public policy reasons why a court should rule in your favor. Public policy reasons are arguments that a court should find in your favor because the resulting decision will be good for society as a whole, not just for you.

C. Legal Research: How to Find and Support Legal Arguments

1. Sources for Legal Research

There are three categories of resources in your law library. The first category is "primary sources." Primary sources include the documents that make up the "law": constitutions, legislation, and case law (court decisions). Primary sources also include law created by "delegated authority," such as executive orders, regulations, and the rulings of administrative tribunals. Since legislative bodies such as the U.S. Congress cannot regulate the details of every law, other government bodies (such as administrative agencies) fill in the details of generally worded statutes, usually by creating regulations. Courts base their decisions on all of these primary sources of law.

The second category of resources found in a law library is "secondary sources." These are not themselves law, but books and articles that discuss and comment on the law. This commentary can help you understand the law and help you to find relevant primary sources. Secondary sources include textbooks, treatises, form books, dictionaries, periodical literature such as law journals, and manuals like the *JLM*. While courts prefer primary sources, sometimes you can use a secondary source, such as a law review article or a treatise, if you cannot find any applicable cases or statutes. These sources can be useful in persuading a court to rule a certain way. However, ***you should not use a manual such as the JLM*** as authority for the court—you should use the JLM to help you find law which you can then use to persuade the court.

The third category of resources found in a law library is search books. Search books are library tools that help you to find primary and secondary sources of authority. They include digests of court decisions, citators (such as Shepard's), and annotated statute books. These search tools can help you find cases to make strong arguments, and are discussed in more detail in the remainder of this Chapter.

2. Methods of Legal Research

Your goal in researching a legal question should be to find relevant primary sources. Your prison library will contain research tools that will help you find these primary sources, in addition to the sources themselves. Although you will need to find different sources for each case, the research process will be similar. This process has seven basic steps:

(1) Analyze the problem;
(2) Get an overview of the subject matter;
(3) Find relevant legislation;
(4) Find relevant cases;
(5) Check other sources;

(6) Update your research; and
(7) Cite cases.

If you are familiar with an issue you may be able to skip some steps, although we recommended that you follow all seven steps for each research issue. This way, you can be sure that you have researched your question completely and accurately.

Remember to take careful notes during your research. Your notes will provide a record of your research and will help you to avoid losing information. Careful note-taking is key to successful legal research.

(a) Analyze the Problem

Your case will begin with a story, not a precise series of legal issues. While you will eventually translate the story into legal issues, you must first confirm the facts of your story. If you are preparing to appeal your criminal conviction, you must first review all the evidence from the trial court transcript. If you are filing a civil case (for example, if you are suing the prison for use of excessive force), you should gather as much information as possible about what happened, especially written documentation (medical records, complaints you have filed, etc.). As your research progresses, you will need to look at the facts again to determine which ones are most important.

If you are planning to appeal a lower court decision, remember that the appellate court will accept the facts as found by the lower court. Challenging the factual findings of the lower court is very difficult (*see* footnote 1 in this Chapter). Therefore, you should research your legal issues as they apply to the facts that the lower court found.

Once you have a firm grasp of the facts of your case, you should examine the legal issues they raise. In doing so, you should start by asking yourself the following three questions:

(1) What are the legal issues that I want to raise?;
(2) Which court has the power to hear my case and rule on the issues I will raise?; and
(3) If the court accepts the merits of my legal arguments and rules in my favor, does the court have the power to award me the relief that I seek (such as award me money, reverse my conviction, or force someone else to take a specific action)?

The last question is whether the court can grant you your requested remedy. Remedies are discussed in detail in Chapter 9 and Chapters 13–17 of the *JLM*. The remainder of this Chapter deals with the first two questions.

The first question goes to the heart of your case: what legal issues do you want the court to consider? To answer, you should look first at the general areas of law in your case. Is your case about arrest? bail? parole?

In a civil case, you need to find out what you will have to prove in order to show that the defendant is liable for each claim you are asserting. (In civil cases, you are the plaintiff and each person or prison you are suing is a defendant.) You should also be prepared to rebut (argue against) any defenses the defendant makes. You will find much of this information in case law, but statutes may also be important.

If you are appealing a criminal conviction, you should focus on errors made by the trial court. You should review secondary sources covering arrest and trial practices to learn the most common arrest and trial errors. Then you should thoroughly review the lower court proceedings and the judge's decision in your case to find any areas of possible error. Conducting focused research on the laws applicable to your case will help you to figure out whether an error was made. While this Chapter focuses on how to conduct the legal research that is necessary for your appeal, you should also read Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence." Chapter 9 contains important information such as how to file your appeal, time limitations you might face, and your right to have a lawyer.

As you are deciding which issues to investigate, it may be helpful to break down the general areas of law into more specific problems. For example, you may start your research in a broad area of law (such as "criminal procedure") and move to a narrower area (such as "searches incident to arrest") and ultimately to a precise question (such as, "can a police officer use a "choke hold" to arrest a suspect and search for drugs?"). It is easier to research a narrow issue and build it into a larger case than to try to research the entire case right away.

Once you have a legal question, you must ask which court has jurisdiction to hear it. As discussed in Part B(1) of this Chapter, there are both territorial (geographic) and subject matter limits on a court's power. You must bring your action or appeal in a court that has jurisdiction to hear it, or your case will be dismissed. Territorial jurisdiction for a trial court will depend on where the alleged incident took place. For

an appellate court, territorial jurisdiction will depend on which court made the ruling that you are appealing (*see* Part B(1) of this Chapter). You should also confirm subject matter jurisdiction before beginning extensive research on the merits of your case. While most cases will not involve complicated jurisdictional issues, you must make sure you are filing your case in a court that has jurisdiction to hear it.

(b) Get an Overview of the Subject Matter

Legal research is hardest at the beginning, since you will need to understand the general area of law that covers your case before you focus on narrower issues. Background reading will help you understand how to apply the current law to your facts. Two particularly helpful sources for general overviews are legal encyclopedias, which provide concise summaries of the law, and treatises, which provide a more detailed analysis of a particular type of law. Prison libraries usually have the two most common legal encyclopedias, American Jurisprudence and Corpus Juris Secundum, as well as copies of treatises such as McCormick on Evidence, Johnson's The Elements of Criminal Due Process, Kerper's Introduction to the Criminal Justice System, and Kerper's Legal Rights of the Convicted. As you read these background materials, be sure to take notes about any cases, legislation, or constitutional provisions that seem like they may help your case. To find a subject in an encyclopedia or treatise, use either the "index" (usually found in the back of a book; if you are talking about more than one index, the plural is "indices") or the "table of contents" (usually found in the beginning of a book). Both types of research are fully described later in this Chapter.

(c) Find Relevant Legislation

After learning the basics of a subject area, you should turn to the main sources of law—legislation and cases. Research can take a long time, so remember to take good notes about the sources you read and to follow the outline this Chapter provides.

You should start your research by reading legislation. Legislation includes constitutions, federal and state statutes, and supporting governmental enactments, such as regulations and administrative decisions. Constitutions and statutes are generally broken down into parts called articles, sections (the § symbol means "section"), and clauses. Regulations issued by state or federal agencies, such as the New York Department of Correctional Services or the U.S. Bureau of Prisons, are an important form of legislation and should be checked during your research. Each form of legislation will now be discussed in greater detail.

(i) Federal Constitution

Constitutions create the structure of government and define individual rights and liberties. They are the most important authorities, and the Constitution of the United States is the supreme law of the United States. Any federal case or statute, or any state constitution, case, or statute that violates the U.S. Constitution is "unconstitutional," which means it is completely invalid. Thus, the Constitution should be your first source to research your case, and you should determine if a constitutional provision applies to your case at the beginning of your research. The first ten amendments to the Constitution (known as the "Bill of Rights"), along with the Fourteenth Amendment, are the most important parts of the Constitution for criminal defendants and prisoners. They contain guarantees of personal rights and liberties. Of particular interest are the First Amendment (freedom of speech), the Fourth Amendment (search and seizure), the Fifth Amendment (grand jury indictment, double jeopardy, self-incrimination, and due process), the Sixth Amendment (jury trials for crimes and procedural rights), and the Eighth Amendment (excessive bail and cruel and unusual punishment). The Fourteenth Amendment is also very important because it prohibits state governments from depriving you of life, liberty, or property without due process of law (i.e., certain legal procedures), and it guarantees the equal protection of law. Similar rights are guaranteed to you from the federal government through the Fifth Amendment. The text of the Constitution can be found in each of the first twenty-eight volumes of the United States Code Annotated ("U.S.C.A.").

(ii) State Constitutions

Each state has its own constitution. The text of the New York State Constitution appears in the first few volumes of McKinney's Consolidated Laws of New York Annotated ("McKinney's"). Each state's constitution is supreme over all other laws of that state, including state statutes passed by the legislature, and cases that state courts decide. But, state constitutions are ***not*** supreme over federal law (federal law includes the U.S. Constitution and laws passed by the U.S. Congress). State constitutions apply only to state law. While many provisions of state constitutions are similar to provisions found in the U.S. Constitution, your state

constitution may give you more rights than the U.S. Constitution. Thus, you should always consult your state constitution after reviewing the U.S. Constitution.

The U.S. Constitution and most state constitutions are found in "annotated" volumes. Annotated volumes include the text of each constitutional provision as well as summaries of cases that have interpreted them. Following the constitutional text is a section titled "Notes of Decisions," which has the case summaries grouped into separate legal subjects. There is an index to these legal subjects at the beginning of each Notes of Decisions section. You will find the case citation[12] at the end of each summary. Annotated volumes also contain other helpful research tools. These include cross-references, which are citations to legal encyclopedias and relevant treatises in which the same legal subject is discussed, as well as the West "key number system" (discussed in Part C(2)(d) of this Chapter). Finally, annotated volumes often contain summaries of legislative history, which give you information about why a particular law was passed.

To find the relevant constitutional provisions for your case, use the constitutional index found at the back of the final constitutional volume.[13] The methods you use to locate statutes[14] and cases[15] related to your legal question are also applicable to finding relevant constitutional provisions in a constitutional index.

(iii) Federal Statutes

The U.S.C.A. contains the text of the U.S. Constitution and all laws passed by the U.S. Congress. Following the text of many of the legislative provisions is a section titled "Notes of Decisions" which contains summaries of cases that have interpreted each provision. These summaries are not law but will give you an idea of which cases may be helpful to read in detail. The U.S.C.A. also contains other useful research tools such as cross-references to the West key number system (discussed in Part C(2)(d) of this Chapter), which can be found in the section entitled "Library References," located after each legislative provision.

The U.S.C.A. is divided into fifty "titles." Each title brings together in one place all federal laws in a particular subject area. For example, Title 18 brings together all federal laws concerning crimes and criminal procedure, while Title 28 does the same for laws concerning the judiciary and judicial procedure. Each title may contain multiple volumes. There is a paperback index to the entire U.S.C.A. (excluding the constitutional volumes) shelved after the main volumes. Each title also has its own index located in its last volume.

The text of all federal laws also appears in the United States Code ("U.S.C."). The U.S.C. is organized in exactly the same way as the U.S.C.A. It differs from the U.S.C.A. in that each title contains only the law, not the Notes of Decisions. Your prison library may have the U.S.C.A., the U.S.C., both, or neither.

If you are charged with an offense under federal law, a useful starting point is to review the text of the provision under which you are charged. Beneath the text of that provision of law there may be summaries of cases interpreting the text that will allow you to see how courts have applied that provision in other cases.

It is essential that your research be current. Hardcover volumes of sources are not replaced frequently. The most up-to-date information is found in soft cover updates found in a folder inside the back cover of each hardcover volume or next to the volumes on the shelf (called the "pocket part"). Soft cover updates contain information received after publication of the hardcover volume. These pocket parts will reveal any recent amendments (changes) to the statutory provision and any recent cases interpreting that provision. You must check the pocket part for the most current law whenever you use a hardcover volume of any source in your research.[16]

The entire U.S.C. is updated every six years. The most recent volumes are from 2006. The U.S.C.A. is updated more frequently. If your prison library has not updated its collection of hardcover volumes, you should continue to check the pocket parts to make sure that your research is up to date.

You should ***always*** check whether statutes have changed before relying on them in a legal paper. When referring to a federal statute, cite to the most recent U.S.C. or U.S.C.A. in your prison library, meaning the

12. Case citations are discussed in Part D of this Chapter.

13. Note that there is a separate index for the constitutional volumes of the U.S.C.A. A larger multi-volume paperback index is published for the rest of the U.S.C.A. volumes that refer to legislation, but that index does not contain any references to the Constitution.

14. Statutes are described in Part C(2)(c)(v) of this Chapter.

15. Cases are described in Part C(2)(d) of this Chapter.

16. When a statute has been amended or repealed within the past twelve months, the pocket part may not have the most recent change. For the most up-to-date information, consult the paperback supplement normally shelved at the end of the volumes you are using. Paperback supplements are updated monthly.

book and pocket parts that you looked at while researching your case. It may not be the same year as the versions cited in the *JLM*.

(iv) State Statutes

State statutes are organized in a manner similar to federal statutes. Each state organizes its statutes a little differently, but consider New York as an example. The permanent laws of New York are found in McKinney's Consolidated Laws of New York Annotated ("McKinney's").[17] Like the U.S.C.A., McKinney's is organized according to subject matter but divided into "books" rather than "titles," and arranged in alphabetical order. (But, like titles, each book may contain multiple volumes.) Thus, Book 10B brings together all New York laws on the subject of Correction Law (Prison Law), Book 11A does so for Criminal Procedure, and Book 39 for Penal Law (Criminal Law). McKinney's also contains "Notes of Decisions" summarizing cases that have interpreted each provision. When working with state statutes, as with federal statutes, be careful to consult the pocket parts for information on the most current legislation and cases. State statutes are updated frequently. The years listed in *JLM* citations to state statutes may not correspond to the version in your prison library. As with federal statutes, cite to the version in your prison library.

McKinney's also contains a section called "Practice Commentary" following certain statutory provisions. This commentary is neither a case summary nor actual law, but it reflects the comments of a lawyer who has studied the statute. The commentaries help researchers understand the law. Like general summaries of particular subjects, commentaries can be useful sources of analysis and research information.

If you are charged with an offense under state law, a useful starting point is to review the text of the provision under which you are charged. In New York, crimes are defined in Book 39, "Penal Law." The procedural aspects of criminal prosecution are found in the New York Criminal Procedure Law ("N.Y. Crim. Proc. Law"). The N.Y. Crim. Proc. Law is found in the fifteen volumes that make up McKinney's Book 11A. Do not confuse the N.Y. Crim. Proc. Law with the New York Civil Practice Law and Rules ("N.Y. C.P.L.R."), which explains the rules of the courts in New York.

(v) Finding Statutes—The General Index

You will not always have a particular statute or statutory section to begin your research. If you are starting from scratch and the provision under which you were charged is not helpful, the best place to turn is the "general index" of a source. This is true whether you are researching the U.S. Constitution, federal legislation, or state legislation. The general index is normally found in separate volumes at the end of the source you are using. For example, the general index for New York legislation is found in several paperback volumes shelved after the McKinney's main volumes. The index lists topics in alphabetical order, so you can begin by searching for a word that describes or is related to your problem. These descriptive words can refer to an event (for example, "arrest" or "homicide"), certain persons (for example, "addicts" or "police"), places (for example, "prison" or "hospital"), or things (for example, "motor vehicles" or "weapons"). General descriptive words are divided into subcategories. For example, under "weapons" you will find separate entries for different types of firearms. The general index is designed to lead you to the relevant statutes from a variety of descriptive words. Thus, you need not find the "perfect" word. Keep track of the different possible descriptive words as you research and use the many indices to help you find relevant authorities.

A second method of finding legislation is to check the title or book index. The title or book index is similar to a table of contents, and is found at the beginning of each volume. So, for example, scanning the names of the McKinney's volumes shows three possible criminal titles: "Correction Law," "Penal Law," and "Criminal Procedure Law." If you were researching a procedural issue (say your home was searched pursuant to a search warrant in the middle of the night), the volumes on Criminal Procedure Law (Book 11A) seem like the most useful place to begin. You would then take out a volume of 11A and turn to its "book index." Note that this table appears after the shorter "Table of Contents" section, and is immediately before

17. If you need to find a law that is no longer in force (for example, if you were convicted under a version of the Penal Law that was later changed), look first to McKinney's for the current version of the law. After the current statute, find the "Historical and Statutory Notes" section, which will tell you what year of the Session Law to look at in order to find the old law. That year's "Session Law" can be found in McKinney's Session Laws of New York. It is unlikely, however, that a prison library will have the Session Laws. If your library does not have the Session Laws, the "Historical and Statutory Notes" section often lists a short summary of changes that have been made to the original law.

the statutory provisions. The book index breaks down the general subject of Criminal Procedure into smaller topics and subtopics.

Following each subtopic is a list of statutory sections that deal with that subtopic, so you can review the subtopics to find statutory provisions that may be helpful for your research. For example, on the issue of "nighttime searches," the book index in any of the volumes of 11A shows a section on "procedures for securing evidence," and another on "search warrants." If you go to the volume of 11A that contains the legislation on search warrants (Sections 690.05 to 690.55) and turn to the beginning of that section, you will see another listing of even more specific subtopics that includes "search warrants; when executable" (Section 690.30). Turning to that section of the legislation, you will find that, in New York, search warrants may only be used between 6:00 a.m. and 9:00 p.m. unless the warrant provides otherwise. Thus, you have found a law to support your complaint if the warrant used to search your house did not explicitly allow the search to be conducted at night. After the text of Section 690.30, you will find a "Practice Commentaries" and a "Notes of Decisions" section that contains summaries of a number of cases applying this legal rule to various circumstances. Updating your findings by turning to the pocket part of that volume reveals several more recent cases on nighttime searches.

Do not be discouraged if you are having trouble finding a relevant law. Research takes time, and you may need to try the general index, the title or book index, or even a little browsing before you can find relevant legislation. Or, your case may be governed by court cases rather than legislation. Finding case law is the subject of Part C(2)(d) of this Chapter.

(vi) Legislative History

When reading legislation, the "legislative intent," or what the legislators hoped the statute would accomplish, is sometimes unclear. Knowing the legislative intent can often help you to better understand the legislation. It may help you apply the legal rule to the facts of your case. Your exact factual situation may not have been considered by the legislators when they created the law. The best way to find legislative intent is to review the "legislative history" of the legislation. State legislative history is difficult to find and often cannot be found at all. This Subsection will concentrate on how to find the legislative history of federal laws and therefore learn the congressional purpose behind federal legislation.

Legislative history consists of the written record of what Congress considered before passing a law. It includes the text of the bill[18] introduced into the legislature, any later amendments (changes) to the bill, committee and conference reports[19], congressional hearings, and the debates of the House of Representatives and Senate. Committee reports are produced by the Congressional Committees that review legislation. Conference reports are produced by "conferences" set up when the House and Senate pass different versions of the same legislation. Because the conference report is produced jointly by the committees of both the Senate and the House just before the final passage of the legislation, it is perhaps the most important source of legislative intent.

Legislative history is found in many books that are not located in prison libraries. However, one publication, the United States Code Congressional and Administrative News ("U.S.C.C.A.N."), publishes "compiled" legislative histories that bring several sources together in one place. Although the U.S.C.C.A.N. does not provide all legislative history, it is the only source of legislative history you are likely to find in a prison library. There are several volumes of the U.S.C.C.A.N. for each year. To use these books, you must know the year in which the statute was passed. The U.S.C.A. tells you the year the statute was passed at the end of each section. It may also tell you where in the U.S.C.C.A.N. to find the legislative history. Each set of annual U.S.C.C.A.N. volumes also contains a table of "Legislative History." This table lists all the laws passed during that year and identifies certain parts of the legislative history. To find legislative history in U.S.C.C.A.N., look in the index found in the last volume of that year. Search the index for the name or the subject matter of the statute you are researching. The index will list the page number where you can find legislative history for that topic. The volumes of U.S.C.C.A.N. with "Legislative History" on their spines contain the text of the legislative report from the House of Representatives or the Senate.

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18. A statute is called a "bill" before it is passed by legislators.

19. The House of Representatives and the Senate are subdivided into committees that work in a particular area. For example, the House Judiciary Committee works on legislation that concerns the federal judiciary.

If you review the legislative history of a statute, you will often find a statement by a member of Congress or by a committee that explains what Congress intended it to mean. If this explanation helps your argument, you should quote it in the papers you submit to the court.

Legislative histories of state statutes are hard to find because few states keep a record of the process of enacting a bill. In New York, legislative history is usually found in the New York Legislative Annual, which you are unlikely to find in a prison library. Your library may, however, have McKinney's Session Laws of New York (*see* footnote 17 of this Chapter), which contains limited legislative history for some bills enacted that year. This legislative history is found at the end of the final Session Law volume for that year.

(vii) Court Rules

Court rules govern the mechanics of how to get a case into court and what procedures are used once the case is before the court. Sometimes these rules are called "rules of practice" or "rules of procedure." The U.S. Supreme Court has created court rules that apply to all cases in federal courts. The rules are published as part of Title 28 of the U.S.C.A. (in the volumes that have the word "rules" on their spines), and include "Notes of Decisions" sections summarizing cases interpreting the rules. Formally, the rules are separated into the Federal Rules of Civil Procedure (rules for federal civil cases), the Federal Rules of Criminal Procedure (rules for federal criminal cases), and the Federal Rules of Appellate Procedure (rules for appellate procedure in all federal cases). There may also be additional local rules enacted by local federal courts. In addition, the Federal Rules of Evidence govern what can be used as evidence in federal cases. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are published in separate volumes that are part of Title 28 of the U.S.C.A.

State courts have their own court rules. In New York, for example, the rules are contained in McKinney's New York Rules of Court. This paperback volume contains the rules of court for all New York state courts. It also contains the "local federal rules" for the federal district courts in New York and the Second Circuit Court of Appeals. These rules will tell you which court to file papers in and how the papers should be filed (size, form, etc.). The rules will also tell you the usual court calendar. For example, some courts hear certain kinds of cases only on specific days of the week. The rules will also tell you what information is required for certain kinds of lawsuits. If you are involved in a New York State or federal case, always review the New York Rules of Court. In particular, review the section(s) that apply to the court to which you are sending your papers. This review should be done before filing any legal papers, since you do not want to find out afterwards that the deadline for filing the papers has already passed. If you cannot figure out something in the New York Rules of Court, sometimes a court clerk will tell you the answer over the telephone. The addresses and telephone numbers of the trial courts in New York are contained in Appendix II of the *JLM*. Call the courthouse and ask for the court clerk's office. Although this does not always work, it might save you time and effort.

(viii) Administrative Codes

Federal and state legislatures often give government agencies the power to create rules or regulations that govern specific subjects. The rules are often referred to as "administrative" rules or regulations. Here are two examples: the federal government gives the Bureau of Prisons power to make specific rules about how federal prisons are run, and a state will often allow the state's Department of Corrections to make specific rules about how state prisons are run.

All federal administrative rules and regulations are published in the Code of Federal Regulations ("C.F.R."). Similarly, rules and regulations from all departments or agencies within a state are also collected together and published. Each state organizes the regulations a little differently, but the publications are often referred to as the administrative "code," "rules," or "regulations." For instance, New York's administrative rules are published in the Official Compilation of Codes, Rules & Regulations of the State of New York ("N.Y. Comp. Codes R. & Regs."), and Texas' codes are published as the Texas Administrative Code ("Tex. Admin. Code"). Your prison library may have a copy of the C.F.R. and/or a copy of your state's administrative code.

If you are in a federal prison, you may want to review a copy of the C.F.R. to find out if any provisions are relevant to your case. The C.F.R. has many volumes, organized alphabetically by subject matter, and a separate general index will likely be shelved after the main volumes. This general index is a good place to begin your research. For instance, you can open the general index and look under "Prisons Bureau," and under this main heading (which will be in bold type), there are several subtopics. You can scan those

subtopics, and if any of them appears to be related to your case, the index will refer you to the appropriate title and section of the C.F.R. For example, if you are interested in parole issues, you can look under "Prisons Bureau" for the subtopic on "Parole," which will refer you to "28 C.F.R. 572." This means that the rules on parole in federal prisons are contained in Title 28, Part 572 of the C.F.R. You can then pull out the appropriate volume from the shelf (the title and part information is on the spine of the book), and read through Part 572 to see if there is a "section" that interests you. Note that in the C.F.R., sections are simply subtopics under each Part. For example, you would not refer to "Part 572," but to "section 572.30." The index to the C.F.R. is updated once every year.[20]

If you are in a state prison, you may want to review a copy of your state's administrative code. The administrative code will likely have many volumes, organized by subject. A good place to begin your research is in the general index, which should be in one or more volumes shelved after the code's main volumes. For instance, if you have a question about how much exercise time prisoners are supposed to have, you may want to begin by looking in the general index under "prisons." In New York, the index would then refer you to the section on "correctional institutions." Under "correctional institutions," there are many subtopics. One of these subtopics is "exercise," which refers you to "7 § 304.3" and "7 § 1704.6." If you then look at Title 7, section 1704.6 of the N.Y. Comp. Codes R. & Regs., you will find that in New York, most prisoners have the right to exercise outside of their cells for at least one hour each day. If you are using a state administrative rule or regulation in your legal papers, be sure to check whether the regulation has been recently updated or changed. Updates to state administrative code can usually be found in soft cover volumes that follow the main volumes of the administrative code.

(d) Find Relevant Cases

The bulk of your research time will be spent trying to find cases to support your arguments. In researching cases, you want to search for a case that is similar to your case. To be most useful to you, the case must have very similar facts to your case, have been decided by a court in your jurisdiction, and must not have been reversed on appeal, or overruled by a later case or statute. It also helps if the case is recent.

Sometimes you may hear about the "*holding*" or the "dicta" of a case. The holding is the major part of the decision in a case and usually controls only those cases with facts like the case the court decided. Dicta is all of the other things that the court says in the opinion ("dicta" is the plural; when you are talking about only one such comment, say "dictum"). For example, the holding of a case may be that you have the right to an attorney in a criminal case, and other comments that the court may make about the general role of an attorney would be dicta. You will rarely find a "perfect" case (one that matches the facts of your case exactly). Thus, your search should be for cases that have strong similarities to your case.

In addition to looking for similar cases that help you, you need to be aware of any similar cases that do not support your position. You must be prepared to explain to the judge why that contrary case should not apply to your situation or why the judge should not follow that case.[21] Remember, your opponent will also be researching your case. You must be ready to respond to your opponent's arguments and to make your own.

A law report is the written record of the decision reached by the court. The decision set out by the court is called an "opinion." Books that contain these reports are known as "reporters." This is where you will find case law to support your arguments.

(i) Federal Reporters

There are three levels of courts in the federal system, and each level has a separate reporter containing the court's decision. The Supreme Court reporter is called the United States Reports (abbreviated as "U.S."). The circuit court (the intermediate federal appellate court) reporter is called the Federal Reporter (abbreviated as "F.," "F.2d," or "F.3d"). The trial court is called a district court and its reporter series is called the Federal Supplement (abbreviated as "F. Supp." or "F. Supp. 2d"). Not all decisions of federal district courts are published. Publication is called "reporting" a decision. In New York, there are four federal district courts: the Northern, Southern, Eastern, and Western Districts. Reported decisions of each of these courts are found in the F. Supp. Each reported case is found and referred to by its "citation." The citation of a

20. To get updates before the new version is printed, you first have to look at the monthly "List of C.F.R. Sections Affected" which will refer you to the appropriate section in the Federal Register. It is highly unlikely that you will have access to these resources in prison.

21. *See* Part B(b)(2) of this Chapter for more information on precedential cases.

case provides the official way of referring to an opinion, and tells you where to find the text of the opinion in the correct reporter. Citations will be explained in Part D of this Chapter, but you may want to read that Part now.

Unfortunately, many opinions that are of interest to prisoners are "unreported" or "unpublished"—that is, they do not appear in the Federal Supplement or Federal Reporter volumes available in prison law libraries. Many cases that do not appear in a reporter are available on computer services like Lexis and Westlaw. Citations like "2000 U.S. App. LEXIS 12345" or "2000 U.S. Dist. LEXIS 12345" are Lexis citations. In the *JLM*, unpublished cases are generally cited to Lexis ("LEXIS"), and occasionally Westlaw ("WL"), and are always indicated with the text "(*unpublished*)" after the citation. Sometimes cases have book citations (such as "F.2d") but the opinions are not actually printed; they are just listed in a table. In the *JLM*, table citations are included, where available, along with a citation to an electronic source.

You should note that a citation like "___ F. Supp. ___, 2001 U.S. Dist. LEXIS 12345" does not mean the case is unpublished, but that it is merely a recently reported decision that will be available in the Federal Supplement in the near future. You should check to see if this decision has been published in a reporter since the *JLM* was printed.

The *JLM* cites published decisions whenever possible. Courts generally prefer that you cite published cases, so you should research the rules of the court in which you are filing before you cite unpublished cases. Some courts may bar citations to unpublished cases altogether; some permit it in certain circumstances where specific requirements are met, such as serving a copy of the case on other parties and on the court. These rules can be obtained for a small fee from the court clerk (the *pro se* clerk in New York). At the very least, an unpublished case may help you predict the outcome of similar lawsuits. Many legal researchers find unpublished cases helpful because they can shed light on particular applications of settled law; in areas in which the law is unsettled, unpublished cases may provide the only insight into how a court may respond to a certain type of claim.

Recently, the Federal Rules of Appellate Procedure were changed, which affects your ability to cite to unpublished cases in certain situations. For federal appellate courts, you can now cite to any unpublished cases that were decided on or after January 1, 2007.[22] You should note that most unpublished cases are not precedential, which means that courts do not have to follow their holdings. They can be cited, however, for their persuasive value. Also, you generally do not need to attach a paper copy of the case to your petition or brief, as long as the case is available on a publicly accessible database.[23] Some jurisdictions have more specific rules. For example, many federal courts allow you to cite to unpublished cases even if they were decided ***before*** January 1, 2007.[24]

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22. Fed. R. App. P. 32.1.

23. The two computer services mentioned above, Lexis and Westlaw, are examples of publicly accessible databases.

24. The 1st, 3rd, 4th, 5th, 6th, 10th, and 11th Circuit Courts allow citation to unpublished cases decided before and after Jan. 1, 2007. 1st Cir. R. 32.1.0(a) ("An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance."); 3rd Cir. I.O.P. 5.7 ("The court by tradition does not cite to its non-precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."); 4th Cir. R. 32.1 ("If a party believes … that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP [Federal Rules of Appellate Procedure] 32.1(b) are met."); 5th Cir. R. 47.5.3 ("Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a)."); 6th Cir. R. 28(g) ("Citation of unpublished decisions is permitted. FRAP 32.1(b) applies to all such citations."); 10th Cir. R. 32.1(a) ("The citation of unpublished decisions is permitted to the full extent of the authority found in Fed. R. App. P. 32.1."); 11th Cir. R. 36.2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."). However, the 2nd, 7th, 8th, and 9th Circuit Courts allow citation to unpublished cases only if the cases were decided on or after Jan. 1, 2007. 2nd Cir. R. 23(c)(2) ("Citation to summary orders filed prior to January 1, 2007, is not permitted in this or any other court, except in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata."); 7th Cir. R. 32.1 ("No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding."); 8th Cir. R. 32.1a ("Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1."); 9th Cir. R. 36.3 ("Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1."). When filing in the D.C. Circuit Court, you can cite to its own unpublished opinions dating back to Jan. 1, 2002, but you can only cite to

There are a few ways you can learn about cases that don't appear in the federal reporters. First of all, you can read the *JLM.* While ordinarily you should never cite a case that you haven't read, for some cases you may have to rely on the descriptions in this book (if, having read the rules of the court in which you are filing your claim, you decide it is acceptable to cite unpublished cases).

The West Group sells a compilation of U.S. Court of Appeals unpublished opinions called the Federal Appendix, last updated (at the time of this printing) in 2009. You could ask your library to subscribe to the Federal Appendix, but your library might not grant your request, as the 182-volume set is very expensive. You can also ask a lawyer or someone else with access to Lexis or Westlaw to print out the case and send it to you. Keep in mind that these electronic sources are expensive and lawyers who assist *pro se* prisoners may not have the resources to respond to such requests.

Finally, some federal courts will send prisoners copies of unreported cases, upon request and for a fee; others will not. Send your request to the clerk of the court in which the case was decided. You could also try writing a letter to the chambers of the judge who wrote the opinion and request a copy. In both instances, be sure you include the case name, the docket number (for example, "No. 12 345 67"), the court, and the date of the decision you are requesting. All of this information should be available in the *JLM* citation. If you can tell which decision you are looking for (e.g., the summary judgment motion, the motion to dismiss, or the motion to set aside the jury verdict, etc.), indicate that as well.[25]

Citations will be discussed further in Part D of this chapter. However, here is a short example of a citation: *Mukmuk v. Comm'r*, 369 F. Supp. 245 (S.D.N.Y. 1974). The italicized portions of the citation are the parties involved in the case. (Comm'r is the accepted abbreviation for "Commissioner.") The first number (369) is the volume number of the reporter, which appears on the spine of the book. "F. Supp." identifies the Federal Supplement reporter. The second number (245) is the page in the 369th volume of the Federal Supplement where the case of *Mukmuk v. Comm'r* begins (the 245th page). The information in parentheses refers to the court in which the case was decided (S.D.N.Y. is the accepted abbreviation for the Southern District Court of New York) and the year in which the case was decided (1974). Thus, if you need to refer to this case in your legal papers, you should use the citation listed above. In your research, you will come across many similar citations, or variations of such citations. You can use a citation to find the text of the case by following the procedure explained in this paragraph. A fuller explanation of citations is provided in Part D and Appendix A of this Chapter.

The second level of courts in the federal system is called the circuit court of appeals.[26] There are twelve such circuits in the United States.[27] Circuit courts are the intermediate appellate courts in the federal system. Reports of all circuit court decisions are found in the Federal Reporter (abbreviated as "F.", "F.2d" or "F.3d"). The Federal Reporter has three series of reporters (so the volume numbers do not get too high within each series) with volumes individually numbered within each series. Each circuit court of appeals covers the appeals from several federal district courts. For example, cases from the four New York federal district courts plus the district courts of Connecticut and Vermont are appealed to the Second Circuit Court of Appeals (abbreviated "2d Cir."). Thus the case *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995) is a 1995 case from the Second Circuit Court of Appeals found on page 511 of volume 47 of the Federal Reporter (Third Series).

The third and highest level of the federal court system is the United States Supreme Court. There is only one U.S. Supreme Court. In addition to hearing cases from lower federal courts, the Supreme Court can also hear certain cases from state high courts. All U.S. Supreme Court decisions are reported in the "official" reporter, United States Reports (abbreviated as "U.S."). Decisions of the Supreme Court are also reported in two "unofficial" reporters, the Supreme Court Reporter (abbreviated as "S. Ct.") and the United States

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unpublished opinions from another circuit court decided prior to Jan. 1, 2007 if that particular court's rules allow it. D.C. Cir. R. 32.1 ("All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent … [U]npublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition …").

25. You can sometimes tell what motion the decision relates to by the parenthetical explanation that follows the citation. For example, if a case citation has a parenthetical explanation that begins with "(granting motion to dismiss where …)," the decision you are looking for decided the motion to dismiss.

26. When a losing party is not satisfied with the outcome of a trial court case, it can challenge the decision by bringing the case before the circuit court for review.

27. See Part B of this Chapter for a discussion of the Circuit Courts of Appeals.

Supreme Court Reports, Lawyers' Edition (abbreviated as "L. Ed." or "L. Ed. 2d").[28] The text of the opinions published in any of the three Supreme Court reporters is identical, although the citations are different. However, if you are citing a case in a legal paper, use the United States Reports ("U.S.") citation, if available. Thus, the citation for the famous case that requires the police to inform those in custody of their rights is *Miranda v. Arizona*, 384 U.S. 436 (1966). As only Supreme Court cases are reported in the reporter "U.S.," it is not necessary to list the court name in the citation.

Prison libraries usually have copies of only the Supreme Court Reporter. However, you can find the "U.S." citation at the top of each case in the Supreme Court Reporter listed above the case name. The "S. Ct." version of the case also provides cross-references throughout the opinion to the corresponding "U.S." pages. This is useful if you are quoting text from the decision, since you can read the decision in the "S. Ct." reporter but cite the correct page in the "U.S." reporter. We have tried to give the citations to all three of the Supreme Court reporters in the *JLM*.

(ii) State Reporters

State reporters are organized in the same way as federal reporters. New York has three levels of courts and three official state reporters. New York Miscellaneous Reports (abbreviated as "Misc." or "Misc. 2d") reports the decisions of state trial courts. Appellate Division Reports (abbreviated as "A.D." or "A.D.2d") reports the decisions of New York's intermediate appellate courts. New York Reports (abbreviated as "N.Y." or "N.Y.2d") and the North Eastern Reporter (abbreviated as "N.E." or "N.E.2d") both report decisions rendered by New York's highest court, the New York Court of Appeals.

Important appellate decisions of the New York courts are also reported in an unofficial reporter called the New York Supplement (abbreviated as "N.Y.S." or "N.Y.S.2d"). This is the only New York reporter in most New York prison libraries. The text of opinions published in the New York Supplement is identical to that published in the official reporters. However, if possible, citations to the official reporter should be used in papers submitted to New York state courts. The N.Y.S. or N.Y.S.2d version of the case provides the official citation at the beginning of each opinion (for example, it will give the N.Y.2d citation). Every state has its own official reporter. Check your prison library to find the official reporter of your state.

(iii) Reporters as Research Tools

All reporters are useful as research tools, but those published by West Publishing Company ("West") are the most useful. West reporters begin each case by providing "headnotes." Headnotes are separate paragraphs that summarize each of the major issues decided in the case. Each headnote is numbered and labeled with a "key number" that identifies the legal issue that was discussed. As the next Subsection of this Chapter will explain, these key numbers allow you to find other cases that deal with the same issue.

Although they are useful research tools, headnotes are not official parts of the decision and therefore should not be quoted or discussed in legal papers. Reading only the headnotes may give you a mistaken understanding of the decision. If the headnote discusses a topic that might be relevant to your case, you should find and read the section of the decision on which the headnote is based. If this section of the decision is helpful, that part of the decision can be used in your legal papers. To find the part of the decision that supports a particular headnote, refer to the paragraph(s) in the decision labeled with the same number as the headnote. Because West publishes almost all of the major reporters, headnotes will be present in most case reports that you read. Ultimately, however, you must read the entire case to determine if the case will be truly useful to you.

(iv) Digests and the "Key Number System"

You may have found helpful cases while doing your background reading (for example, in treatises), or while researching relevant constitutional or statutory references (in the "Notes of Decisions" section of the applicable source). If you have not found any useful cases (and even if you have), the next step is to look at a "digest." Your prison library probably has three digests. The United States Supreme Court Digest is the digest used to find relevant Supreme Court cases. For relevant cases from other federal courts, use the

28. One advantage of the Lawyers' Edition is that for selected cases, not only is the text of the case provided but attorneys' briefs submitted to the Court are also summarized. This reporter also includes essays written by its editorial staff on significant issues raised by selected cases. These essays provide a good review of the case law on those issues.

Federal Practice Digest. Your prison library should also have a state digest, which will help you find relevant cases from your state. In New York, that digest will be the New York Digest.

Digests summarize case law using the West headnotes discussed above. Whereas cases have individual headnotes for each issue discussed in the case, the digests take headnotes from all the reported cases, and group them together by subject matter. These subject areas, known as the "Digest Topics," are arranged alphabetically. You can use digests by finding the broad subject area relating to your issue. Examples of Digest Topics include arrest, bail, convicts, and criminal law. Within each Digest Topic, there will likely be many subtopics, each of which is assigned a "key number." You will know you are looking at the key number because it will have a little picture of a key in front of it. Once you find the Digest Topic and key number of a particular legal point, you can use that number to find cases on that legal point in any jurisdiction. The key numbers are the same for all digests. For example, Criminal Law (110) key number 37(1)[29] can be used to find cases on the subject of entrapment in New York state courts (by looking in the New York Digest), in federal courts (by looking in the Federal Practice Digest), and the U.S. Supreme Court (by looking in the U.S. Supreme Court Digest), or cases from any state court (by looking in the digest of that state). For this reason, finding a key number for a particular issue in your case can greatly advance your research.

Under each key number, a digest will list "headnotes," i.e., cases and their citations that address the topic of the key number. Depending on how often a particular issue is litigated, there may be no headnotes, or there may be hundreds of headnotes under each key number. Headnotes are listed first by the level of the court that decided the case, next in alphabetical order by jurisdiction, and finally in reverse chronological order (by date, beginning with the most recent) within each jurisdiction. Each headnote also provides a citation to the relevant case.

Digests do not provide comments on cases; they simply contain organized lists of headnotes (cases by topic). It is up to you to decide whether a particular case might be applicable to your legal problems. Once you decide that a headnote discusses an issue that might be helpful, you should write down the citation given in the headnote and use that citation to find the text of the case in a reporter. You can decide whether the headnote has pointed you to a useful case only after you have actually read that case. Digests are only research guides; you may find that a headnote points you to a helpful case, but you also may find that a promising headnote leads you to an unhelpful case.

Note that digests are usually published in several series, with each series limited to a certain time period. For example, the fourth series of the New York Digest only contains headnotes for cases decided from 1978 to the present; for earlier cases, you would need to consult an earlier series of this digest. You must be aware of the period covered by the digest to maximize your research effort. Each digest will explain its coverage in its preface, found at the beginning of each volume. As with all other sources, do not forget to update by referring to the pocket part[30] of each hardcover volume you consult.

(v) Finding Key Numbers

There are three basic ways to find relevant key numbers. The first and easiest way is if you have already found a useful case. Obtain the case from a reporter published by West. Next, review the headnotes found at the beginning of the case. One or more of the headnotes will concern the issue(s) with which you are interested. At the beginning of the headnotes there will be a number preceded by the picture of a key. This is the "key number." As described earlier, this key number can be used to find other cases that address the same issue by looking in the digests under that key number.

The two other ways of obtaining key numbers are similar to the way you would find relevant legislation. As described earlier, one of these ways is the "book index" method. This method requires looking in a digest's book index (located at the front of the volume), and scanning the alphabetical list of subject areas (digest topics) and the breakdown of each subject area into smaller topics and even smaller subtopics. For example, suppose that you were looking for federal cases on whether a search pursuant to a search warrant could be executed at night. You would start by pulling out the volume that has "Search and Seizure" on the spine of the book (volumes 84 and 85 in the Federal Practice Digest (Fourth Series)). At the beginning of the section on Searches and Seizures is an index that breaks down the large topic of Searches and Seizures into smaller

29. "110" refers to the section containing Criminal Law, "37" refers to the key number for entrapment, and "(1)" refers to the subsection of "entrapment" entitled "in general." This is where you will find the cases most often cited for the concept of entrapment.

30. For a discussion on pocket parts see Part C(2)(c)(iii) of this Chapter.

and more specific legal areas. Part III refers to "Execution and Return of Warrants." By looking at the subtopics under Part III, you will find an entry for "Time of Execution" and an even more specific entry for "nighttime execution." This last entry of "nighttime execution" corresponds to the key number 146 in the digest topic "Searches and Seizures." You should then write down all possible key numbers (here, Search and Seizure 146), and look up each key number and review a few headnotes under the numbers. In this way you will find useful key numbers and potentially helpful cases.

The final way of finding key numbers is by using the general index to the digests. This index is called the Descriptive Word Index ("DWI") and contains several volumes. The DWI lists words in their common, everyday usage. It then tells you what digest topic in the main part of the digest you should look at to find cases and headnotes related to that word. Often, the DWI will give you the key number under which to look.

For example, suppose that you wanted to know whether you were entitled to be represented by a lawyer in prison disciplinary proceedings. A reasonable place to start looking would be the digest topic "Prisons" since that is where the disciplinary proceeding is to occur. In the DWI of the New York Digest (Fourth Series), there is a subheading under "Prisons" called "Proceedings" under which you will see a section titled "Discipline and Grievance," which includes "counsel and counsel substitutes." Next to "counsel and counsel substitutes" is the key number Prisons 13(9).

You would then look at the digest volume containing the digest topic "Prisons" and turn within that volume to key number 13. You will see that the specific issue of whether you are entitled to be represented by counsel in prison disciplinary proceedings is discussed as the ninth heading under key number 13, or "13(9)." As indicated earlier, you should read the descriptions of the cases, write down the citations of possibly useful cases, and then read these cases. To find similar cases in another jurisdiction, look up "Prisons 13(9)" in the digest for that jurisdiction.

A more specialized digest index is the Words and Phrases Index, which is found in a separate volume of each digest series. This index gives citations of cases that define a word or phrase. For example, if you want to know in detail what is meant by the term "detention," look it up in this index. The index will give you the citations of cases that have defined that term. Although the Words and Phrases Index will not give you a key number, you can go to the cases it cites to obtain relevant key numbers.

D. Citation

Whenever you mention cases, statutes, regulations, etc. in your legal writing, these materials must be referenced in a proper legal form known as a "citation." Legal citations allow a reader to easily find the sources that you use in your legal writings.

There are many rules about citation style, and the major ones are detailed below. Also, Appendix A at the end of this Chapter analyzes the most common types of citations and will help you understand basic citation style. Detailed rules for every imaginable legal citation are contained in A Uniform System of Citation (commonly called "The Bluebook"), a publication that your prison library may have. Proper legal citation of cases, constitutions, and statutes should not be ignored, as it not only helps your readers find the materials that you are discussing, but also gives the judge a good first impression of your research.

1. Citing Cases

A case citation includes information about the parties involved in the case, the reporter in which the case can be found, the court that decided the case, and the date of decision. An example of a complete case citation is: *People v. Delaremore*, 212 A.D.2d 804 (N.Y. App. Div. 1995). The "case name" (a listing of the names of the parties on either side) comes first and is underlined or italicized: *People v. Delaremore* or People v. Delaremore. Next comes the information that tells you where to find the case, in this order: the volume number of the reporter, the abbreviation of the reporter, and the page number where the case starts (in this example, 212 A.D.2d 804). The final portion of the citation is enclosed in parentheses. It includes the court that decided the case and the year the decision was released (here, (N.Y. App. Div. 1995)). The court name "N.Y. App. Div." stands for the New York Supreme Court, Appellate Division. Note that in New York, the intermediate level of appellate court (the Appellate Division) is split into four separate "Departments." If you are citing an Appellate Division case to a New York state court, you may also want to include which Department the decision came from. So in the example above, the court name could be expanded to "N.Y. App. Div. 2d Dept." in order to show that the decision came from the Second Department. If the reporter that you are using publishes the decisions of only one state (for example, N.Y.S.2d), it is not necessary to repeat the state in the court name. For example, a correct citation would be: *People v. Aponte*, 759 N.Y.S.2d 486

(App. Div. 1995), not "(N.Y. App. Div. 1995)." If the reporter publishes the decisions of only one court (for example, S. Ct.), it is not necessary to list that court in the citation. Appendix A at the end of this Chapter summarizes the major citation styles.

You will sometimes want to refer to a particular page within the written opinion. If you are citing part of a case for the first time, put a comma after the number of the first page of the case and then put the specific page number (called a "pin cite"). For example, *Allen v. Hardy*, 478 U.S. 255, 259 (1986) indicates you are specifically referring to page 259 of the case *Allen v. Hardy*, which starts on page 255. If you have already given a citation to that particular case earlier in the paper, you can use a short form (abbreviated citation). The basic rule for a short form is to write the name of the first party in the case (for example, *Allen*), then the volume number of the reporter and the reporter abbreviation, and then the word "at," followed by the page number of what you want to cite (478 U.S. at 259). So, the short form citation of this case would be: *Allen*, 478 U.S. at 259. If the first party is a governmental party, use the other party's name. Thus, *United States v. Rosario* would be shortened to *Rosario* and never to *United States*.

Normally, you cite to the decision of the highest court that considered a case. For example, if the case was ultimately decided by the New York Court of Appeals (the highest state court in New York), it is not necessary to cite to the decisions of the lower New York courts that heard the same case. There may be times, however, that you wish to cite to the lower court decision. It would be appropriate to cite a lower court decision where the lower court considered an issue that a later court upheld without comment. However, if the case has been appealed to a higher court, this should be reflected in the citation. For example, *Schmuck v. United States*, 840 F.2d 384 (7th Cir. 1988), *aff'd*, 489 U.S. 705 (1989). This citation shows that the U.S. Supreme Court "affirmed," or upheld, the decision of the Seventh Circuit Court of Appeals in the *Schmuck* case. If a decision has been reversed on appeal but the part of the decision that helps you was not reversed, the citation should reflect this—for example, *People v. Perkins*, 531 N.E.2d 141 (Ill. App. Ct. 5th Dist. 1988), *rev'd on other grounds sub nom. Illinois v. Perkins*, 496 U.S. 292 (1990). This citation tells you that the Supreme Court decided the *Perkins* appeal two years after the Fifth District of the Illinois Appellate Court made its decision, and reversed that decision for a reason unrelated to the part of the case that helps you. The citation also shows that the Supreme Court considered the case under a different name than the Fifth District of the Illinois Appellate Court (that is what "*sub nom.*" means).

When you cite a federal appellate court decision, you also should show whether the Supreme Court has refused to review the decision. For example, *United States v. Fisher*, 895 F.2d 208 (5th Cir. 1990), *cert. denied*, 493 U.S. 834 (1989). "Cert." stands for "writ of certiorari," which is what the Supreme Court issues when it decides to review a lower court decision. "Cert. denied" means that a party asked the Supreme Court to review the case but the Supreme Court refused to issue certiorari and thus refused to review the case. The Supreme Court refuses to review an overwhelming majority of the cases that come before it for certiorari.

You must check each case you cite to find out whether it was appealed and whether it was reversed or affirmed on appeal. Read Part E(2)(a) of this Chapter for information of how to update a case. If the entire case was reversed, you should not mention the lower court's decision in your legal papers because it is no longer good law.

2. Citing Statutes

Citations for statutes are similar to other legal citations. The citation shows: (1) the "volume" number of the book the statute is in (the "title" or "book" number); (2) the statutory source in which you found the statute (for example, the United States Code Annotated is cited as U.S.C.A.); (3) the section of the law to which you are referring; and (4) the date of publication of the volume in which you found the statute. An example is 42 U.S.C.A. § 1983 (1994). Here, "42" is the title, "U.S.C.A." is the abbreviation for United States Code Annotated, "§" means section, "1983" means the section 1983 within title 42, and "1994" is the year the volume you looked at was published. If the statute was changed recently, you must cite to the changed version of the statute. You can determine if a statute has been changed by looking at the supplement or "pocket part" at the back of the hardcover volume. For instance, if section 1983 had been amended in 1995, you would cite the amended section like this: 42 U.S.C.A. § 1983 (Supp. 1995). If you want to refer to the entire statute and only part of it has been amended, you would cite it like this: 42 U.S.C.A. § 1983 (1994 & Supp. 1995).

Citations for federal administrative regulations are very similar to citations for statutes. The citation includes (1) the title number of the regulation; (2) the source in which you found the regulation (the Code of Federal Regulations is cited as C.F.R.); (3) the specific section cited; and (4) the date of the code edition. For

example, 28 C.F.R. § 544.70 (2003) refers to section 544.70 of Title 28 of the C.F.R. of the volume published in 2003. This section discusses the Federal Bureau of Prisons' literacy program.

The format for citations to state administrative codes is slightly different in each state, but generally contains the same information as citations to statutes or federal regulations. Generally, the citation includes (1) the source that contains the state's administrative code (for example, the Official Compilation of Codes, Rules & Regulations of the State of New York, cited as N.Y. Comp. Codes R. & Regs.); (2) the title or book number of the regulation (for example, in New York, Title 7 contains the rules and regulations of the Department of Corrections); (3) the specific section of the regulation to which you are referring; and (4) the publishing date of the volume in which you found the regulation. For example, N.Y. Comp. Codes R. & Regs. tit. 7 § 1704.6 (2003) is the correct citation for Title 7, section 1704.6 of the Codes, Rules, and Regulations of the State of New York. Although the format varies slightly in each state, you may be able to find the correct citation format for your state's administrative code by looking in the first few pages of any volume of the code. Depending on the publisher of your state's code, these pages may include information that gives the correct, official citation format.

Any citation in a footnote should be followed by a period.

E. Important Next Steps

1. Check Other Sources

A final way to research an issue is to read the *JLM*. If there is a chapter that discusses the issue or topic that you are interested in, read the cases cited in that chapter. If you want additional cases in a subject area, you can obtain the key numbers by looking at the case headnotes in the relevant reporter. The key numbers will allow you to find additional cases in the digests.

To find out more about a relevant case and its subject matter, you can look up that case in the "Table of Cases" in a relevant treatise. If the case is listed, read what the treatise author has to say about the case and the issues it discusses. While not binding on courts, treatise commentary can be helpful to a researcher and can be used to support your legal arguments.

Although legislation and case law will be the major sources of support for your legal arguments, other sources in your library might also be useful. Another review of general treatises may be helpful in explaining some of the cases you found, and may also provide leads for other potential arguments. You should also read legal magazines and newspapers. Your prison library will likely have the local legal newspaper, such as the New York Law Journal. Any other type of legal aid found in your library should also be consulted. Practice commentaries, loose-leaf services, manuals, form books, textbooks, and legal dictionaries are all useful sources that your law library may have.

2. Update Your Research

It is extremely important that your research be up-to-date. You should make sure that any authority you use is current law. To ensure that statutes are current, consult the latest code editions and supplements. As described in Part C(2)(c)(iii) of this Chapter, a hardcover volume will likely have soft cover updates in the pocket located at the back of the volume. It may also have additional updates shelved after the main volumes. Additionally, you must make sure that any case you use has not been overturned or overruled. Finally, you must confirm that the issue you have been researching has not been reinterpreted or modified by recent cases or statutes. You normally check to make sure that cases and the issues decided in them are up-to-date with a research tool called Shepard's Citations ("Shepard's").

(a) Shepard's

Shepard's is a research tool that provides a listing of all cases that have cited the case you are checking. Using this tool is called "Shepardizing." Shepard's serves two purposes: (1) it allows you to update your research and confirm that the case you wish to rely upon has not been affected by later legal developments (overruled, criticized, etc.), and (2) it points you to more cases that might be helpful.

There is a separate series of Shepard's volumes for each level of federal courts. Thus, there is a separate series for the Federal Supplement, the Federal Reporter, and the United States Reports (U.S.C.). Shepard's volumes are also available for state reporters. The basic function of Shepard's is to list every reported case that discusses a particular case. You use it to check for updates to cases that you want to cite. Updating means checking to see if the case is still good law that you can rely on. Thus, if *Miranda v. Arizona* is

discussed in ten other cases, Shepard's will identify these ten cases. Shepard's will list a case that overrules the case you wish to update, as well as other cases that discuss, explain, or even mention the case you are updating. This will allow you to find out what other courts have said about the case you are updating and will also show you how other courts have handled the issues raised by that case.

Cases are listed in Shepard's only by citation, not by name. To "Shepardize" a case, first find the Shepard's series that matches the reporter in which your case is found. The corresponding case reporter name is printed on the binding of each Shepard's volume. For example, if the case you are updating is reported in "F.2d," find the Shepard's volumes that have "Federal Reporter (Second Series)" printed on the binding. The binding will also show what year(s) or volume(s) of the reporter are covered by that Shepard's volume. Next, find the volume number in the citation of the case you are updating. (The volume is the first number in the citation.) Open the Shepard's volume that includes the volume of the reporter, then search for that volume number in the upper right hand corner of the page. Once you've found the page where the citations for that volume number begin, look down the columns of citations listed until you find the starting page number of the case you are updating. This page number will be printed in large bold type. Beneath the bold page number are citations to cases that have mentioned the case you are updating. Citations in Shepard's are provided alphabetically by jurisdiction and in reverse chronological order (most recent to oldest) within each jurisdiction. The citations are not given in full. They contain only the volume number, the reporter, and the page number that refers to the case you are updating. (Note that the page number provided is not the first page of the cited case, but rather the page where the case you have Shepardized is mentioned.)

A list of abbreviations appears at the front of each Shepard's volume to help you decode and understand the reporter abbreviations. There are often letters in front of the listed citations. The letters are a code that tells you how the later cases treated the case you are Shepardizing. They tell you whether a later court overruled, criticized, or followed the case. The code letters are explained in a table on the inside of the front cover of each Shepard's volume. The most important symbols to look for are "o" which indicates the case you are researching has been overruled, "r" which indicates that the case you are researching has been reversed, and "d" which indicates that the case you are researching has been distinguished (that is, another court has created an exception to the case you are researching). These are "negative treatments" of the case. Negative treatment makes a case less reliable. If the case you are researching has been overruled or reversed, then it is no longer useful to you. If it has been distinguished, then you must find out why it was distinguished and then make arguments why your situation should not be distinguished from the case you are Shepardizing. Sometimes a court reverses, overrules, or distinguishes only a part of a previous case rather than the entire opinion. Therefore, it is important to determine whether the specific issue of interest to you has been reversed, overruled, or distinguished. Even if the court overruled or reversed the case based on a different issue, if you use this case in your legal documents, your case citation should indicate that the case was reversed on other grounds so the court knows you have done your research.

To find the most recent cases that have mentioned the case you are updating, check the hardcover supplements, if any. Next, check the current paperback supplements. You should check the supplements just as you would the main volume, because they are organized in the same way. There are also volumes of Shepard's citations for statutes and federal rules, which list the judicial opinions that cite particular statutory provisions or federal rules. These are used to update statutes and rules in the same manner as the series for updating case law.

Shepardizing is used not only to update cases but also as a means to find other helpful cases. If you already have one case that is useful, Shepardizing that case will often lead you to other cases that will be helpful. The disadvantage of this method of finding cases is that Shepard's does not contain headnotes. Thus, you must read the cited case to learn whether it is helpful. However, you can shorten your search if you know the relevant headnote number from the case you are updating. You can use this headnote number to limit the cases you need to review to those containing the same number. In some citations there is a small superscript number between the reporter abbreviation and the page number; this shows that the cited case discusses the issue described in that headnote (superscript is text written small and high like this word: superscript). If you are interested in the issue discussed in headnote number 2 of the case you are updating, scan the list of citations for those that have a superscripted "2" in the citation. This will limit your review of cases to those that discuss the issue corresponding to headnote number 2 of the case you are updating. However, not all citations will list which headnotes are discussed. If you find a citation that does not list which headnotes are discussed, then you cannot tell whether that case will be useful until you read it.

Regardless of whether you use Shepard's to find cases, you must always use it to ensure the cases you are citing were not overruled, reversed, or distinguished.

F. Summary

Research is a key step in developing and presenting a legal argument. This Chapter has suggested an outline for the development of your legal arguments:

(1) Analyze the problem: separate your case into small, separate issues. This will help you get started and provide manageable issues for you to research;
(2) Get an overview of the subject area: review treatises and legal encyclopedias to obtain an introduction to the details of particular areas of law;
(3) Find relevant legislation: consult the annotated codes to find U.S. and state constitutional provisions, federal statutes, state statutes, and legislative history;
(4) Find relevant cases: read cases cited in annotated codes such as U.S.C.A. and McKinney's. Find additional cases through digests, key numbers, indices, words and phrases tables, and Shepard's;
(5) Check other sources: review treatises, legal periodicals, practice commentaries, manuals, form books, texts, and legal dictionaries for additional commentary;
(6) Update your research: make certain that you rely on the most up-to-date editions and supplements, and that you Shepardize your case law and legislation; and
(7) Complete your citations: properly cite the authorities upon which you rely.

Two preliminary issues that you will want to confirm before beginning your research are: (1) which court has jurisdiction to hear your case (both territorial and subject matter jurisdiction), and (2) if you are appealing a conviction, whether the prosecutor followed proper court rules to get your case to court. The following are the sources most often used in prison law libraries to find the law.

For federal law:

(1) U.S.C.A. (for statutes and the annotations that follow the statutory text); and
(2) Modern Federal Practice Digest (for federal cases on specific topics).

The major reporters you will be looking to for reported federal cases will be: the Federal Supplement, cited as __ F. Supp. __, __ F. Supp. 2d __, and __ F. Supp. 3d __ (the 3d series will contain the most recent cases), for selected cases from all federal district courts; the Federal Reporter, cited as __ F. __, __ F.3d __, and __ F.3d __ (the 3d series will contain the most recent cases), for cases from all federal circuit courts of appeals; and the Supreme Court Reporter, cited as __ S. Ct. __, for cases from the U.S. Supreme Court. In case citations the reporter volume number goes before the reporter name, and the page number on which the case begins goes after.

For New York law:

(1) McKinney's (for statutes and for the case annotations that follow the statutory text); and
(2) New York Digest (for New York cases on specific topics).

The major reporter you will be looking to for reported New York cases will be the New York Supplement (Second Series). It is cited as __ N.Y.S.2d __.

G. Other Ways to Learn About Legal Research

Many organizations have developed materials to help non-lawyers understand the law. For example, West Publishing Company publishes The Guide to American Law, Everyone's Legal Encyclopedia, which is directed toward non-lawyers. Additionally, a detailed explanation of how to conduct legal research is found in M. Cohen's Legal Research in a Nutshell. Finally, the law is full of technical terms. Black's Law Dictionary (9th ed. 2009) is particularly helpful in explaining legal terms.

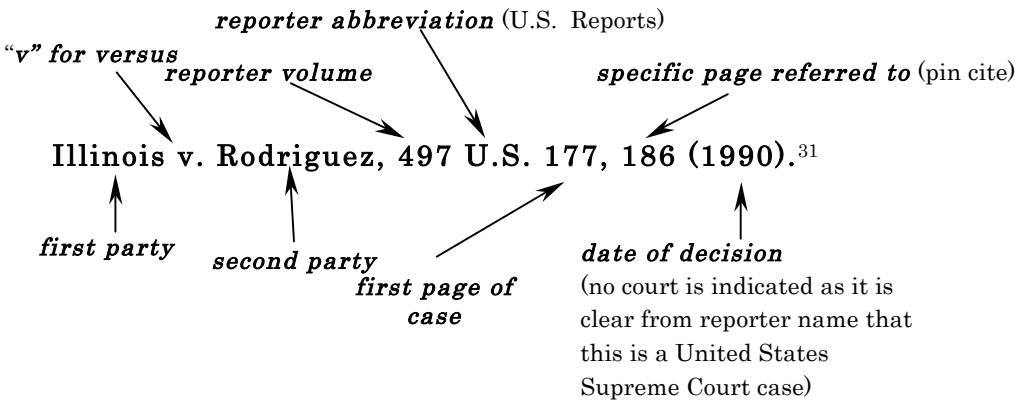
H. Conclusion

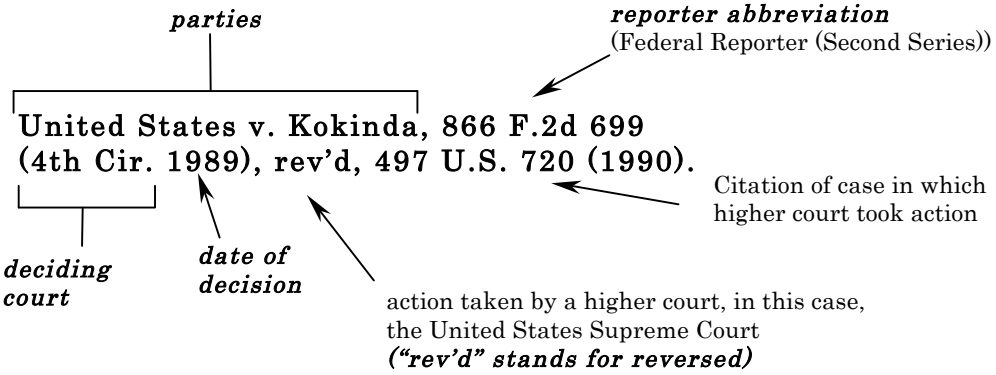
Legal research is an important task for jailhouse lawyers because it provides you with the legal rules and principles you will need to argue your case effectively. The process begins with identifying the appropriate court (state versus federal, trial versus appellate, one with proper jurisdiction). The next step involves breaking down the issues in your specific case—the factual story—to see what legal sources you can use to make your argument. You should start with finding the legislation or administrative rules that apply, which can help you identify where your rights have been violated or how a court got it wrong. It will then be important to find precedents that have facts similar to your case and support your position. Finally, after you gather different legal sources, you must make sure these sources are still valid and up-to-date (i.e., Shephardize) and cite them properly.

APPENDIX A

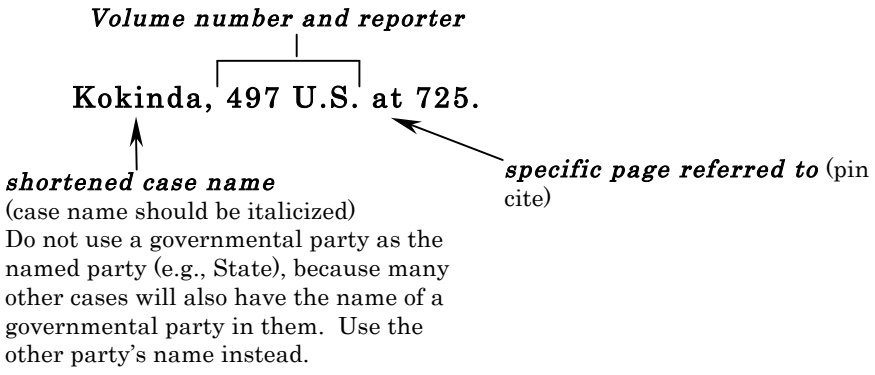
CITATION EXAMPLES OF COMMON AUTHORITIES

A-1. Federal Cases



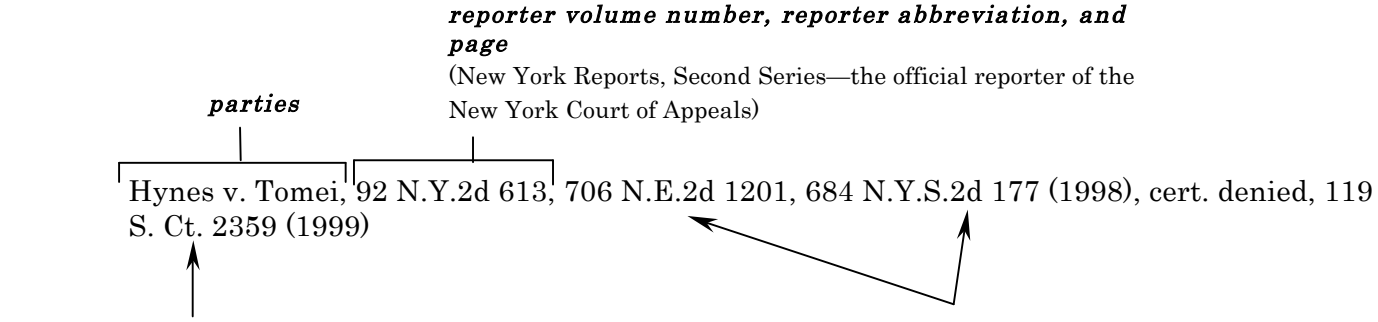


Shortform (abbreviated) citation for the above case after it has been cited in full earlier in your legal paper:



31. You will notice that the *JLM* often cites to many different reporters for each case. Often, cases are published in more than one reporter; these "extra" citations are "parallel citations." If possible, you should always cite to an official reporter (for example, "U.S.," or "F.2d."). If you do not have the official reporter available at your prison library, just make sure that your citation to an unofficial reporter is accurate.

A-2. State Cases



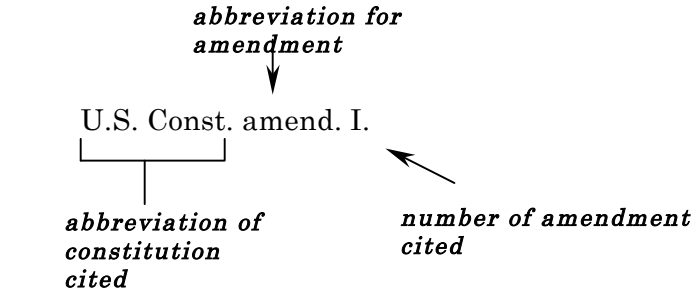
Action taken by a higher court, in this case, the United States Supreme Court. ("cert. denied" indicates that the U.S. Supreme Court denied the petition for certiorari). The reporter "S. Ct." is an unofficial reporter for the U.S. Supreme Court. This is a recent case—often cases are available in the Supreme Court Reports ("S. Ct.") before they are printed in the United States Reports ("U.S."). The next number is the citation of the case in which the Supreme Court took action.

parallel citations

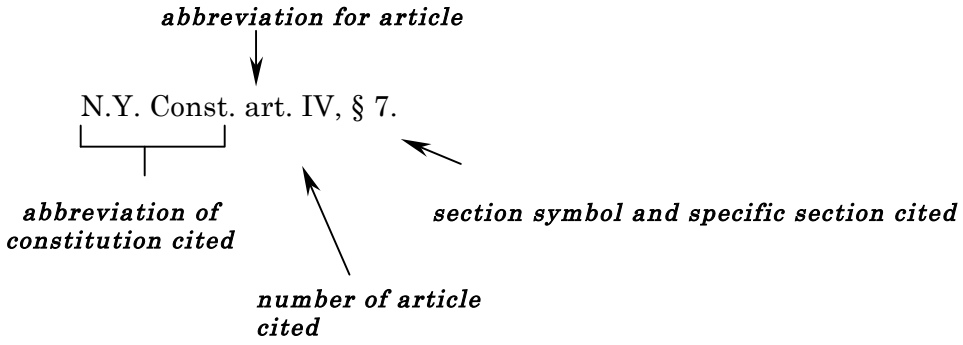
The two citations that refer to "N.E.2d" and "N.Y.S.2d" are parallel citations. For more information on parallel citations, see note 29 of this Appendix A.

A-3. Constitutions

United States Constitution

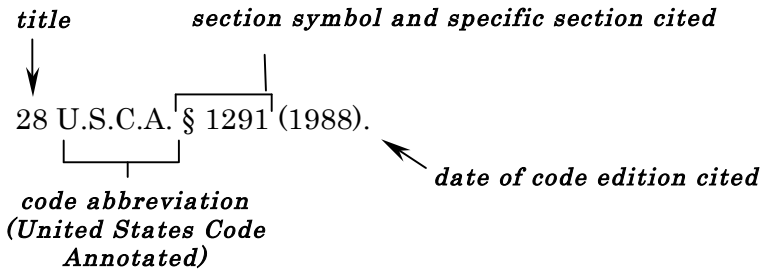


State Constitution

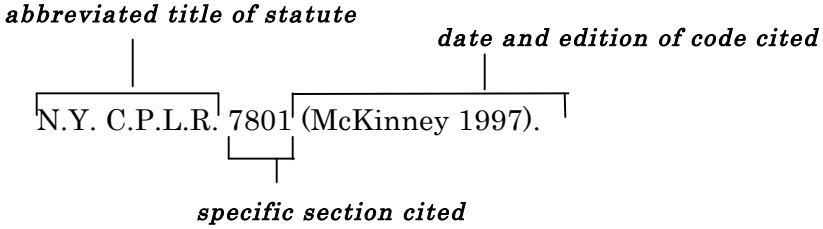


A-4. Statutes

Federal Statute



State Statute



A-5. Definitions for Common Statutory Abbreviations

Ann.	Annotated
App.	Appendix
art.	Article
Civ.	Civil
Comp.	Compilation
Const.	Constitution
Ct.	Court
Crim.	Criminal
et seq.	et sequentes, latin for 'and the following ones'
Gen.	General
Jud.	Judicial
P. or Proc.	Procedure
Rev.	Revised
R.	Rules
Stat.	Statutes
S. Ct.	Supreme Court
tit.	Title

A JAILHOUSE LAWYER'S MANUAL

Chapter 3:
Your Right to Learn the Law and Go to Court

Columbia Human Rights Law Review

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CHAPTER 3

YOUR RIGHT TO LEARN THE LAW AND GO TO COURT*

A. Introduction

Although many rights are suspended while you are in prison, courts have protected a prisoner's constitutional right to access the state and federal courts.[1] This right includes a prisoner's ability to prepare and submit petitions and complaints, including federal habeas corpus petitions and civil rights actions.[2] The Supreme Court held in *Bounds v. Smith* that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[3] In other words, the Supreme Court believes that prisoners need a way to learn the law in order to take full advantage of their constitutional right to access the courts. If the state stands in the way of your ability to do legal research or get legal assistance, you may be able to file a suit claiming that you have been denied access to the courts. You may also be able to file a suit claiming a denial of court access if the state prevents you from creating and mailing your legal papers by withholding necessary resources or materials. The Supreme Court stated in *Bounds* that the right of access to the courts includes the state's obligation to provide indigent prisoners "with paper and pen to draft legal documents, with notarial services to authenticate them, with stamps to mail them."[4]

The Supreme Court has limited the circumstances in which a prisoner can win a denial of access suit. In 1996, the Court held in *Lewis v. Casey* that in order for a prisoner to have a cause of action under *Bounds*, he must first show that an actual injury has occurred because he has been denied access to the courts. This actual injury requirement means you must show both that the State's legal access program was inadequate, *and* that you suffered an actual injury because of its inadequacies. The Supreme Court went on to hold that proving an actual injury requires showing that a "non-frivolous legal claim" has been frustrated.[5] Therefore, under *Lewis*, you must show (1) your right of access to the courts was denied, and (2) because of that denial you lost a non-frivolous legal claim.[6]

Congress has also limited the ability of prisoners to bring denial of access suits. In 1995, Congress enacted the Prison Litigation Reform Act ("PLRA") which, among other things, requires prisoners to exhaust their prison's administrative remedies before filing claims alleging violation of civil rights under 42 U.S.C. Section 1983 in federal court. The information provided in this Chapter is to be used *only as a supplement* to the information provided in Chapter 14 of the *JLM*. **If you decide to pursue any claim in federal court, you must read Chapter 14** of the *JLM* on the Prison Litigation Reform Act. Failure to follow the requirements in the PLRA can lead, among other things, to the loss of your good-time credit and to the loss of your right to bring future claims in federal court without paying the full filing fee at the time you file your claim.

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1. *See* Procunier v. Martinez, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974) (describing right of access to courts as part of constitutional due process of law requirements); *see also* Murray v. Giarratano, 492 U.S. 1, 11 n.6, 109 S. Ct. 2765, 2771 n.6, 106 L. Ed. 2d 1, 12 n.6 (1989) (tracing right of access to courts to due process and equal protection clauses of U.S. Constitution).

2. Bounds v. Smith, 430 U.S. 817, 828 n.17, 97 S. Ct. 1491, 1498 n.17, 52 L. Ed. 2d 72, 83 n.17 (1977). For an explanation of federal habeas corpus petitions and how to use them, see *JLM*, Chapter 13. Civil rights actions involve the violation of your constitutional rights. For more information about your constitutional rights and how to sue those who violate your constitutional rights, see Chapter 16 of the *JLM*, which discusses Section 1983 and *Bivens* actions.

3. Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977).

4. Bounds v. Smith, 430 U.S. 817, 824–25, 97 S. Ct. 1491, 1496, 52 L. Ed. 2d 72, 81 (1977).

5. Lewis v. Casey, 518 U.S. 343, 351–53, 116 S. Ct. 2174, 2180–81, 135 L. Ed. 2d 606, 617–19 (1996). *Lewis* was a class action claiming denial of prisoners' right of access to courts. The Supreme Court reversed a Ninth Circuit decision ordering Arizona to provide prisoners with extensively equipped law libraries and experienced library staff.

6. Lewis v. Casey, 518 U.S. 343, 350–51, 116 S. Ct. 2174, 2179–89, 135 L. Ed. 2d 606, 617–18 (1996).

This Chapter explains what constitutes a violation of your right of access to the courts. Parts B and C explore the threshold requirements you must prove before the court will examine your opportunities for access: that you suffered an actual injury and that you did so because the state failed to fulfill its duty. Part B explains the actual injury requirement, as stated in *Lewis v. Casey*. Part C outlines the reach of the state's[7] duty to provide you access to the courts. The later Parts explain your rights once these requirements have been met. Part D explains what adequate law libraries must contain. Part E explains what constitutes adequate assistance from persons trained in the law (including the role of jailhouse lawyers[8] in providing adequate assistance). Part F explains the state's duty to provide you with legal materials. Appendix A provides a list of organizations that will help you to get certain legal materials. Be aware, however, that these organizations usually charge a fee for their services.

Because the rights described in this Chapter relate to the conditions of your confinement, **the PLRA requires you first try to protect your rights through your institution's administrative grievance procedure. Read Chapter 15 of the *JLM* for further information on inmate grievance procedures.** If you are unsuccessful or do not receive a favorable result through these procedures, you can then either bring a case under 42 U.S.C. § 1983, file a tort action in state court (or in the Court of Claims if you are in New York), or file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5, "Choosing a Court and a Lawsuit," Chapter 14, "The Prison Litigation Reform Act," Chapter 16, "42 U.S.C. § 1983," Chapter 17, "Tort Actions," and Chapter 22, "Article 78," of the *JLM*.

B. Fulfilling the Actual Injury Requirement

The Supreme Court in *Lewis v. Casey* narrowly interpreted the *Bounds* decision by holding that establishing a violation of your right to access the courts requires showing "actual injury" from the alleged violation.[9] The actual injury requirement is not a new concept, but the *Lewis* approach makes things harder for prisoners. Establishing that the prison's law library or legal assistance program is inadequate is not enough to prove actual injury. You must also show that you were kept from pursuing a non-frivolous claim—that is, "a claim for relief that is at least arguable in law and in fact"[10]—because of these inadequacies.[11]

One way to prove an actual injury may be to show a complaint you prepared was dismissed for failure to meet a technical requirement you could not have known about because of the insufficient legal assistance provided at your prison facility.[12] Another way may be to show you were prevented from filing a claim in the

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7. "State" in this chapter means either a state government or the federal government. In other words, if you are a federal prisoner, when we refer to "state" in this chapter, for you it means the federal government.

8. *Black's Law Dictionary* 851 (8th ed. 2004) defines a jailhouse lawyer as "[a] prison inmate who seeks release through legal procedures or who gives legal advice to other inmates."

9. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 617–18 (1996); *see also* Chirceol v. Phillips, 169 F.3d 313, 317 (5th Cir. 1999) (finding that denial of access to funds from prison accounts to pay for filing fees did not constitute an actual injury because the complaint had been successfully filed); Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (finding that defendant failed to allege facts demonstrating that the number of hours he was required to work frustrated his access to the courts); Klinger v. Dept. of Corr., 107 F.3d 609, 617 (8th Cir. 1997) (showing a complete and systematic denial of access to the law library or legal assistance was not enough to demonstrate actual injury); Oliver v. Fauver, 118 F.3d 175, 178 (3d Cir. 1997) (dismissing a claim because the prisoner suffered no injury as a result of alleged interference with legal mail); Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996) (holding that *pro se* prisoners failed to demonstrate that inadequacy of the prison law library or legal assistance caused actual injury); Sabers v. Delano, 100 F.3d 82, 84 (8th Cir. 1996) (finding prisoner had to show actual injury due to denial of access to courts, even if denial was systematic; specifically, prisoner had the burden of showing that the "lack of a library or the attorney's inadequacies hindered [her] efforts to proceed with [the] legal claim in a criminal appeal, post-conviction matter, or a civil rights action."); Stotts v. Salas, 938 F. Supp. 663, 667–68 (D. Haw. 1996) (holding that a state prisoner transferred to another state must show actual injury to have law books sent from the state of his former prison).

10. Lewis v. Casey, 518 U.S. 343, 399, 116 S. Ct. 2174, 2203, 135 L. Ed. 2d 606, 662 (1996).

11. Lewis v. Casey, 518 U.S. 343, 352–53, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606, 616 (1996). The Court said, "the inmate … must … demonstrate … the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996).

12. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996).

first place because of weaknesses in the legal facilities provided.[13] If you and others bring a class action, you must show the injury was systemic—that is, you must show a system-wide problem.[14]

C. How The State's Limited Duty to Provide Access to the Courts May Apply to You

There are a few things to keep in mind when developing your claim: (1) your state's duty to provide you with adequate law libraries or adequate assistance from persons trained in law may not extend to the type of action you want to bring; (2) your correctional facility can choose how it will meet its duty to provide legal information or expertise; (3) the state's duty almost always applies regardless of the kind of facility in which you are incarcerated; (4) it is currently unclear how far the state's duty to provide access extends; (5) the state's duty applies whether or not you are considered indigent.

First, courts disagree about whether your right of access to the courts is applicable in all cases or only in those cases involving constitutional rights. In *Lewis v. Casey*,[15] the Supreme Court stated that your right of access does not guarantee your right to file any claim; instead, this right is limited to non-frivolous lawsuits that attack prison sentences or challenge the conditions of confinement.[16] Though this language is somewhat unclear, *Lewis* and subsequent cases have narrowly defined the claims to which the right of access to the courts extends.[17] For example, some courts have held that the state's duty extends only to the initiation of habeas corpus proceedings, direct appeals, and civil rights actions,[18] because these are the only actions specifically mentioned in *Bounds v. Smith*.[19] Thus, your state's duty to provide access to the courts may not extend to ordinary civil proceedings.[20] Nonetheless, you should check your state's law on this issue, which *may* cover civil proceedings.

Second, the state may choose how to fulfill its duty.[21] The state may provide you with an adequate law library, adequate assistance from persons trained in the law, a combination of the two, or something slightly

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13. Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (arguing that a prisoner could prove actual injury if the "inadequacies of the law library" prevented him from even filing a complaint).

14. *See*, *e.g.*, Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606, 616 (1996) (holding that "isolated instances of actual injury" are not enough to show a systemic *Bounds* violation).

15. Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

16. The Supreme Court in *Lewis* held:

> "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."

Lewis v. Casey, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182, 135 L. Ed. 2d 606, 620 (1996).

17. *See*, *e.g.*, Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999) (holding that "a prisoner's right to access the courts extends to direct appeals, habeas corpus applications, and civil rights claims only"); Wilson v. Blankenship, 163 F.3d 1284, 1291 (11th Cir. 1998) (holding that the civil forfeiture case that the plaintiff was attempting to litigate was "not a type of case that is included under the right of inmates' access to courts under *Lewis*").

18. Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999).

19. Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977) (holding federal habeas corpus or state or federal civil rights actions are encompassed within right of access to the courts); *see also* Knop v. Johnson, 977 F.2d 996, 1009 (6th Cir. 1992) (determining that requiring a state to provide affirmative legal assistance to prisoners in actions unrelated to constitutional rights or their incarceration would be "an unwarranted extension of the right of access"); *cf.* Glover v. Johnson, 75 F.3d 264, 269 (6th Cir. 1996) (finding female prisoners *not* entitled to legal assistance in child custody matters); John L. v. Adams, 969 F.2d 228, 235–36 (6th Cir. 1992) (holding states do *not* have a duty to provide affirmative assistance to prisoners on civil matters arising under state law, but noting that "states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration … [and also that] in all other types of civil actions states may not erect barriers that impede the right of access of incarcerated persons"); Walters v. Edgar, 900 F. Supp. 197, 229 (N.D. Ill. 1995) (finding prisoners have no constitutional right to assistance from the state to pursue child custody matters).

20. *See* Glover v. Johnson, 75 F.3d 264, 269 (6th Cir. 1996) (holding female prisoners *not* entitled to legal assistance in child custody matters); John L. v. Adams, 969 F.2d 228, 235–36 (6th Cir. 1992) (holding that states do *not* have a duty to provide affirmative assistance to prisoners on civil matters arising under state law).

21. Morello v. James, 810 F.2d 344, 346–47 (2d Cir. 1987) ("The right of access to the courts is substantive rather than procedural. Its exercise can be shaped and guided by the state but cannot be obstructed, regardless of the procedural means applied." (citations omitted)); Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980) ("*Bounds* does not hold that inmates have an absolute right to any particular type of legal assistance. The states are still free to choose among a variety of methods or combinations thereof in meeting their constitutional obligations [to provide access to the

different.[22] For example, an inadequate or non-existent law library may not violate a prisoner's right of access when the state provides some other sort of legal assistance.[23] At the same time, while the state is free to devise its own legal access plan, there is no guarantee that courts will find it sufficient to satisfy your right of access to the courts.[24]

Third, the state's duty to provide you with access to the courts is not limited to those in state prison, but also extends to prisoners in county and city jails,[25] incarcerated juveniles,[26] persons serving brief sentences in local jails, pretrial detainees, and mental patients under commitment. Prisoners who are transferred from one state correctional facility to another or from a state correctional facility to a federal correctional facility retain their right of access to the courts and therefore must be provided some legal access program.[27] However, as in *Blake v. Berman*, the court may find that the state has fulfilled its duty by providing you with persons trained in the law but no legal materials pertaining to the state in which you were convicted.[28] For example, a federal court in New York has suggested that a state might fulfill its obligation to provide access to the courts by either supplying law books or providing legal counsel to state prisoners incarcerated in federal facilities.[29]

Fourth, the extent of a state's duty to assist your access to the courts is unclear. For instance, is it enough for a state to assist only until you are finished writing your complaint? *Lewis* greatly limits the *Bounds* decision by explaining that prison authorities have no duty to enable the prisoner to find or

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courts]." (citations omitted)); Glover v. Johnson, 75 F.3d 264, 266–67 (6th Cir. 1996) (holding that state could terminate funding for prison legal services program that provided female prisoners with assistance on child care matters because the termination did not violate the right of access to courts).

22. The Supreme Court has pointed out that "while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts," alternative programs may be acceptable. Bounds v. Smith, 430 U.S. 817, 830, 97 S. Ct. 1491, 1499, 52 L. Ed. 2d 72, 84 (1977). The *Bounds* Court suggested some alternatives to having a law library:

> "Among the alternatives [to providing law libraries] are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students …, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices."

The *Bounds* Court did not consider this list of proposed alternatives exhaustive, stating that "a legal access program need not include any particular element we have discussed, and we encourage local experimentation." Bounds v. Smith, 430 U.S. 817, 831–32, 97 S. Ct. 1491, 1499–1500, 52 L. Ed. 2d 72, 84–85 (1977).

23. Prison authorities may "replace libraries with some minimal access to legal advice and a system of court-provided forms … that asked the inmates to provide only the facts and not to attempt any legal analysis." Lewis v. Casey, 518 U.S. 343, 352, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618–19 (1996) (citations omitted). *See also* Blake v. Berman, 877 F.2d 145, 146 (1st Cir. 1989) (finding law school clinical program might be considered an adequate alternative to a law library).

24. *See* Novak v. Beto, 453 F.2d 661, 663–64 (5th Cir. 1971) (finding that a prison legal access program consisting of a small "library," permission to use the law books of fellow prisoners, the prison employment of two full time attorneys, and three senior law students employed one summer may not be a sufficient alternative to allowing prisoners to provide some form of legal assistance to one another).

25. *See* Leeds v. Watson, 630 F.2d 674, 676–77 (9th Cir. 1980) (finding that there is a question of obstruction when prisoners in a county jail are required to get a court order to have access to a law library close by, and must be accompanied by a guard, and are not given sufficient information concerning these requirements); Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978) (finding that a situation where a prisoner in a city jail was only allowed access to legal resources 45 minutes a day, three days a week was "on its face a constitutional violation"); Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973) (holding that prison regulations must not unreasonably invade the relationship of the prisoner to the courts in a case where the prisoner was in a county jail); Tuggle v. Barksdale, 641 F. Supp. 34, 36–37 (W.D. Tenn. 1985) (discussing how the fundamental right of access to the court may be applied in a county jail).

26. John L. v. Adams, 969 F.2d 228, 233 (6th Cir. 1992) (holding that incarcerated juveniles have a constitutional right of access to the courts).

27. Messere v. Fair, 752 F. Supp. 48, 50 (D. Mass. 1990) (holding that neither a copying service providing Massachusetts law but requiring specific citations, nor a Connecticut legal assistance program that refused to work on Massachusetts legal materials, provided a prisoner "meaningful access to the Massachusetts courts within the contemplation of *Bounds v. Smith*").

28. Blake v. Berman, 877 F.2d 145, 146 (1st Cir. 1989) (finding prison program providing legal assistance instead of full law library satisfied access requirements).

29. *See* Kivela v. U.S. Attorney Gen., 523 F. Supp. 1321, 1325 (S.D.N.Y. 1981) (holding prisoners' right of access to courts satisfied where state has provided either law books or legal counsel), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

recognize violations of his rights[30] or to "litigate effectively once in court."[31] This seems to imply that your right to access the courts extends only until the time that you file your claim. Therefore, the state could technically assist you until you submit your complaint and forgo any assistance from then on.

Finally, the right of access to the courts applies to prisoners regardless of their financial status.

D. What is an Adequate Law Library?

The Supreme Court has never defined exactly what an "adequate" law library is.[32] The American Association of Law Libraries' ("AALL") Special Committee on Law Library Services to Prisoners has a suggested list of resources that should be in a prison law library, but states are not required to follow the AALL's guidelines, and various circuits have come up with their own list of what a prison law library should contain.[33] Even if a prison has a law library that meets either a circuit's requirements or the AALL's guidelines, a court may still decide that access to the court has been denied if books are frequently missing[34] or if prisoners cannot use the library.[35] For example, functionally illiterate prisoners,[36] non-English speakers,[37] and the blind cannot use typical law libraries.[38] When prisoners cannot use the law library because of illiteracy, an inability to speak English, or a disability, the state may need to provide a legal

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30. Lewis v. Casey, 518 U.S. 343, 354, 116 S. Ct. 2174, 2181, 135 L. Ed. 2d 606, 619 (1996) (denying that "the State must enable the prisoner to discover grievances" (emphasis omitted)).

31. The *Lewis* Court restricted the *Bounds* ruling to require states to provide the tools "that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." Lewis v. Casey, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182, 135 L. Ed. 2d 606, 620 (1996).

32. The Court simply stated that prisoner access to the courts should be "adequate, effective, and meaningful" and that "'[m]eaningful access' to the courts is the touchstone." Bounds v. Smith, 430 U.S. 817, 822–23, 97 S. Ct. 1491, 1495, 52 L. Ed. 2d 72, 79–80 (1977) (quoting Ross v. Moffitt, 417 U.S. 600, 611, 615, 94 S. Ct. 2437, 2444, 2446, 41 L. Ed. 2d 341, 351, 353 (1974)).

33. In Lindquist v. Idaho State Bd. of Corr., 776 F.2d 851, 856 (9th Cir. 1985), the Ninth Circuit held that the following list of books "meets minimum constitutional standards and provides inmates with sufficient access to legal research materials to prepare *pro se* pleadings, appeals, and other legal documents" for Idaho State: Idaho Code; Idaho Reports; United States Reports, from 1962 to present; Federal Reporter Second Series, beginning with volume 273 [1960]; portions of the United States Code Annotated, including Federal Rules of Appellate Procedure and Federal Rules of Evidence; Appellate Rules of the Ninth Circuit Court of Appeals; Local Rules of the United States District Court for the District of Idaho; various Nutshells on procedure, civil rights, criminal law, constitutional law, and legal research; West Pacific Digest Second Series; various volumes of Federal Practice & Procedure; Manual for Complex Litigation Pamphlet Subscription; Federal Practice & Procedure, Criminal Pamphlet; West Federal Practice Digest 2d; Pacific Digest Second Series; Federal Supplement, beginning with volume 482 [1980]. In Tuggle v. Barksdale, 641 F. Supp. 34, 39 (W.D. Tenn. 1985), the court stated that the law library in question should include: [all] volumes and titles of U.S.C.A … which cover the United States Constitution, and Titles 5, 15, 18 with complete rules of the various courts, 28 with complete rules, 42 and the General Index … Federal Practice and Procedure by Wright and Miller, … Tennessee Code Annotated Volume 7 and 10 and Criminal Law Library (2-volume set, latest edition)[,] … Black's Law Dictionary latest edition. *See also* Griffin v. Coughlin, 743 F. Supp. 1006, 1020–25 (N.D.N.Y. 1990), in which the court detailed and examined the inventory of the Clinton Main law library and stated that it was constitutionally sufficient and provided prisoners with "access to a law book inventory which rises above the constitutional minimum."

34. Walters v. Edgar, 900 F. Supp. 197, 226–27 (N.D. Ill. 1995) (finding that prison's replacement of missing volumes only once a year appeared to be inadequate maintenance of library, and holding that even if prisoners might be responsible for stealing the missing volumes, "each plaintiff's right of access to the courts is individual, and therefore a … [prisoner] cannot be prevented access by … theft").

35. *See*, *e.g.*, Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980) ("Library books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate."); Acevedo v. Forcinito, 820 F. Supp 886, 888 (D.N.J. 1993) ("[F]or prisoners who cannot read or understand English, the constitutional right of access to the courts cannot be determined solely by the number of volumes in, or size of, a law library.").

36. *See*, *e.g.*, Lindquist v. Idaho State Bd. of Corr., 776 F.2d 851, 855–56 (9th Cir. 1985) (stating that "[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read"); U.S. *ex rel.* Para-Prof. Law Clinic v. Kane, 656 F. Supp. 1099, 1105–07 (E.D. Pa. 1987) (the elimination of a jailhouse lawyer association, leaving only a law library for prisoners, would leave functionally illiterate prisoners without court access), *aff'd*, 835 F.2d 285 (3d Cir. 1987).

37. *See*, *e.g.*, U.S. *ex rel.* Para-Prof. Law Clinic v. Kane, 656 F. Supp. 1099, 1106 (E.D. Pa. 1987) (stating that "Spanish-speaking inmates who cannot read or write English are unable to present, with reasonable adequacy, complaints to the courts without assistance").

38. Phillips v. United States, 836 F. Supp. 965, 967–68 (N.D.N.Y. 1993) (stating that a prisoner's blindness may effectively deny him access to the prison law library).

assistance program consisting of persons trained in the law in addition to, or in place of, an adequate prison law library.[39]

Generally, the state may limit your access to law libraries and legal materials for security reasons.[40] The Supreme Court held in *Lewis v. Casey* that restrictive practices justified by security concerns will be upheld even if they obstruct court access.[41] For instance, prison officials may restrict the amount of time an individual prisoner may spend in the library[42] and the amount of time the library is open "in light of legitimate security considerations."[43] But, the state may not limit your access to law libraries or legal assistance to the point that your right of access to the courts is frustrated.[44]

Prison regulations that affect segregated prisoners' access to law libraries, legal materials, and legal assistance have spawned a great deal of litigation. Courts have stopped states from enforcing regulations restricting or withholding law books from prisoners in solitary confinement.[45] Several (but not all) courts have criticized requirements that make prisoners request specific books to be delivered to their cells,[46] or identify the exact materials they want to use before entering the library.[47] However, a prison can meet its obligation to provide a segregated prisoner with access to the courts by allowing some, but not unfettered, access to legal materials or some access to legal assistance.[48]

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39. Phillips v. United States, 836 F. Supp. 965, 967–68 (N.D.N.Y. 1993) (stating that denial of access to a legal assistance program may give rise to a claim of denial of access to the court).

40. Lindquist v. Idaho State Bd. of Corr., 776 F.2d 851, 858 (9th Cir. 1985) (stating that "[p]rison officials of necessity must regulate the time, manner, and place in which library facilities are used") (*citing* Twyman v. Crips, 584 F.2d 352, 358 (10th Cir. 1978)).

41. Lewis v. Casey, 518 U.S. 343, 361–62, 116 S. Ct. 2174, 2185, 135 L. Ed. 2d 606, 624 (1996) (holding that "delays in receiving legal materials or legal assistance" are "not of constitutional significance, even where they result in actual injury" as long as they come from "prison regulations reasonably related to legitimate penological interests").

42. Shango v. Jurich, 965 F.2d 289, 292–93 (7th Cir. 1992) (holding that restrictions on library hours which included: being closed nights, weekends, and holidays; allowing general population prisoners to use library, optimally for 10 to 11 hours, one day each week; and limiting the library visitation hours for prisoners in segregation and protective custody to about three hours every third to fifth weekday, did not deny prisoners the constitutional right of meaningful access as described in *Bounds*); *see also* Lindquist v. Idaho State Bd. of Corr., 776 F.2d 851, 858 (9th Cir. 1985) (stating that library being open a minimum of eleven hours each day was "an adequate amount of total library access time").

43. Shango v. Jurich, 965 F.2d 289, 292 (7th Cir. 1992) (quoting Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986)).

44. *See* Straub v. Monge, 815 F.2d 1467, 1469 (11th Cir. 1987) (stating that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid" (quoting Procunier v. Martinez, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224 (1974)).

45. *See*, *e.g.*, Knell v. Bensinger, 489 F.2d 1014, 1017 (7th Cir. 1973) (holding that, although a prisoner in isolation does not have unlimited rights to use the library, if a prisoner in solitary confinement is prevented from using the library or consulting an advisor to prepare a petition, the courts may find that the prisoner's right of access was effectively denied); U.S. *ex rel.* Para-Prof. Law Clinic v. Kane, 656 F. Supp. 1099, 1104–05 (E.D. Pa. 1987) (finding prison's program of providing a small number of cases or books to segregated prisoners was unconstitutional, and prison had a "duty to insure that the 'opportunity to do legal research [given to segregated prisoners] must be at least the equivalent of the opportunity that is available to an inmate who is permitted to go personally to the prison library'" (quoting Wojtczak v. Cuyler, 480 F. Supp. 1288, 1301 (E.D. Pa. 1979)); Johnson v. Anderson, 370 F. Supp. 1373, 1383–85 (D. Del. 1974) (holding prison rules allowing a prisoner in solitary confinement access to only one law book of his choosing on two times during the week violated the prisoner's due process right), *modified on other grounds*, 420 F. Supp. 845 (D. Del. 1976).

46. The runner system or paging system, "also known as an 'exact-cite system' because an inmate must request materials by exact cite," has been deemed an inadequate legal access system for both segregated and non-segregated prisoners by some courts. Cannell v. Bradshaw, 840 F. Supp. 1382, 1389 (D. Or. 1993) (holding paging system alone does not provide adequate access to the courts); Griffin v. Coughlin, 743 F. Supp. 1006, 1023 (N.D.N.Y. 1990) (finding book request system deprived protective custody prisoners of meaningful access to the courts).

47. *See*, *e.g.*, Cepulonis v. Fair, 732 F.2d 1, 4 (1st Cir. 1984) (finding requirement that prisoners identify specific volumes sought prior to entering library to be suspect); Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978) ("It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.").

48. *See*, *e.g.*, Lovell v. Brennan, 566 F. Supp. 672, 696–97 (D. Me. 1983) (stating that an adequate legal access plan would provide segregated prisoners with access to law books and a prisoner advocate, or other persons trained in the law, depending on the circumstances), *aff'd*, 728 F.2d 560 (1st Cir. 1984).

E. The State's Duty to Permit Access to Adequate Legal Assistance

While the *Bounds v. Smith* Court described various legal substitutes for law libraries,[49] it never defined the elements of an adequate legal access program or adequate assistance from persons trained in the law. Therefore, it is not exactly clear what "adequate" means in these contexts, but courts have occasionally described what might qualify.[50] For example, if the state only provides people to assist you who are *not* trained in the law, the court would most likely find that such assistance does not satisfy your right of access to the courts.[51]

Occasionally, the state may decide to fulfill its obligation to provide you with access to courts by allowing other prisoners to assist you.[52] Prisoners who provide other prisoners with legal assistance are called jailhouse lawyers or "writ writers."[53] In *Johnson v. Avery*, the Supreme Court held that a state could not prevent one prisoner from assisting another prisoner in the preparation of his writ in the absence of reasonable alternatives to such assistance.[54] Therefore, if the state does not provide you with any sort of adequate legal access program, it cannot prohibit you from getting assistance from a jailhouse lawyer.[55] Although the state may not prohibit you from getting assistance from a jailhouse lawyer, the state still has the power to reasonably regulate the activities of jailhouse lawyers.[56] For example, the state can require that a jailhouse lawyer get approval from the state prior to helping another prisoner.[57] The state can also prohibit jailhouse lawyers from visiting the cells of the prisoners they are assisting,[58] and from receiving payment for their services.[59]

F. The State's Duty to Provide Materials

The Supreme Court has held that the right of access to the courts includes providing indigent prisoners "with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps

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49. Bounds v. Smith, 430 U.S. 817, 831, 97 S. Ct. 1491, 1499–500, 52 L. Ed. 2d 72, 84–85 (1977).

50. In *Gluth v. Kangas*, the Ninth Circuit upheld the district court's imposition of a training program for prisoner legal assistants. The *Gluth* Court stated that "*Bounds* requires, in the absence of adequate law libraries, some degree of professional or quasi-professional legal assistance to prisoners. Although legal training need not be extensive, *Bounds* does require that inmates be provided the legal assistance of persons with at least some training in the law." Gluth v. Kangas, 951 F.2d 1504, 1511–12 (9th Cir. 1991) (citations omitted).

51. Valentine v. Beyer, 850 F.2d 951, 956 (3d Cir. 1988) ("An untrained legal research staff is insufficient to safeguard an inmate's right of access to the courts") (quoting Para-Professional Law Clinic v. Kane, 656 F. Supp. 1099 (E.D. Pa. 1987), *aff'd,* 835 F.2d 285 (3d Cir. 1987), *cert. denied,* 485 U.S. 993, 108 S. Ct. 1302, 99 L. Ed. 2d 511 (1988)).

52. This has also been called "mutual assistance among inmates." Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 751, 21 L. Ed. 2d 718, 724 (1969).

53. *See* Johnson v. Avery, 393 U.S. 483, 487–88, 89 S. Ct. 747, 749–750, 21 L. Ed. 2d 718, 722–23 (1969) (discussing role of prisoners who provide legal assistance to other prisoners).

54. Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 751, 21 L. Ed. 2d 718, 724 (1969) (striking down a prison regulation that forbade prisoners from providing each other with any sort of legal help or advice).

55. Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 751, 21 L. Ed. 2d 718, 724 (1969) ("[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation … barring inmates from furnishing such assistance to other prisoners."). However, you have no right to demand the assistance of a specific jailhouse lawyer. *See* Storseth v. Spellman, 654 F.2d 1349, 1353 (9th Cir. 1981) (prisoner had no right to "services of a particular writ writer"); Prisoners' Legal Ass'n v. Robertson, 822 F. Supp. 185, 190 (D.N.J. 1993) (holding a prisoner has no "right to the assistance of a particular prisoner").

56. Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 751, 21 L. Ed. 2d 718, 724 (1969) ("[T]he State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance … for example, by limitations on the time and location of such activities ..."); Sizemore v. Lee, 20 F. Supp. 2d 956, 958 (W.D. Va. 1998) (holding the prisoner can be ordered not to engage in writ writing on an individual basis when the security of the prison requires the order and that writ writers were not mandated where the prison provided prisoners with a law library and legal assistance.

57. Rivera v. Coughlin, 210 A.D.2d 543, 543–544, 620 N.Y.S.2d 505, 506 (3d Dept. 1994) (upholding determination of disciplinary violation by a prisoner who sent a letter to the FBI on behalf of another prisoner without receiving prior approval for providing such assistance pursuant to state directives).

58. Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984) (holding that prisoner was not denied effective assistance of counsel where jailhouse lawyers were prohibited from visiting his cell).

59. Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 751, 21 L. Ed. 2d 718, 724 (1969) (jailhouse lawyers may be punished for receiving payment for legal assistance); Henderson v. Ricketts, 499 F. Supp. 1066, 1069 (D. Colo. 1980) ("Compensation to jailhouse lawyers by other inmates may be prohibited.").

to mail them."[60] In other words, even if the state provides an adequate law library or assistance from persons trained in the law, failure to provide you with the materials necessary for drafting, notarizing, and mailing your legal documents may also violate your right to access the courts.

There are a few important things to remember before claiming that you have been denied access to the courts because of the state's refusal to provide you with materials. First, you may not be entitled to all or any of the materials that you request. The courts have held: that prisoners may be given pencils instead of the pens mentioned in *Bounds;* [61] that prisoners have no constitutional right to use or possess computers or typewriters;[62] that the state is not required in all cases to provide free photocopying;[63] that the state need not provide unlimited free postage;[64] and that a notary need not be available at all times.[65] Second, unlike its duty to provide adequate law libraries or assistance from persons trained in the law, the state's duty to provide you with materials may only apply to indigent prisoners. You may need to research the laws and regulations in your state to determine what the accepted standard for indigence is in your correctional facility and in your state.[66] Third, your right of access to the courts may be balanced against the state's "legitimate interests, including budgetary concerns."[67] In other words, a court could determine that the

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60. Bounds v. Smith, 430 U.S. 817, 824–25, 97 S. Ct. 1491, 1496, 52 L. Ed. 2d 72, 81 (1977).

61. Canell v. Bradshaw, 840 F. Supp. 1382, 1391 (D. Or. 1993) ("Security considerations may … justify the issuance of two-inch 'golf' pencils.") (citing Jeffries v. Reed, 631 F. Supp. 1212, 1215 (E.D. Wash. 1986)). However, the court also stated that if the prisoner in *Canell* had suffered from a medical condition preventing him from drafting legal documents longhand with a two-inch pencil, then "[u]nder those circumstances, a full-sized writing instrument or typewriter might become an indispensable tool for communicating with the court. If prison officials know of such a problem, then their denial of … [the prisoner's] request could constitute a deprivation of necessary legal supplies unless that action was justified by a sufficient penological interest." Canell v. Bradshaw, 840 F. Supp. 1382, 1391 (D. Or. 1993).

62. *See*, *e.g.*, Taylor v. Coughlin, 29 F.3d 39, 40 (2d Cir. 1994) (finding "no constitutional right to a typewriter as an incident to the right of access to the courts … [and no] constitutional right to typewriters of a specific memory capacity" (citations omitted)); Sands v. Lewis, 886 F.2d 1166, 1169 (9th Cir. 1989) (holding that prisoners have no constitutional right to a typewriter); Am. Inmate Paralegal Ass'n v. Cline, 859 F.2d 59, 61 (8th Cir. 1988) ("Prison inmates have no constitutional right of access to a typewriter and prison officials are not required to provide one as long as the prisoner is not denied access to the courts.") (citation omitted); Walters v. Edgar, 900 F. Supp. 197, 229 (N.D. Ill. 1995) ("[P]risons are not required to provide inmates with typewriters."); Howard v. Leonardo, 845 F. Supp. 943, 946 (N.D.N.Y. 1994) ("[I]nmates have no constitutional right to the possession and use of a typewriter … since prisoners are not prejudiced by filing hand written briefs.") (citation omitted)); Lehn v. Hartwig, 13 Fed. Appx. 389, 392 (7th Cir. 2001) (holding that "if prisoners have no constitutional right to a typewriter, they certainly do not have a right to a computer.") (citations omitted)); *but see* Tuggle v. Barksdale, 641 F. Supp. 34, 38 (W.D. Tenn. 1985) (holding jail must provide a sufficient number of usable typewriters in legal room unless they can be proven to be a security threat).

63. Gittens v. Sullivan, 670 F. Supp. 119, 122 (S.D.N.Y. 1987), *aff'd* 848 F.2d 389 (2d Cir. 1988) (finding provision of carbon paper to prisoners was "sufficient to provide proper access to the courts …. The State should not be forced to provide free access to copier machines for prisoner use when there is an acceptable, less costly substitute."); Dugar v. Coughlin, 613 F. Supp. 849, 854 (S.D.N.Y. 1985) (noting prisons may make prisoners pay for photocopies, as this is a "reasonable balance of the legitimate interests of both prisoners and the State"). *But see* Canell v. Bradshaw, 840 F. Supp. 1382, 1392 (D. Or. 1993) (holding prisoner has clearly established right to photocopying under certain limited circumstances).

64. Gittens v. Sullivan, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (holding provision of $1.10 per week for stamps and an additional advance of $36.00 for legal mailings to indigent prisoner satisfied the constitutional minimum for access to the courts); Dugar v. Coughlin, 613 F. Supp. 849, 854 (S.D.N.Y. 1985) (upholding directive providing that prisoners could mail five one-ounce letters per week free of charge but would have to pay for any mail weighing more than one ounce, or in excess of five one-ounce letters in one week, because "a prisoner's constitutional right of access to the courts … does not require that prisoners be provided with unlimited free postage"); *see also* Pacheco v. Commissioner, 897 F. Supp. 671, 681 (N.D.N.Y. 1995).

65. The courts have held that correctional facilities must provide prisoners with notaries public. Tuggle v. Barksdale, 641 F. Supp. 34, 39–40 (W.D. Tenn. 1985) (holding the prison "must continue to afford notary publics for all inmates"). Correctional facilities, however, need not make the notary services available five days a week. Dugar v. Coughlin, 613 F. Supp. 849, 854 (S.D.N.Y. 1985) (holding that prisoners do not have a constitutional right to notary services five days a week).

66. *See*, *e.g.*, Gluth v. Kangas, 951 F.2d 1504, 1508–09 (9th Cir. 1991) (finding that the Department of Correction's indigency policy, which only allowed a prisoner to apply for indigency classification if his prison account balance was less than $12.00 was unconstitutional because it forced prisoners to choose between purchasing the mandatory hygienic supplies and essential legal supplies, and that an indigency standard of $46.00 was more appropriate).

67. *See* Gittens v. Sullivan, 670 F. Supp. 119, 122 (S.D.N.Y. 1987) ("The State should not be forced to provide free access to copier machines for prisoner use when there is an acceptable, less costly substitute."); Dugar v. Coughlin, 613 F. Supp. 849, 853–54 (S.D.N.Y. 1985) (holding that making prisoners pay for photocopies is a "reasonable balance of the

state's duty to provide you with materials is limited by state budgetary or security concerns. Fourth, the state's duty to assist you may only apply to habeas corpus petitions and civil rights actions involving constitutional claims.[68]

Finally, when you sue on the basis of the state's refusal to provide necessary materials, you also need to show that you suffered an "actual injury" as a direct result of that refusal. Because standards vary depending on where you are, you will need to research this "actual injury" requirement in your state and circuit. *Canell v. Bradshaw* is an example of one state's particular requirements. In *Canell,* a prisoner claimed that he was denied access to the courts because the state would not make photocopies for him. The court stated that he could prove that the state had deprived him of meaningful access to the courts, but in order to do so he would have to: demonstrate that he wanted to copy specific documents which could not be duplicated longhand; that those documents were to be filed with the court as part of a specific memorandum or other document; that he had advised [prison] officials of this need; his request was denied either by or in accordance with a policy promulgated by the defendants; that those documents were relevant and necessary to the particular case; and had to be omitted from the filing as a consequence of the prison officials' refusal to provide photocopying services.[69]

Remember, if you are going to pursue this type of action, you must bring a Section 1983 or a *Bivens* claim. Please see Chapter 16 of the *JLM* for more details on these claims.

G. Conclusion

In this Chapter, you have learned that if you (1) exhaust your prison's administrative remedies for getting your complaint heard, (2) are not able to go to court or are hindered in pursuit of your claim by state interference, and (3) suffer an injury as a result of the state's interference or denial of your right to access the courts, you may pursue a claim against the state. You can request that the state provide you with access to an adequate law library, adequate assistance from someone trained in the law, or some other legal access program. A state can regulate its jails and prisons for the purpose of discipline and safety, but cannot completely deny a prisoner's right of access to the courts.

Pursuing a claim has several requirements. First, you must show that you suffered an actual injury from the state's failure to provide you with an adequate opportunity to litigate your claim.[70] Second, some state courts have held that the state only needs to provide you with an adequate law library or legal access program if you want to pursue federal habeas corpus petitions or state or federal civil rights actions. Third, the state, not you, decides what type of legal access you will get, though it must provide you meaningful access to the courts.[71] Fourth, the state must adhere to the requirements laid out in this Chapter whether or not you are considered indigent. Finally, the state can place reasonable limits on your ability to use the library or other legal access programs.

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legitimate interests of both prisoners and the State").

68. *See* Lewis v. Casey, 518 U.S. 343, 354–55, 116 S. Ct. 2174, 2181–82, 135 L. Ed. 2d 606, 620 (1996) (holding that *Bounds* only requires states to provide tools that "inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.").

69. Canell v. Bradshaw, 840 F. Supp. 1382, 1392 (D. Or. 1993).

70. *See* Lewis v. Casey, 518 U.S. 343, 350–51, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 617–18 (1996) (explaining that there is no general right to a law library or legal assistance except as they relate to a prisoner's actual ability to access the courts).

71. Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978) ("Under *Bounds*, the state is duty bound to assure prisoners some form of meaningful access to the courts. But states remain free to satisfy that duty in a variety of ways.").

APPENDIX A

DIRECTORY OF SELECTED LAW LIBRARIES OFFERING SERVICES TO PRISONERS**

If your state is not listed, you, or someone you know, should check the Southern Center for Human Rights's webpage (http://www.schr.org) for organizations and libraries providing legal materials to prisoners.

CALIFORNIA

Oakland **Alameda County Law Library**
125 Twelfth Street
Oakland, CA 94607
(510) 208-4832
http://www.acgov.org/law/index.htm

Serves Alameda County prisoners. Photocopies are $0.52/page plus a $10 handling fee, tax, postage and prepayment. The library requires correct citations and gives no legal advice. 30-page limit per request.

Los Angeles **Los Angeles County Law Library**
301 W. First Street.
Los Angeles, CA 90012
(213) 629-3531
http://lalaw.lib.ca.us

This library serves prisoners and other institution residents in California. No material is loaned. Correct citations are required and limited reference work is done. Prepayment is required.

Photocopies: $12.00 transaction charge per document for the first 25 pages (includes postage and tax) and sales tax if applicable. $0.25 per page over first 25 pages.

Payee: Los Angeles County Law Library

San Diego **San Diego County Public Law Library**
1105 Front Street
San Diego, CA 92101-3904
(619) 531-3900
http://www.sdcpll.org

This library serves prisoners and other institutional residents located at institutions in California. It lends materials to prisoners of San Diego County Jail under procedures set up by the Sheriff under a federal court consent decree. Loan periods are 1, 3, or 7 days. Correct citations are required.

Photocopies: $0.20 per page, $5.00 fee per citation. Shipping and handling is $0.50 per order plus postage (prepayment required).

Payee: San Diego County Public Law Library

Santa Clara **Heafey Law Library**
Attn: Prisoner requests
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

Serves prisoners in California institutions. Exact citations are required. Only primary materials (cases, statutes, administrative regulations; not journal articles or treatises) are eligible for photocopying. There is

** These are the libraries or facilities that provide materials in states where the most *JLM*s are sold. If you live in a different state than those listed, you should contact law school or governmental law libraries in your state.

a 30-page limit on photocopies per year. Photocopies are provided free of charge. No material is loaned, and no reference work is done. Library will only respond to mail requests.

Ventura **Ventura County Law Library**
800 South Victoria Avenue
Ventura, CA 93009-2020
http://www.infopeople.org/ventura/vclaw

This library serves prisoners in Ventura County only. Correct citations are required and only cases and statutes are available.

Photocopies: $0.25 per page, plus postage. Prepayment is required; limit of 20 pages per letter.

NEW JERSEY

Trenton **New Jersey State Library**
185 West State Street P.O. Box 520
Trenton, NJ 08625-0520
(609) 278-2640
www.njstatelib.org

Serves only prison libraries located at institutions operated by New Jersey State Department of Corrections. Requests must be submitted by NJDOC prison librarians on behalf of prisoners. There is no charge to prison libraries, but there is a limit of 50 pages per day per prison. No material is loaned, and all material must be law-related. Correct citations are required. Limited reference work is done, and no legal advice is given.

NEW YORK

Albany **Prisoner Services Project—New York State Library**
Cultural Education Center
Empire State Plaza
Albany, NY 12230
(518) 474-5355
http://www.nysl.nysed.gov/index.html

Serves only prisoners located at institutions operated by New York State Department of Correctional Services. To access library services, a prisoner should send a letter to the library and the library will respond by sending the proper forms. No material is loaned and all material must be law related. Correct citations are required and limited reference work is done, but no legal advice is given. No charge for photocopies. In addition, prisoners may borrow non-law material through their prison libraries and inter-library loan.

New York **Fordham Law School Library**
140 West 62nd Street
New York, NY 10023
(212) 636-6900
http://lawlib1.lawnet.fordham.edu/

This library serves prisoners and other institution residents located at institutions in New York. No materials are loaned, no reference work is done, and correct citations are desirable. The library will only provide copies of published materials.

Photocopies: $0.10 per page, plus $5.00 postage and handling fee. Limit of 75 copies per request. Prepayment by money order payable to Fordham Law Library required.

VIRGINIA

Charlottesville **University of Virginia Law Library**
580 Massie Road
Charlottesville, VA 22903
(434) 924-3384
http://www.law.virginia.edu/html/librarysite/library.htm

This library serves prisoners and other residents of Virginia institutions only. No material is loaned and correct citations are required. No legal advice is given.

Photocopies: $0.50 per page. Prepayment required; quotations given.

Payee: University of Virginia Law Library

Williamsburg **Wolf Law Library**
William and Mary School of Law
PO Box 8795
Williamsburg, VA 23187-8795
(757) 221-3255
http://www.wm.edu/law/lawlibrary/

The library will provide cases if correct citations are given. No legal advice is given. In addition, prisoners may borrow certain materials that circulate (books and treatises, not statutes or case reporters) through inter-library loan if their prison library has an official ILL program.

Photocopies: Prices are per item requested; quotations are given. $3.00 for less than 10 pages. $5.00 for 11–20 pages. $7.00 for 21–40 pages. $10.00 for 41–60. No copies over 60 pages.

Payee: Photocopy Account/Marshall-Wythe Foundation

A JAILHOUSE LAWYER'S MANUAL

Chapter 4:
How to Find a Lawyer

Columbia Human Rights Law Review

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Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER 4

HOW TO FIND A LAWYER*

A. Introduction

Finding a lawyer if you do not have the money to pay a private attorney can be difficult, but it is not impossible. Before you try to find a lawyer, you must know the following:

(1) The type of correctional institution you are in (city, county, federal or state);
(2) The type of case for which you are seeking representation (civil, criminal, or criminal appeal);
(3) If you are seeking a criminal appeal, the name of the county in which you allegedly committed the crime; and
(4) Your county of residence.

The more specific information you know about your case, the easier it will be to find a lawyer and to help the lawyer prepare your case. There are generally two types of cases in which you may be involved:

(1) **Criminal:** A *criminal case* is a case in which the *state* charges you with a crime. If you have already been convicted and are in prison, you are probably not currently involved in a criminal trial unless the state thinks that you committed a crime *while* you were in prison. Therefore, this chapter does not discuss how to find a lawyer for a criminal trial. But, you may want to try a *criminal appeal*. A criminal appeal is a case in which you appeal from the conviction or sentence that sent you to prison. If you have a right to a criminal appeal, you also have the right to a lawyer if you cannot afford one.[1] Read Part B below if you would like to find a lawyer to help you in your criminal appeal.
(2) **Civil:** A *civil case* is a case in which you either *bring a claim* against someone (an individual or the state), or an individual brings a non-criminal claim against you. You file a civil lawsuit whenever you bring any of the suits explained in the *JLM* Chapters about federal and state habeas corpus, Section 1983, Article 78 of the New York Civil Practice Law and Rules, and tort actions. Unlike in criminal cases and appeals, you do not have the right to a lawyer when filing a civil case. Read Part C if you would like to try to find a lawyer to help you in your civil case.

B. Attorneys for Criminal Appeals

When you have the right to bring a criminal appeal, you also have the right to have a lawyer assigned to your case if you are unable to pay a private lawyer to represent you.[2] If you cannot afford an attorney for your criminal appeal, you should petition the court to proceed as a poor person (or what in legal terms is called *in forma pauperis*) and ask the court to assign an attorney to your case. Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," has sample poor person's papers.

One of the first places you should try contacting when looking for a lawyer is the Public Defender or Indigent Defender office in any of the following places:

(1) The county where the appellate court (the higher court) is located;
(2) The county where your prison is;
(3) The county where your original trial took place; or
(4) The county where you live.

These offices can provide you with further information about having a lawyer assigned to your criminal appeal. If you have access to the Internet, the easiest way to find a Public Defender is by doing

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* This Chapter was written by Won Park based on a previous version by Angie Armer and members of the 1991–1992 *Columbia Human Rights Law Review.*

1. Douglas v. California, 372 U.S. 353, 357–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d. 811, 814–15 (1963) (finding that a state must provide counsel for an indigent defendant in a first appeal from a criminal conviction).

2. Douglas v. California, 372 U.S. 353, 357–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d. 811, 814–15 (1963). There are some higher-level appeals that you do not necessarily have the right to bring, such as an appeal to the United States Supreme Court. In these cases, you may not have the right to a lawyer if you cannot afford one. *See* Ross v. Moffitt, 417 U.S. 600, 610, 94 S. Ct. 2437, 2443, 41 L. Ed. 2d 341, 351 (1974) (holding that a state need not appoint counsel to aid a poor person pursuing a second-tier discretionary appeal).

a simple Internet search. For example, you can try using the term "Public Defender" and the name of one of the four counties mentioned above on a research site like Google or Yahoo.[3]

If you would like to choose your lawyer instead being assigned one, you have fewer options than if you were filing a civil suit. Most Legal Aid offices do not handle criminal appeals. But, some organizations have specific criminal appeals divisions. The Legal Aid Society of New York City is one such organization. See Appendix IV of the *JLM* for other such groups. You might also contact local prisoners' rights groups, which may refer you to organizations that handle criminal appeals free of charge.[4] Keep in mind that lawyers cannot arrange contingency fees with you for a criminal case. Read Part C below for more information about contingency fees.

C. Attorneys for Civil Cases

If you are looking for a lawyer for a civil case in the *federal* courts, think about whether it is worth it to bring your case in light of what may happen under the Prison Litigation Reform Act ("PLRA"). You must read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," to understand the requirements of the PLRA. Failure to follow the requirements in the PLRA can have negative consequences. For example, you can lose the good-time credit you have earned so far. Some attorneys do not know very much about the PLRA, so you should make sure to know about it yourself so that you can tell your attorney about the requirements.

If you have a civil case, and you are incarcerated in a New York *state* institution, you may be able to find a lawyer through the Prisoners' Legal Services of New York ("PLS"). PLS is described in the very beginning of Appendix IV of the *JLM* (Part A(1)(a)). PLS provides assistance to prisoners in state institutions in cases involving habeas corpus, jail time and sentence problems, and warrants and detainers. They may also be able to forward your letter to a private attorney who could handle your Section 1983 case, Article 78 petition, or tort action. But unlike the Legal Aid Society of New York mentioned above, PLS does not handle criminal cases or criminal appeals.

If you are in a city, county, or federal prison, check the other organizations listed in Appendix IV to see if special legal assistance programs serve prisons in your area. Check if a Legal Aid office exists in the county in which you are incarcerated. If none exist in your county, check for offices in the surrounding counties, since these organizations might still be able to help you. Note that Legal Aid organizations usually handle only civil matters, unless they have a special criminal appeals division. Also, many Legal Aid offices may not be able to help you because their government funding does not allow them to help prisoners. However, the Prisoners' Rights Project of the Legal Aid Society of New York does not receive government funding, and it sometimes takes cases that help prisoners.

You can also ask the court to appoint a lawyer for you. You should do this at the same time that you file your poor person's papers.[5] New York law states that a New York court may assign an attorney to you in a civil case at the same time it permits you to proceed as a poor person, but this is very rare.[6] If you can establish your inability to pay a lawyer, then you may be able to get a lawyer assigned to your case if your claim is substantial. For example, you are much more likely to get a lawyer if there is a lot

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3. To find a list of Federal Public Defenders, visit the Office of Defender Services website, *available at* http://www.fd.org. Federal Public Defenders either work for the federal government directly, or are paid through federal government funds. Note that Federal Public Defenders take on fewer cases than state or local Public Defenders.

4. The American Civil Liberties Union ("ACLU") publishes a Prisoners' Assistance Directory with contact information for organizations helping prisoners around the U.S. This book costs $35. If you would like to buy it, write to:

National Prison Project of the ACLU
Attn: Prisoners' Assistance Directory
915 15th St. NW, 7th Floor
Washington, D.C. 20005

5. Chapters 2–8 of the *JLM* discuss how to bring a lawsuit. Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," explains how to file poor person's (also called *in forma pauperis*) papers in the context of an *appeal*. You should change the affidavit example shown in Appendix B-3 of *JLM, Chapter* 9 to show that you are filing poor person's papers in a civil case, *not* a criminal appeal. *See* N.Y. C.P.L.R. § 1101 (McKinney 2010). These papers establish that you do not have the money to pay for a lawyer.

6. N.Y. C.P.L.R. § 1102(a) (McKinney 2010). The court has the discretion to appoint you a lawyer for free if a lawyer is needed to reach a fair decision. But, you do not have a constitutional or statutory right to a lawyer. *See In re* Smiley, 36 N.Y.2d 433, 438, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 91 (1975) (noting that there is no absolute right to assigned counsel and that the determination to assign an attorney lies within the discretion of the court).

of factual investigation that must be done on your case that you cannot do because you do not have the money. You are also more likely to get a lawyer if the facts of your case depend on the credibility (believability) of people involved.[7] In general, if your case requires you to know very complex legal issues that you yourself may not be able to handle, the court may be more willing to assign you a lawyer.[8] If you are not assigned a lawyer but your case survives the defendants' motion for summary judgment,[9] you should again request that the court assign you a lawyer, as they may be more likely to do so at that stage.[10] Remember, if the court assigns you a lawyer, you will have little or no say as to who your lawyer will be. Thus, you may want to first try on your own to find a lawyer whom you trust and who is committed to helping you.

Remember that many lawyers will be taking your case to earn a fee. Whether you pay a flat fee (fixed amount of money for the lawyer to represent you), an hourly fee, or a contingency fee, you will still be expected to pay for the lawyer's litigation expenses, either before or after money is spent on your case.[11] These expenses may include things like long-distance telephone calls, postage, photocopying, stenographers for depositions, hiring an investigator, medical reports, etc. Unless you get poor person's status, you are also responsible by law for all court costs, such as filing fees.

If you cannot pay a lawyer's fees, a lawyer might take your case for a contingency fee.[12] You will be asked to sign an agreement giving the lawyer a percentage (usually 33%) of whatever money the other side gives you if you win (the "recovery"). If you do not win, your lawyer gets no money. Lawyers *cannot* ask you for a contingency fee in criminal or domestic relations (family law) cases.

D. Conclusion

Finding a lawyer whom you trust and who you can work with is an important part of your legal process. You should feel that you can be truthful with your lawyer, and that your lawyer is working in your best interest. Even if finding a good lawyer seems frustrating, keep on trying. When you write letters to ask for legal help, provide as much specific information about your case as possible so that a lawyer can see you have a good case.

If you cannot find a lawyer, or you choose not to hire an attorney, you have the option of acting *pro se.* This means that you represent yourself without the aid of an attorney. You should still try to proceed *pro se* if you cannot find a lawyer.

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7. For example, if you claim that your warden assaulted you, the facts of your case would depend on the credibility of you, your warden, witnesses, and maybe other prisoners or staff members who knew you and the warden. In such a case, a court might be more willing to assign you a lawyer.

8. *See* Hodge v. Police Officers, 802 F.2d 58, 61–62 (2d Cir. 1986) (reaffirming that the *Maclin* factors apply to judicial determinations of appointment of counsel); Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981) (setting forth the factors for a district court to consider in determining whether to appoint counsel). *But see* Stewart v. McMickens, 677 F.Supp. 226, 227–228 (S.D.N.Y. 1988) (interpreting *Hodge* to require appointment of counsel "only where the individualized assessment suggests that an apparently legitimate case cannot proceed without the assistance of an attorney").

9. Summary judgment is when a court decides before a trial that no trial will be necessary, because in applying the law to important undisputed facts, one party is clearly the winner.

10. You should request assignment of counsel again at this stage because if your case survives a summary judgment motion, then the court thinks that it is worthy of a trial or hearing. *See* Hendricks v. Coughlin, 114 F.3d 390, 393 (2d Cir. 1997) (invalidating lower court's application of a bright line rule of appointing counsel only after plaintiff's case survived a motion for summary judgment).

11. *See* N.Y. State Bar Assoc., The Courts of New York: A Guide to Court Procedures with a Glossary of Legal Terms 66–68 (2001), http://www.nysba.org/Content/NavigationMenu/PublicResources/GuidetotheiCourtsofNewYork/CourtsofNY2002.pdf (discussing the basis of your legal fees as well as your rights as a client).

12. You cannot be convinced to enter into a contingency fee arrangement by fraud, nor can your lawyer ask for so much money that the lawyer obviously took advantage of you. *See* Gair v. Peck, 6 N.Y.2d 97, 106, 160 N.E.2d 43, 48, 188 N.Y.S.2d 491, 497–498 (1959) (holding contingency fees may be disallowed where "the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated on him"); *see also* King v. Fox, 7 N.Y.3d 181, 191, 851 N.E.2d 1184, 1191, 818 N.Y.S.2d 833, 840 (2006) (stating a contingency fee may be unconscionable if not proportional to the value of the services rendered).

A JAILHOUSE LAWYER'S MANUAL

Chapter 5: Choosing a Court and a Lawsuit: An Overview of the Options

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CHAPTER 5

CHOOSING A COURT AND A LAWSUIT: AN OVERVIEW OF THE OPTIONS

A. Introduction

This Chapter will briefly explain the different lawsuits available to you, so that you can decide which type of lawsuit is best for you to bring. Each kind of lawsuit is described in more detail in later chapters of the *JLM*, so you should read those chapters for more specific information.

The first step you should take when determining what suit to bring is to ask yourself: Do I want to attack the cause of my imprisonment, or the circumstances I am suffering in prison, or both? If you think unlawful circumstances *led to your imprisonment*, read Part B of this Chapter. If you think something unlawful and damaging has happened to you *while in prison*—for example, the prison refuses to give you your mail—read Part C. If you are not sure, read both Part B and Part C for more information.

For the best chance of success, you must pay attention to things the law requires you to do when bringing the type of suit you choose. Many lawsuits require you to do certain things before you even begin the lawsuit itself (such as pursue an administrative grievance). Some lawsuits also require you to do certain things once you have begun the lawsuit (such as pay court fees, unless you can qualify for an exception).

Different types of lawsuits have different results, or *remedies*. For example, some lawsuits allow you to demand that the opposing party pay you money if you win. Other lawsuits do not result in money awards, or *damages*, but may require the opposing party to do something (such as give you your mail) or stop doing something that is causing you harm. Some types of lawsuits may lead to the reversal of your sentence or conviction, while other types do not provide for such remedies. Once you know what remedies each type of lawsuit can provide, you can decide which type of suit, if any, is right for you to file.

B. Lawsuits to Challenge Your Conviction or Sentence

1. Criminal Appeals

If a New York trial court convicted you of a crime, you have the right to appeal your conviction or your sentence to a higher New York court.[1] Prisoners in other states, and prisoners who were convicted of a federal crime, have a similar right to appeal their convictions.[2] On appeal, the higher, or *appellate*, court will examine the record of your trial to determine whether the judge or prosecutor committed any legal errors[3] in conducting your trial or sentencing. The appellate court may also determine if the jury properly weighed the evidence at trial, or if your sentence was excessively harsh or longer than the maximum time allowed by law. *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," explains the criminal appeals process in detail.

2. Post-Conviction Remedies

New York also has three other procedures you can use to challenge the legality of your sentence or conviction. These additional procedures are frequently called *post-conviction remedies*, because you are asking the court to help you *after* you have been convicted. These procedures are different from an appeal, because during the appeal process your conviction is not yet final. The three post-conviction remedies are: (1) an Article 440 motion, (2) a petition for state habeas corpus, and (3) a petition for federal habeas corpus. These procedures do not exist only in New York. Chapter 20 of the *JLM* lists the statutes in every state that are similar to New York's Article 440 motion.[4] *JLM*, Chapter 21, covers state habeas corpus procedures for Florida and New York. State specific habeas corpus procedures are published in the *JLM* State Supplements, where available.

Furthermore, prisoners in every state have the right to petition for federal habeas corpus. Federal habeas corpus is described in more detail in *JLM*, Chapter 13. Keep in mind, however, that an appeal is

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1. N.Y. Crim. Proc. §450.10 (McKinney 2007).
2. Fed. R. App. P. 4(b).
3. Legal errors are explained in *JLM*, Chapter 9, "Appealing Your Conviction or Sentence;" *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence;" *JLM*, Chapter 13, "Federal Habeas Corpus;" and *JLM*, Chapter 21, "State Habeas Corpus."
4. See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Conviction or Sentence," Appendix A.

often the most effective way of challenging your sentence or conviction and is required if you want to raise certain arguments later. You should try to appeal your sentence before you use these other remedies.

(a) Article 440 Motion[5]

In an Article 440 motion, you request the trial court to review circumstances that made your conviction or sentence unfair. Examples of these circumstances are a change in the law, discovery of new evidence, an unauthorized or illegal sentence, or misconduct by the prosecutor or judge of which you did not and could not have known at the time of your trial.[6] You may also make an Article 440 motion on the grounds that you were convicted and sentenced in violation of your rights under the U.S. or New York State constitutions.[7] However, you cannot raise any claims that you have already raised or could have raised in your criminal appeal. Relief under an Article 440 motion is a new trial, a new appeal, or a new sentence. Keep in mind that although there is no statute of limitations (time limit) for making an Article 440 motion, a court may not grant your motion if you wait too long after your sentencing to make your motion.[8] Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," discusses Article 440 in great detail, and you should read it before making this motion.

(b) State Habeas Corpus[9]

State habeas corpus petitions challenge the government's right to keep you in prison by asserting that your confinement is not legal. In general, however, New York courts will require you to use Article 440 instead of a petition for state habeas corpus unless you are challenging a parole or bail decision. Relief under habeas corpus is immediate release from custody. Chapter 21 of the *JLM*, "State Habeas Corpus," explains New York habeas corpus in detail, as well as Florida habeas corpus procedures. State specific habeas corpus procedures are published in the *JLM* State Supplements, where available. New York habeas corpus is also available to challenge bail determinations, revocations of your parole, extradition, arraignment and delay, misdemeanor complaint and delay, felony complaint and delay, and speedy trial issues.

(c) Federal Habeas Corpus[10]

Federal habeas corpus is a procedure through which you can get a federal judge to review a claim that you were convicted or sentenced in violation of your rights under the federal Constitution. This is different from an Article 440 motion or a petition for state habeas corpus, where you ask a state judge to review your state constitutional claims. Recently, federal judges have been more reluctant to interfere in state criminal proceedings, and, therefore, it has become more difficult for prisoners to get federal courts to review their state claims.[11] Furthermore, federal legislation now requires that prisoners exhaust all forms of state relief, such as filing an Article 440 motion or petitioning for state habeas corpus, before seeking relief in federal court.[12] You also have only one year to make a federal habeas corpus claim from the time you were sentenced or re-sentenced to prison.[13] Chapter 13 of the *JLM*, "Federal Habeas Corpus," explains federal habeas corpus in detail, and you should read it carefully if you wish to bring a federal habeas claim.

C. Lawsuits to Challenge the Conditions of Your Imprisonment[14]

Before you decide to bring a claim about your prison conditions, it is very important that you read *JLM*, Chapter 14, "The Prison Litigation Reform Act." The PLRA, as it is know, makes it harder for prisoners to

5. N.Y. Crim. Proc. §§ 440.10–440.65 (McKinney 2005 & 2007 Supp.).
6. N.Y. Crim. Proc. § 440.10(1)(a)–(g) (McKinney 2005 & 2007 Supp.).
7. N.Y. Crim. Proc. § 440.10(1)(h) (McKinney 2005 & 2007 Supp.).
8. *See* People v. Byrdsong, 161 Misc. 2d 232, 236, 613 N.Y.S.2d 543, 545 (Sup. Ct. Queens County 1994) (declaring that a post-conviction motion filed nine years after trial and seven years after appeals was, in the interest of finality, too long of a time period to continue further litigation).
9. N.Y. C.PL.R. 7001–12 (McKinney 2007).
10. 28 U.S.C. §§ 2241–66 (2006).
11. This concern will not be relevant to you if you are a federal prisoner in a federal institution.
12. The Prison Litigation Reform Act is explained briefly in Part (C), and in detail in *JLM*, Chapter 14.
13. 28 U.S.C. § 2244(d)(1) (2006) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court.").
14. You can also file a complaint with the U.S. Department of Justice (DOJ), but, this is not a lawsuit, as they do not have to respond to your complaint. See Part C(6) for more details on the DOJ process.

take their complaints about prison conditions to federal court. The PLRA also imposes harsh consequences if you bring your claim incorrectly. Though the PLRA only applies to federal court cases, many states have passed similar laws to reduce the amount of prisoner litigation, especially civil suits. *JLM*, Chapter 2, "Introduction to Legal Research," will help you learn how to research if your state has laws similar to the PLRA.

For federal court claims, the PLRA requires you pay the full court filing fee even if you proceed *in forma pauperis* (as a poor person). If you file as a poor person, however, your fees will be taken in installments from your prison account. This means instead of having to pay all the fees at one time, you can pay a little at a time. However, if you file a federal claim *in forma pauperis*, you risk receiving a *strike* under the "three strikes" provision of the PLRA. The three strikes provision states that if you have three cases dismissed as frivolous, malicious, or failing to state a valid legal claim, you will have to pay the full filing fee up front to pursue your next claim. If you receive three strikes, you will not be able to use the *in forma pauperis* procedure. Moreover, if the court finds you have filed a lawsuit for malicious or harassing purposes, you may lose any good-time credit you have earned.[15]

Additionally, the PLRA requires you to use or attempt to use, a process known as "exhausting," all of your administrative remedies *before* you bring a claim in court.[16] You must pursue all institutional grievance procedures and their appeals before filing a federal claim. Otherwise, your claim will be thrown out and you will not get your filing fee back. Remember, these are only a few of the restrictions imposed by the PLRA. Therefore, you should read Chapter 14 of the *JLM* before you file any federal claim.

1. Filing an Administrative Grievance

The PLRA requires you to use all administrative grievance programs available to you—both state and federal—before filing a federal court case. Many states also have this requirement. In New York, you must first file a complaint in the New York State Inmate Grievance Program before bringing a lawsuit. See *JLM*, Chapter 15, "Inmate Grievance Procedures," for more details about the New York program as well as some basic information about similar inmate grievance programs in other states.

The New York State Inmate Grievance Program allows prisoners in any of the facilities of the Department of Correctional Services ("DOCS") to file a complaint. Grievances must be about a DOCS policy, rule, or regulation, either as it is written or as correction officials or officers have applied it to you personally. Issues and problems that do not relate to a DOCS policy, rule, or regulation, or that do not involve you personally cannot be resolved through this program. For example, if your complaint involves a policy, rule, or action of an outside agency, such as the Division of Parole, DOCS cannot help you.[17] Therefore, the PLRA will not prevent you from filing a federal claim without first exhausting the DOCS grievance procedure if your claim does not relate to a DOCS policy, rule, or regulation. You should be certain before proceding, however, and it may still be a good idea to file a grievance just to be sure.

2. 42 U.S.C. § 1983

A federal law, 42 U.S.C. § 1983 ("Section 1983"), allows you to sue state and city prison or jail officials and guards if they deprive you of your federal constitutional rights (like your right to adequate medical care, to be free from assault, and to have access to the courts and to legal materials). *You cannot use Section 1983 to attack your conviction or sentence.*

When you file a Section 1983 complaint, you must give a detailed description of the incident or practice which you want remedied. If the problem affects many prisoners, you might also be able to bring your lawsuit as a class action. A class action is a suit brought on behalf of you and others who experience the same problem or have the same complaint.[18] You can also add any supplemental state claims to your federal cause of action if a state claim involves the same facts as the alleged federal claim.[19]

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15. 28 U.S.C. § 1932 (2006).

16. 42 U.S.C. § 1997e(a) (2006).

17. State of New York, Department of Correctional Services, Directive No. 4040 § III (F), Inmate Grievance Program (1998) (as revised Aug. 22, 2003).

18. But keep in mind that you need a lawyer to file a class action. You cannot file one by yourself.

19. See Part C(6)(b) of *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," for more information on supplementing your federal § 1983 case with state claims.

Section 1983 has a statute of limitations, which is the limit on the amount of time you have before your right to file a lawsuit expires. Section 1983 claims use the state statute of limitations for personal injury suits in the state in which the court is located. The statute of limitations period begins to run when you find out about (or should have found out about) the injury that you are complaining about.

A federal judge who hears a Section 1983 claim may order any one or more of the following remedies: (1) an injunction (an order to prison officials to stop denying you your rights or to take steps to allow you to exercise your rights); (2) money damages (to make up for your injuries); or (3) a declaratory judgment (a statement by the court about the nature and limits of your rights made before they have been violated).

After you determine the district court in which you must file, you should write to the clerk of that district court asking for the forms and information you need. You can complete the filing of your Section 1983 lawsuit simply by mailing the appropriate documents to the clerk. Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," discusses Section 1983 suits in detail.

3. *Bivens* Actions[20] under 28 U.S.C. § 1331

There is no statute similar to Section 1983 allowing you to sue *federal* officials who deprive you of your federal rights. However, you can use what is called a "*Bivens* action" under 28 U.S.C. § 1331(a) to sue federal officials.[21] A *Bivens* action is similar to a Section 1983 claim. Much of the information applying to Section 1983 claims also applies to *Bivens* actions. For example, just like a Section 1983 action, you may use a *Bivens* action to complain about conditions or treatment violating your constitutional rights. The PLRA similarly requires that you exhaust all available administrative remedies before filing your *Bivens* action.

A *Bivens* action allows you to sue a federal officer who violated your rights. However, you can only sue a federal officer as an *individual*, but not as an *official*. This means that you can sue the officer as a person, but not as a government employee, and therefore your remedies are limited to what the individual can do to make you whole.[22] Additionally, you cannot bring a *Bivens* action against a federal agency or a private corporation operates a federal prison facility.[23] If you wish to sue a private corporation that operates prison facilities, you might have more success trying to bring a state tort claim. Federal courts also may not listen to your complaint if it sounds like you are suing for a harm that is relatively less serious, such as your personal items being taken from you.

If you bring a *Bivens* action, you must serve a copy of the summons and complaint on (1) the named defendants, (2) the U.S. Attorney for the district in which you bring your suit, and (3) the U.S. Attorney General in Washington, D.C.[24] If you seek injunctive or declaratory relief (meaning you are asking the court to stop something being done to you, but you are not asking for money), you may file your suit in the federal district where *any* defendant resides, where the events complained of occurred or are occurring, or where you presently reside.[25] If you are suing under Section 1331 for only money damages, you need to serve the summons and complaint on (1) the U.S. Attorney for the district in which you bring your suit, (2) the U.S. Attorney General in Washington, D.C., and (3) the officer or employee you are suing.[26] To sue for damages, you must file in the federal district in which *all* the defendants reside or the district in which your claim

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20. For more information on *Bivens* actions see Part E of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 & 28 U.S.C. §1331 to Obtain Relief from Violations of Federal Law."

21. The claim comes from the case Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389, 91 S. Ct. 1999, 2001, 29 L. Ed. 2d 619, 622 (1971) (allowing a lawsuit against federal agents claiming a 4th Amendment violation).

22. *See* Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (stating that a *Bivens* action "must be brought against the federal officers involved in their individual capacities."). This is because if you sue an officer in his "official capacity," it is like suing the federal government, and under the concept of "sovereign immunity," the federal government cannot be sued.

23. *See* Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 324 (1994) (holding that Bivens suits cannot be brought against a federal agency); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 122 S. Ct. 515, 517, 151 L. Ed. 2d 456, 461 (2001) (refusing to extend *Bivens* to allow recovery against a private company operating a halfway house under contract with the Federal Bureau of Prisons).

24. Fed. R. Civ. P. 4(i).

25. 28 U.S.C. §1391(e) (2006).

26. Fed. R. Civ. P. 4(i)(3).

arose (where the events you are complaining about occurred). [27] All service must be by registered or certified mail. [28]

4. Tort Actions in State Courts

As noted above, if you were injured by a state official or employee, *and* as a result your constitutional rights were violated, you may file a Section 1983 suit. This is a claim under federal law even though the person who injured you is a *state* official or employee. You may also file a tort action in state courts against anyone who deliberately or carelessly injured you, or damaged or destroyed your property. You can file a state tort action regardless of whether they violated any of your constitutional rights, and regardless of whether you are also filing a Section 1983 federal suit.[29] Even if you are not filing a Section 1983 suit, you can bring a tort action in state courts. [30]

In New York, if the person who injured you was a state official, state employee, or someone acting under the authority of the state (like a private doctor the state hired), you may sue New York State in the Court of Claims. The Court of Claims only allows such claims against the state and can only award money damages; it cannot issue an injunction. Also, before filing suit in the Court of Claims, you must exhaust administrative procedures, like the Inmate Grievance Program, and you must pay the filing fee. Read *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about tort suits.

5. Tort Suits in Federal Courts

If you are a federal prisoner and want to sue for a simple tort violation, you must sue using the Federal Tort Claims Act ("FTCA")[31] instead of a *Bivens* action. The FTCA creates the procedures to sue the federal government for harm federal employees may have caused you or your property while they were doing their jobs. You must first send in a completed Form 95, "Claim for Damage, Injury, or Death," and ask for damages from the federal agency whose employee allegedly caused the harm.[32] Many FTCA cases go through the agency and are settled there. If your claim is denied, however, you may file suit in federal court. Remember, if you have not gone through the administrative remedies before going to federal court, the judge will dismiss your case.

6. Article 78 Proceedings

Article 78 of the New York Civil Practice Law allows you to go to court to challenge decisions made by New York State administrative bodies or officers.[33] Like the other suits mentioned in Part C of this chapter, you cannot use Article 78 to challenge your conviction or sentence. Article 78 is useful to challenge decisions made by administrative bodies like the Department of Correctional Services, the Board of Parole, and the Temporary Release Committee, or by state employees such as prison guards and administrators. You may challenge decisions made by bodies like these if you think they did something wrong when making a decision in one of the following four ways: (1) they acted beyond their legal authority; (2) they failed to do something required by law; (3) they made an unreasonable or grossly unfair (arbitrary) decision; or (4) they made a decision at a hearing without enough evidence to warrant such a decision.[34] Even though you cannot challenge your sentence or conviction under Article 78, you may challenge the Board of Parole's decision to revoke your parole, which, if successful, would lead to your release from prison. Chapter 22 of the *JLM,* "How to Challenge Administrative Decisions Using Article 78 of the N.Y. C.P.L.R." discusses Article 78 proceedings in greater detail.

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27. Fed. R. Civ. P. 4(i).
28. Fed. R. Civ. P. 4(i)(1).
29. If someone did violate your constitutional rights, you may also file a tort action in a federal court.
30. If you file a tort action in New York state court, you should file your claim in the New York Court of Claims.
31. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2000).
32. You can get this form by writing to the clerk of the federal district court in which you plan to file your action. *See* U.S. Dept. of Justice Civil Division Forms – Form SF 95, *available at* http://www.justice.gov/forms/dojform.php (last visited October14, 2010).
33. N.Y. C.P.L.R. § 7801 (McKinney 1994 & Supp. 2006).
34. N.Y. C.P.L.R. §§ 7803(1)–(4) (McKinney 1994 & Supp. 2006).

7. Challenging Unconstitutional Prison Conditions Through the Department of Justice

The U.S. Department of Justice ("DOJ") has authority under the Civil Rights of Institutionalized Persons Act to investigate state and local institutions for unconstitutional conditions.[35] This unit does not investigate federal institutions; you must use another agency like the Bureau of Prisons if you want to file a complaint about a federal prison.[36] The DOJ will only investigate allegations of systemic abuse—problems experienced by many prisoners. If you think your prison suffers from widespread constitutional abuses, you might consider writing to the DOJ. *The DOJ cannot provide individual relief, nor can it bring a claim regarding your criminal sentence. For these matters, you should contact an attorney.*[37]

The Special Litigation Section of the DOJ protects the constitutional and federal statutory rights of persons confined in certain institutions owned or operated by state and local governments. These institutions include facilities for individuals who are mentally ill or developmentally disabled, nursing homes, juvenile correctional facilities, and adult jails and prisons. The department's recent focus has included work on abuse in nursing homes, juvenile facilities, sexual victimization of women prisoners, and the unmet medical needs of prisoners and pre-trial detainees.

The Special Litigation Section enforces federal civil rights statutes in four major areas: (1) conditions of institutional confinement; (2) law enforcement misconduct; (3) access to reproductive health facilities and places of religious worship; and (4) protection of institutionalized persons' religious exercise rights. The DOJ receives a large number of claims every year and cannot investigate every claim. The DOJ also takes a long time to conduct an investigation, so it is important to be patient if you do bring a claim.

If you write to the DOJ, try to be as specific and clear as possible. Your letter should include your name, prisoner ID number, race, the length of your sentence and how much of it you have served, and a description of what happened or the condition you believe to be unconstitutional. When you talk about what happened, be sure to include all relevant information, including how many times the abuse happened, the names and races of the people involved, and whether the abuse has happened to other prisoners. If you know of others who have had similar experiences, encourage them to write letters too. Send the letter to:

Special Litigation Section
Civil Rights Division, U.S. Department of Justice
950 Pennsylvania Avenue NW
Patrick Henry Building, Room 5028
Washington, D.C. 20530
Telephone: (877) 218–5228; (202) 514–6255; Fax: (202) 514–0212; (202) 514–6273

If you are filing a complaint under the Americans with Disabilities Act, you must write to a different division of the DOJ. *JLM*, Chapter 28, "Rights of Prisoners with Disabilities," will help you file this complaint. A summary of the Special Litigation Section's work is also available on the DOJ website at http://www.justice.gov/crt/split/index.php (last visited October 17, 2010).

D. Conclusion

When considering bringing a lawsuit, you should determine the details of your grievance. Defining your problem will help you decide which laws or procedures are the most appropriate for your situation. After considering your issue, decide whether you are challenging your conviction or sentence, or if you are challenging the conditions of your imprisonment. Read additional chapters of the *JLM* that relate to your issue to help you make a decision. Next, learn what will be required of you for different types of legal action. Review the different types of suits described above for each type of legal problem, and think about what is required to be successful. In addition to comparing the legal requirements of the different types of actions, be sure to think back to what your problem is, who is responsible, and decide what your goals are for fixing that problem. Since different lawsuits provide different types of solutions, you should evaluate your potential

35. 42 U.S.C. § 1997 (2000). Some federal courts in New York have held that, under the PLRA, prisoners must exhaust the DOJ's disability complaint procedure in addition to their internal prison grievance procedure before filing a disability-related complaint in federal court. Other courts have disagreed. For more information about whether your complaint would qualifiy as an "administrative remedy" under the PLRA, read Part E(1) of *JLM*, Chapter 14.

36. For more information, see http://www.bop.gov (last visited October 17, 2010).

37. *See* http://www.justice.gov/crt/split/complaints.php (last visited October 17, 2010).

courses of action with your goal in mind. At that point, you will be in the best position to decide if legal action is right for you, and if so, which type of lawsuit you should pursue.

APPENDIX A

LAWSUITS THAT CHALLENGE YOUR CONVICTION OR SENTENCE

Type of Suit	Characteristics of the Suit	Where Do I Bring My Claim: State or Federal Court?	Important Things to Remember	*JLM* Chapters you should consult
Criminal Appeal	A higher court looks at your case to see if the lower court, judge, or prosecutor committed any legal errors during the trial or sentencing.	It depends on where you were first convicted. If you were convicted in a state trial court, you will appeal to a higher state court. If you were convicted in a federal court, you will appeal to a higher federal court.	The higher court can only look for legal errors, not factual ones.	Chapter 9: "Appealing Your Sentence or Conviction"
Article 440	A trial court reviews circumstances that may have made your conviction or sentence unfair.	You can bring this claim only in the New York state courts. See *JLM*, Chapter 20, Appendix A for similar laws in other states.	You cannot raise any claims you have already raised or could have raised in a criminal appeal.	Chapter 20: "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence"
Federal Habeas Corpus	A federal judge reviews your claim that your rights were violated under the U.S. Constitution.	You may bring a federal habeas corpus claim only in federal court.	You must have tried to use all the relief that your state provides before seeking federal habeas corpus. **Remember that you have a one-year time limit to bring a federal habeas corpus action.** You must have exhausted all your remedies before this. Judges do not often grant habeas relief.	Chapter 13: "Federal Habeas Corpus"
State Habeas Corpus	In New York, state habeas corpus is used mainly to challenge bail determinations and revocations of parole.	You may bring a state habeas corpus claim only in state court.	In New York, try Article 440 before you bring a state habeas petition. Courts will generally make you use Article 440 unless you are challenging bail or a parole decision.	Chapter 21: "State Habeas Corpus"

APPENDIX B

LAWSUITS THAT CHALLENGE THE CONDITIONS OF YOUR IMPRISONMENT

Type of Suit	Characteristics of the Suit	Which Court-State or Federal?	Important Things to Know	*JLM* Chapters you must consult
Administrative Grievance	You may file a complaint to an administrative body. In prison, this means that you will first file a complaint with your prison.	An administrative grievance is not filed with a court, but the PLRA requires you to bring an administrative grievance before challenging prison conditions in federal court.	Make sure you know about the Prison Litigation Reform Act (PLRA) and its requirements. See *JLM*, Chapter 14, "The Prison Litigation Reform Act."	Chapter 15: "Inmate Grievance Procedures"
42 U.S.C. § 1983	You may sue state or city prison officials if they violate your federal constitutional rights and federal statutory rights "under color" of state law.	Section 1983 claims are usually filed in federal court.	You cannot use a Section 1983 claim to challenge your conviction or sentence. You must follow the state statute of limitations (deadline) for personal injury suits and file your complaint by this deadline. Consider whether you might also bring your suit as a class action. You cannot use a Section 1983 claim if you are complaining about a *federal* official.	Chapter 16: "Using 42 U.S.C. § 1983 and 28 U.S. § 1331 to Obtain Relief from Violations of Federal Law"
28 U.S.C. § 1331 (*Bivens* Actions)	You use this type of lawsuit to complain about *federal* officials who violate your federal constitutional rights. This is the federal equivalent to a Section 1983 suit, so much of the information about Section 1983 suits also applies to *Bivens* actions.	You may only bring a *Bivens* action in federal court.	You can sue a federal official only in his *individual* capacity, not in his *official* capacity. You cannot sue federal agencies through a *Bivens* action. You cannot use this suit to sue private corporations that work with the federal government to operate your prison facility (use a tort action instead).	Chapter 16: "Using 42 U.S.C. § 1983 and 28 U.S. § 1331 to Obtain Relief from Violations of Federal Law"

Type of Suit	Characteristics of the Suit	Which Court-State or Federal?	Important Things to Know	*JLM* Chapters you must consult
Tort Actions	In addition to a Section 1983 suit or a *Bivens* action (above) you can file a tort action against anyone who deliberately or carelessly injured you or your property. You can bring a tort claim by itself.	You may bring a tort action in federal or state court.	In New York, you can sue the state of New York in the Court of Claims if the person who injured you was a state official or employee. Remember, if you are a federal prisoner, you must first exhaust administrative remedies under the Federal Tort Claims Act and Prison Litigation Reform Act before bringing a claim in federal court.	Chapter 17: "The State's Duty to Protect You and Your Property: Tort Actions"
Article 78	You may challenge decisions made by administrative bodies or officers in court (for example, the Board of Parole, or state-employed prison guards). You may challenge decisions that may be unlawful or actions that show the administrative bodies failed to follow the law.	You may bring an Article 78 suit only in New York State Court.	You cannot use this type of lawsuit to challenge your conviction or sentence.	Chapter 22: "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules"
U.S. Department of Justice (DOJ)	The DOJ will investigate only allegations of systemic abuse (continued unconstitutional behavior that harms everyone) in state and local institutions.	This type of claim is brought in federal court.	The DOJ cannot provide individual relief—it will only look into problems that are experienced by many prisoners. The DOJ also will not look into problems in federal institutions. If you decide to write to the DOJ Special Litigation Unit, make sure your letter is as clear and specific as possible.	There are no *JLM* Chapters on this subject. For more information, go to: http://www.usdoj.gov/crt/split/complaints.htm

A JAILHOUSE LAWYER'S MANUAL

Chapter 6:
An Introduction to Legal Documents

Columbia Human Rights Law Review

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CHAPTER 6

AN INTRODUCTION TO LEGAL DOCUMENTS*

A. Introduction: The Right and Responsibilities of Self-Representation

You have the right to bring your own lawsuit and to represent yourself in court. This is called bringing a lawsuit *pro se*.[1] Although it is always helpful to have the aid of a lawyer, it is not always possible to get legal assistance, especially in the early stages of a lawsuit. If you plan to start a legal action, it is crucial that you familiarize yourself with the documents that you will need to provide to the court. Courts require that certain documents are prepared and *filed* at specific times in order to begin and maintain a lawsuit. The purpose of this Chapter is to give you a general introduction to legal documents and a basic framework that explains the order in which documents are required in most cases.

Each type of lawsuit described in the *JLM* has at least one *plaintiff* or *petitioner* and at least one *defendant* or *respondent*.[2] In some lawsuits, there may be more than one plaintiff. For example, several prisoners who were all mistreated in the same way can bring a lawsuit together. Your lawsuit will be stronger if you can show that you have been a victim of a regular practice that is illegal, or if you can demonstrate that several people suffered the same mistreatment. You may even be able to bring a lawsuit in the name of a group of people without having to ask them all to join your lawsuit as plaintiffs. Such a lawsuit is called a *class action* and may be very powerful.[3] If you are suing prison officials who are mistreating several prisoners, but you are the only plaintiff, the prison officials can have the case thrown out by merely improving conditions for you and no one else. This is because the court only has power over those people named in the suit—once the prison officials have improved conditions for you, your case is *moot* and will be dismissed. If this happens, the court cannot do anything about the conditions or mistreatment of others unless another suit is brought. On the other hand, if you bring a class action naming all the prisoners who are suffering as plaintiffs, prison officials may have to improve conditions for everyone before the court can dismiss the case. You should try to find a lawyer for this type of case.

In some cases, there may also be more than one defendant. Under the rule of supervisor liability (*respondeat superior*), an employer may sometimes be held *liable* for the illegal acts of his or her employees. Therefore, you should always name as a defendant the individual who injured you, as well as that individual's superiors up to the Commissioner of Corrections.

If you are a plaintiff, you would begin your lawsuit by notifying the court and the person you are suing that you intend to sue. This is done by filing papers (discussed in more detail below) with the court. In these initial papers, you explain the problem you are having and what you would like the court to do about it. Once the court receives these papers, the person you are suing is allowed to defend himself by filing papers with the court that respond to your charges. At this point, you are generally given another opportunity to file more papers, in which you respond to what your opponent has stated in his papers. In most cases, this exchange of claims and responses to the charges occurs before the court makes any decisions on the substance (also called the "merits") of the lawsuit itself.

B. The Legal Documents

All lawsuits, regardless of type, require the same basic legal documents. These documents usually fall into five categories: (1) papers needed to start the lawsuit; (2) supporting papers; (3) miscellaneous papers; (4) the *answer* from the *party* being sued; and (5) the *reply* to that answer by the party bringing the lawsuit. Although they serve the same functions, the names of these documents may differ depending upon the

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* This Chapter was written by Taryn A. Merkl based in part on previous versions by Colleen Romaka and other former members of the *Columbia Human Rights Law Review*.

1. New York Prisoners' Legal Services publishes a newsletter entitled "*Pro se*," which discusses how to proceed *pro se* in various contexts. Many libraries have it. The newsletter is also available from Prisoners' Legal Services. To subscribe, send in a request with your name, DIN number, and facility to Pro Se, 114 Prospect Street, Ithaca, NY 14850.

2. The terms "plaintiff" and "petitioner" are both used to refer to the person who brings a lawsuit. Similarly, the terms "defendant" and "respondent" are both used to refer to the person who is being sued. Which terms are used will vary depending on the court in which the case is brought.

3. *See* Fed. R. Civ. P. 23 (the Federal Rule of Civil Procedure laying out the procedures for class actions); N.Y. C.P.L.R. 901–09 (McKinney 2006) (the rule laying out the procedures for class actions in New York State courts).

particular lawsuit you choose to file. For example, in a federal *habeas corpus* action, the paper needed to start a lawsuit is called a *petition*, while in a *criminal appeal* it is called a *notice* of appeal.

JLM, Chapters 2–5 describe in detail the various types of lawsuits that you may bring and provide you with instructions on how to prepare the forms that you need for each type of suit. A summary of different types of lawsuits, based on New York procedure, is also given in *JLM* Chapter 5. This Part provides an overview of the legal documents you will need to prepare if you decide to bring one of the actions discussed in the *JLM*. The chart at the end of this Chapter matches the various names given to the five basic categories of papers to each type of lawsuit that you may bring.

What comes to most people's minds when they think about a lawsuit is a courtroom trial. However, before any case actually gets into court, certain legal documents must be prepared and filed with the court. If you are appearing (bringing a lawsuit) *pro se* (without a lawyer), you are responsible for preparing the necessary documents. Therefore, it is important that you read Chapters 2–5 of the *JLM*, and carefully follow the directions on how to write the necessary documents. This Part discusses the functions of the five basic types of legal documents necessary to start and maintain the various legal actions.

1. Papers Needed to Start a Lawsuit

Once you have determined what type of action you would like to bring, you must file papers with the court explaining why you are seeking help from the court (pleadings). In these documents, you will usually state what your opponent has done to you and what you want the court to do about it. You will also explain the basis of the court's *jurisdiction* (power) to *hear* your case. Depending upon what type of lawsuit you bring, the names of the papers may differ. The chart at Appendix A of this Chapter provides the names of these papers for each lawsuit. You should refer to the section of the *JLM* describing your legal problem in detail to determine how these documents should be prepared.

2. Supporting Papers

In the papers that you file to start a lawsuit you will make certain claims about what your opponent did to you and why you are seeking help from the court. At this point in most lawsuits, the court will need some sort of *evidence* that supports your claims. Two types of supporting evidence, *affidavits* and memorandums, are discussed below:

(a) Affidavits

Supporting papers usually take the form of an affidavit. An affidavit is a sworn (either notarized or signed by a friend of the court) written statement, by a party to the lawsuit, or by a witness, supporting the claims you made in your starting papers. An affidavit's purpose is to provide the court with some factual evidence that supports your claims. Therefore, it should contain specific facts. It may consist of your own testimony and/or that of someone else who witnessed or has firsthand knowledge of the facts of your claim.

(b) Memorandum of Law

In some suits, a legal memorandum (or brief) is required. A legal memorandum is a statement of the law (as opposed to the facts) on a particular legal issue. A memorandum discusses the legal arguments upon which your claim is based. In your memorandum, you present the facts of your case, and compare them to similar cases. The memorandum of law serves a purpose similar to that of the affidavit—it demonstrates support for the claims that you made in your starting papers. The legal memorandum, an example of which appears in Appendix B of this Chapter, should begin with a statement of the facts in your case. The body of the memorandum should deal with all of the legal issues that you think arise from the facts of your case. The legal issues will be based on your legal rights or laws that provide a *privilege*. You should research these questions of law and explain to the court how other courts have dealt with the issues you are raising. Chapter 2 of the *JLM*, "Introduction to Legal Research," explains how to research an issue in the law library.

3. Miscellaneous Papers

You may also file miscellaneous papers, which usually deal with procedural questions of law (the process by which your case is decided). These questions of law differ from substantive questions of law (the factual and legal issues of your case), but they nevertheless can affect your chances of success in the lawsuit. For example, they may include a request for a lawyer, whose expertise could make the difference between whether you win or lose your case. They may also include a request to file (or proceed) as a poor person,

known as *in forma pauperis*, which would free you from having to pay the normal fees and filing costs necessary to bring a lawsuit.[4] The miscellaneous papers that you will need to file will differ depending on the type of lawsuit you are bringing. You should refer to the chart at Appendix A of this Chapter to determine what papers are appropriate for your particular lawsuit. You should also refer to the specific section of the *JLM* that discusses your legal problem in detail in order to determine how to prepare these documents.

4. Answering Papers from the Opposing Party

The party you sue is required to answer your starting papers. There are several ways to answer. The answering party may simply admit or deny the allegations in your papers. The answering party may also state that he does not know if your statements are true. This is the equivalent of a *denial*.[5] If the party you have sued answers without replying to one of your factual allegations, the court will conclude that he has admitted that your allegation is true.[6]

Another option that the defendant has is to attack the sufficiency of your starting papers by raising certain defenses.[7] The opposing party will typically raise these types of defenses in a *motion* to dismiss your complaint. If the opposing party wins such a motion, the court has the option of either dismissing your case or *granting* you the opportunity to amend your complaint and correct the errors. If you are given an opportunity to amend your complaint, you should think of the amended complaint as new starting papers, which your opponent needs to answer.

An example of an answer that would attack the sufficiency of your starting papers is a "motion to dismiss for failure to state a claim." By filing this motion, your opponent argues you have no legal claim.[8] For example, you might want to sue a prison official because you feel you do not get to spend enough time outside each day. But if there is no law requiring prison officials to allow prisoners to be outdoors for a certain number of hours each day, your claim could be dismissed upon the prison official's motion because no matter what the facts were, you could not show the official violated a law. In this example, the judge would look at the pleadings (the papers you filed to start the case and your opponent's motion to dismiss), and would dismiss your case because there would be no basis for the court to give any *relief* for that claim.

Another type of answer that your opponent can submit is a "motion for summary judgment." In a summary judgment motion, the opposing party states that there are no facts in dispute (as opposed to legal issues in dispute) and argues that there is no way that you can introduce facts to prove your claim. Therefore, he is *entitled* to *judgment* as a matter of law.[9] This means that a judge may decide the case without the case ever going before a *jury*. For example, you might bring a Section 1983 action[10] claiming that your constitutional right under the Eighth Amendment to be protected against "cruel and unusual punishment" was violated because a prison guard hit you. The opposing party might file a summary judgment motion claiming one violent incident does not establish "cruel and unusual punishment" within the meaning of the Eighth Amendment.[11] The judge will read the legal papers and consider the facts in the light most favorable to the non-moving party (the party that opposes the summary judgment motion). This means that the judge will give the benefit of the doubt to the party opposing summary judgment. If the judge believes that there is no way you can demonstrate that the single incident violated the Eighth Amendment,

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4. Under the Prison Litigation Reform Act ("PLRA"), prisoners filing claims in court are required to pay full court filing fees. The full fee will gradually be deducted from your prison account. For a fuller discussion of the PLRA and how it affects your rights, see *JLM, Chapter* 14.

5. *See* Fed. R. Civ. P. 8(b) (rule on defenses and forms of denials for actions in federal court); N.Y. C.P.L.R. 3018(a) (McKinney 1991) (rule for denials and defenses in New York State courts).

6. *See* Fed. R. Civ. P. 8(d) (federal rule regarding the effect of a party's failure to deny allegations); N.Y. C.P.L.R. 3018(a) (McKinney 1991) (rule regarding the effect of a party's failure to deny allegations in New York State courts).

7. For a list of the seven defenses that may be made by motion under the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 12(b). For a list of comparable grounds on which a motion may be made in New York courts, *see* N.Y. C.P.L.R. 3211(a) (McKinney 2005). You must check the court rules for your particular state or federal court for a complete list of defenses.

8. *See* Fed. R. Civ. P. 12(b)(6); N.Y. C.P.L.R. 3211(a)(7) (McKinney 2005).

9. *See* Fed. R. Civ. P. 56 (the federal rule for summary judgment); N.Y. C.P.L.R. 3212 (McKinney 2005) (the New York rule for summary judgment).

10. See Chapter 16 of the *JLM* for a discussion of 42 U.S.C. § 1983.

11. See Chapter 24 of the *JLM* for an explanation of Eighth Amendment protections in assault cases.

the motion for summary judgment will be granted. If the judge thinks that a reasonable jury could find in your favor, however, then he will deny summary judgment, and your case will move forward toward trial.

Summary judgment is different than a motion to dismiss for failure to state a claim. In a motion to dismiss for failure to state a claim, the judge only relies on the pleadings (allegations submitted to the court) to make a decision. However, when your opponent files a motion for summary judgment, the judge decides the motion based on affidavits submitted by both sides. This means that if your opponent submits an affidavit in support of a summary judgment motion, you have the right to introduce affidavits to support your claim and oppose the motion.[12] When you are opposing a motion for summary judgment, you should demonstrate in an affidavit that there are disputed facts that, if considered by a reasonable person (like someone on a jury), would tend to support your claim. If possible, you should seek to amend your complaint (or other introductory papers) to correct any possible defects.

In addition to attempts to have your case dismissed, your opponent may choose to file answering papers that require you to file more papers. These types of answers may include a "motion for a more definite statement" because your complaint was not specific enough.[13] This type of motion may be granted in order to give the party being sued a chance to understand and answer the charges made. It may also simply be a delaying device used by your opponent to buy more time. If this motion is granted, you will have to amend your complaint to explain your claims in more detail. An answering party may also file a *counterclaim* against you.[14] If a counterclaim is brought against you, this means that the opposing party is alleging that you did some harm to him. For example, if you sue a prison guard for assaulting you, the prison guard may answer in turn with a claim that you injured him instead. If a counterclaim is filed, you must file a reply stating your version of the events.[15]

Finally, the party you sued may not be able to respond to your charges within the time limits given to answer. If this happens, he will probably request an extension from the court.[16] Courts usually grant these requests. If, however, the opposing party does not file (1) an answer to your charges; (2) a motion attacking the validity of your charges; or, (3) a motion for an extension of time, you have the right to request that the judge enter a default judgment, which is a judgment in your favor.[17] A default judgment assumes that your charges are true because the party you sued did not respond to them. To get a default judgment, you must file a request that a default judgment be entered with the clerk of the court. You will later request the same court to order the relief you requested in your starting papers.

5. Your Reply to the Opposing Party's Answer

Once you receive the opposing party's answer, you should read it closely. Carefully reading your opponent's answering papers will help you determine the arguments he will make as the case progresses. For example, an opponent might raise an affirmative defense in the answer, such as a claim of contributory *negligence*.[18] Once you know what facts and arguments your opponent will use to prove a claim, you will be able to counter them effectively. (You should also note that an affirmative defense may not be used at trial if it was not raised in the answer to the complaint,[19] although a court will usually grant the defendant permission to amend an answer to add an affirmative defense).

In some instances, such as when the opposing party files a counterclaim in his or her answer, you may be required to respond to the charges. If a reply is required by the court and you do not file, everything in the

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12. If you would like to introduce any documents to support your opposition to the motion, these must be "authenticated" by an affidavit unless they are already in the court's record. *See* Fed. R. Civ. P. 56(e)(1); Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987). This means you should have someone who has knowledge swear that the documents are genuine and reliable. A person has the requisite knowledge to authenticate a document in an affidavit if he could authenticate a document during trial under the evidence rules. *See*, *e.g.*, Fed. R. Evid. 901. Also note that some documents, such as public records and newspapers, are "self-authenticating," which means that they are considered so trustworthy that they do not need to be sworn to in an affidavit. *See* Fed. R. Evid. 902.

13. *See* Fed. R. Civ. P. 12(e); N.Y. C.P.L.R. 3024(a) (McKinney 1991).

14. *See* Fed. R. Civ. P. 13; N.Y. C.P.L.R. 3019(a) (McKinney 1991).

15. *See* Fed. R. Civ. P. 7(a); N.Y. C.P.L.R. 3011 (McKinney 1991).

16. *See* Fed. R. Civ. P. 6(b); N.Y. C.P.L.R. 2004 (McKinney 1997).

17. *See* Fed. R. Civ. P. 55; N.Y. C.P.L.R. 3215 (McKinney 2005).

18. This means that the other side will say that your carelessness somehow helped cause the injury and therefore they are not (fully) responsible.

19. *See* Fed. R. Civ. P. 8(d); N.Y. C.P.L.R. 3211(e) (McKinney 2005).

answer will be accepted as true by the judge and you will lose your lawsuit. Even if you are not required to reply to the opposing party's answer, but the court allows you to do so, you should go ahead and prepare a well-reasoned reply to the statements that your opponent makes. It is in your best interest to file and serve a written reply whenever it is possible to do so.

Chapters 9–13, 15–17, and 20–22 explain in detail the types of claims you can bring and the kinds of documents you will need to maintain such actions. In each Chapter, there are examples of the papers you need to file. The table in Appendix A will help you to familiarize yourself with the names of the papers each suit requires.

C. Conclusion

If you are thinking about taking legal action, you should take the following steps:

(1) identify the law that has been broken;
(2) determine the type of lawsuit you need to file; and
(3) gather the necessary documents.

Appendix A of this Chapter lists types of lawsuits and forms the court requires for each type of suit.

If you file a lawsuit, you will need:

(1) papers to start a lawsuit;
(2) papers supporting your lawsuit; and
(3) other important papers required by the court.

After you have filed your lawsuit, the opposing party should respond to your claim. If the opposing party responds, you should reply. If the opposing party does not respond, you should file papers with the court requesting a default judgment.

APPENDIX A

LEGAL DOCUMENTS TABLE

Type of Suit	Papers to Start Suit	Supporting Papers	Miscellaneous Papers	Answers	Replies
Criminal Appeal	• Notice of Appeal	• Papers to Perfect Appeal	• Poor Person's Papers • Bail Request Papers • Papers for Requesting Extension of Time	• Opposing Brief	• Reply Brief
Article 440	• Notice of Motion to Vacate Judgment • Notice of Motion to Set Aside Sentence	• Affidavits	• Poor Person's Papers	• Answer	
Federal Habeas Corpus	• Petition	• Affidavits	• Motion for Appointment of Counsel	• Answer	• Traverse
State Habeas Corpus	• Petition	• Check requirements of your state	• Notice of Time and Place of Hearing • Poor Person's Papers	• Return	• Reply
42 U.S.C. § 1983	• Summons • Complaint • Order to Show Cause and Temporary Restraining Order	• Affidavit	• Poor Person's Papers	• Answer • Motion to Dismiss	• Reply
Tort Action	• Notice of Intention to File Claim • Notice for Permission to File Late Claim • Verified Tort Claim	• Affidavits	• Affidavit to Request Reduction of Filing Fees • Notice of Appeal	• Demand for Bill of Particulars	• Bill of Particulars
Article 78	• Order to Show Cause • Notice of Petition • Verified Petition • Request for Judicial Intervention • Application for an Index Number	• Affidavits	• Affidavit to Request Reduction or Waiver of Filing Fees	• Answer	• Reply

APPENDIX B

SAMPLE MEMORANDUM OF LAW[20]

This Appendix contains an example of a memorandum of law, or a brief. This particular memorandum was submitted to a federal district court in opposition to defendants' motion for summary judgment on a Section 1983 claim for excessive force in violation of the Eighth Amendment.[21] We are including this in the *JLM* so you may study the form and style of a brief. The names of all parties and witnesses and facts have been changed. The footnotes have been added to clarify and explain things to you but should not go in your memorandum. In addition, you should not use the cases cited in this sample without verifying they are still good law. See *JLM*, Chapter 2, for information on legal research.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Robert K. Simms,	:	
Petitioner,	:	
- against -	:	97 Civ No._____
Corrections Officer William D. Bennett, New York State Penitentiary, and Sergeant Paul J. Wright,	:	
Respondents.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert K. Simms ("Simms") respectfully submits this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

PRELIMINARY STATEMENT

On January 17, 1990, defendant William D. Bennett ("Bennett"), a corrections officer at the New York State Penitentiary ("Penitentiary"), physically assaulted and threatened to beat and kill Robert Simms, an inmate awaiting processing. Defendant Paul J. Wright ("Wright"), Bennett's supervisor, knew of the attack and death threats, yet did nothing to intervene and protect Robert Simms. Simms brings this lawsuit under 42 U.S.C. § 1983 against Officer Bennett for his malicious and sadistic use of excessive force and against Sergeant Wright for his deliberate indifference to the attack and threats of beating and death.

Defendants have moved for summary judgment arguing (i) Simms suffered *de minimis* physical injuries and unactionable psychological pain; (ii) the force used by Bennett, if any, was reasonable and necessary; and (iii) Wright did not act with deliberate indifference because he did not witness the physical attack and threats of beating and death. Defendants are wrong on both the law and the facts.

First, the use of force here was more than *de minimis*. Bennett shoved Simms, pushed him into a wall, swung him around the search room, and punched him in the arms, legs, and face, while simultaneously screaming that he should shoot, stab, and beat him. As a result of the attack, Simms suffered more than *de minimis* physical and mental pain, sustaining not only bruises to his arms, legs, and face, but also serious and extensive mental pain lasting to the present.

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20. This memorandum of law is based on a submission drafted by Daniel M. Abuhoff and Nicole A. Ortsman-Dauer at Debevoise & Plimpton LLP.

21. For more information on how to bring a claim under 42 U.S.C. § 1983, see Chapter 16 of the *JLM*. Chapter 24 of the *JLM* discusses the law that applies to your right to be free from assault in prison.

The Eighth Amendment's prohibition on the unnecessary and wanton infliction of pain encompasses both physical and mental pain.

Second, the evidence demonstrates that there was no need for force. Simms provoked no attack. He was not violent. He did not refuse to follow Officer Bennett's instructions. As indicated by the content of Bennett's threats, the attack—fueled by Bennett's personal feelings of hatred and disgust—was malicious, sadistic, and for the very purpose of causing Simms harm.

Finally, the supervising officer, Sergeant Wright, was deliberately indifferent to Simms's plight. Wright admits to hearing noise from the search room. Indeed, Wright was told by Simms what was going on. Yet, Wright chose to do nothing to stop the attack.

Defendants' motion for summary judgment should be denied.

1. STATEMENT OF FACTS

(a) Robert Simms' Child Pornography Convictions

Plaintiff Robert Simms, a black male in his late forties, is a convicted child pornographer. The last conviction took place on January 10, 1990. As a result of that conviction, Simms was sentenced to five years imprisonment, which he served at the New York State Penitentiary from January 17, 1990 to January 16, 1995. (Simms Aff. ¶ 3).[22]

(b) Officer Bennett Attacks Robert Simms and Sergeant Wright Does Nothing

Simms arrived at the Penitentiary at approximately 9:30 a.m. on January 17, 1990. He was led into the bullpen holding cell and sat on a bench as he waited to be processed. In addition to Simms, there was only one other person in the bullpen. (Simms Aff. ¶ 5; Simms Dep. 20:12–13).

On the morning of January 17, 1990, defendant Officer Bennett and Officer Howard Lewis ("Lewis") worked the 8:00 a.m. to 2:00 p.m. shift in the search area of the Penitentiary. (Bennett Dep. 35:25–27; Lewis Dep. 24:8–10). Sergeant Wright, working the same shift, was the supervisor on duty. (Wright Dep. 22:36–24:5).

Corrections officers at the Penitentiary all have the opportunity to learn incoming inmates' charges. Not only do corrections officers discuss, on occasion, inmates' charges, but officers working in the booking and search areas have access to that information. (Bennett Dep. 43:15–19, 52:9–55:12, 62:24–64:14; Lewis Dep. 27:7–15, 36:24–37:5). Simms sat on the bullpen bench for approximately one hour when he heard Officer Bennett shouting from inside the search room, located a few yards from the bullpen: "He's pond scum. That low-life piece of trash kiddie porn lover deserves to be killed. Someone should kill him." (Simms Aff. ¶ 12; Simms Dep. 21:15–24:7; Compl. Pt. II at 1).

In order to determine the source of and reason for the threats, Simms stood up from the bullpen bench and approached the bullpen bars. Bennett approached the bullpen, stood very close to Simms, and screamed: "You revolting cradle robber. Get the hell out of my face, you pedophile. You nauseate me! Get the hell away from the bars before I beat you senseless." Simms was terrified and did not know how to respond. He had done nothing to provoke the threats. (Simms Aff. ¶ 12; Compl. Pt. II at 1).

Officer Bennett, becoming even more aggressive, continued his verbal attack for the next half hour. He screamed: "If I had a knife, I'd stab you in your chest right now. Get away from the bars you disgusting pond scum pervert!" Simms became very anxious. He thought he was going to be killed by Officer Bennett or by other inmates to whom Bennett would reveal his charges. (Simms Aff. ¶ 13; Simms Dep. 24:7–13; Compl. Pt. II at 1–2).

A few minutes later, Simms was retrieved from the bullpen and escorted to the search room where Officer Bennett stood, glaring at him. (Simms Aff. ¶ 14; Simms Dep. 26:14–25; Compl. Pt. II at 6). Officer Lewis and approximately four to six other corrections officers—including Officer Felding, who booked Simms that morning and prepared his booking sheet containing his child pornography charges—also stood in the room, all staring at Simms and Bennett with expressions of expectation. (Simms Aff. ¶ 15; Compl. Pt. II at 4).

Officer Bennett slammed shut the search room door and pushed Simms from behind with two hands, towards the wall where the other officers stood. He pushed Simms approximately ten times and swung him around the room. Bennett slapped Simms' face and body and again began to scream threats of beating and death at Simms. Bennett next shoved Simms into the wall next to the corrections officers while screaming: "You vile scumbag. I should kill you. If I had

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22. Citations to "Simms Aff. ¶ __" refer to the Affidavit of Robert K. Simms, dated August 15, 1998. Citations to "___ Dep." refer to the transcript of the deposition for the individual specified. Citations to "Compl." refer to Simms' Complaint. Citations to "Def. Mem." refer to the Defendants' Memorandum of Law. The symbol "¶" refers to a particular paragraph in that document. A citation that reads 20:12-13 indicates that the cited information can be found on page 20, lines 12 through 13 of the referenced document.

my knife, I'd carve you up. If I had my revolver, I'd blow you to shreds. You are a sick maggot." Simms was terrified and kept still. (Simms Aff. ¶ 16; Simms Dep. 28:12–30:25; Compl. Pt. II at 3–4).

Officer Bennett continued to push Simms into the wall while yelling that he could not stand the sight of Simms. Simms finally asked Bennett what he had done to deserve this attack and reminded Bennett he did not know the details of Simms' case. Bennett responded by yelling that he did not give "two hoots" about the circumstances of Simms' case; he was going to carve him up anyway. Bennett pushed Simms. Simms ricocheted off the wall, and Bennett continued to scream obscenities and threats of beating and death. Officer Lewis and the others in the search room looked on with amusement. (Simms Aff. ¶ 17; Simms Dep. 29:15–30:10; Compl. Pt. II at 6–7).

At some point, Officer Bennett demanded that Simms stand in a particular spot in the search room. Each time Simms moved to the requested spot, Bennett taunted him and screamed, "No, this way!," pointing to a different spot. He then swung Simms around the room, grabbing his arm and launching him off. Bennett repeated this several times. (Simms Aff. ¶ 18; Simms Dep. 28:7–29:6).

Eventually, Bennett screamed that Simms should strip. Simms complied and removed his shirt. He never refused or questioned Bennett's order. When Simms put his shirt on an empty chair in the room, however, Bennett flew into a rage. He whipped Simms' shirt around in the air above his head, screaming that Simms was a repulsive child pornographer. Bennett prepared to punch Simms again. Simms turned his body to avoid being hit and called out for the sergeant. (Simms Aff. ¶ 16; Simms Dep. 28:9–30:12, 33:14–20, 35:8–29).

Sergeant Wright heard "loud screaming" coming from the search room and went to investigate. (Wright Dep. 28:7–9, 30:22–25, 50:7–25). As Wright appeared at the door, Bennett acted as if nothing were wrong. Simms told Wright that he was glad Wright had arrived and that he needed Wright's help. Wright cut Simms off and told him to "shut the hell up and take off your clothes," to which Simms replied, "You're in this too! This is unbelievable." Simms did not question Wright's order to strip. Rather, he took off his pants. Bennett strip-searched him. (Simms Aff. ¶ 20; Simms Dep. 30:21–32:12, 39:8–40:2; Compl. Pt. II at 8; Wright Dep. 32:20–23, 52:19–21; Bennett Dep. 49:4–20).

Once the strip search was completed, Simms told Wright that Bennett had physically assaulted him and threatened to beat, stab, and kill him. Wright responded, "Well, this is jail!" and walked out of the search room, leaving Simms alone with Bennett and the other officers. (Simms Aff. ¶ 4; Davis Dep. 28:7–29:15; Wright Dep. 15:02–16:20 (testifying that Davis had a complaint about the officers)).

Once Sergeant Wright left the search room, Simms dressed and Bennett resumed threatening him. Bennett again shoved Simms, sending him flying across the search room. Bennett screamed, "You are a piece of crap! You are a disgusting kiddie porn loving animal who deserves to die. I am going to make sure someone's going to kill you. Your days are numbered." (Simms Aff. ¶ 18; Simms Dep. 40:15–42:30; Compl. Pt. II at 8). Bennett then led Simms out of the search room and screamed, "Send him to protective custody and get him out of my face. He gets off on little girls!" (Simms Aff. ¶ 20; Simms Dep. 41:18–22; Compl. Pt. II at 9). After spending approximately forty-five minutes in the search room, Simms was taken to a cell in protective custody where inmates are kept alone in separate cells that are kept locked for most of the day. Simms did not want to be housed in protective custody after the assault. He feared he would be more vulnerable to attack by defendants or others because there would be no witnesses. (Simms Aff. ¶ 22; Simms Dep. 35:3–23, 40:21–42:3, 56:15–58:4; Compl. Pt. II at 10).

(c) Robert Simms' Physical and Mental Pain Resulting from the Attack

As a result of the attack, Simms sustained bruises on his arms, legs, and face. He requested medical attention the day after the incident. By the time Simms saw a doctor—a week later—these injuries were no longer visible. (Simms Aff. ¶ 24; Simms Dep. 44:12–18, 48:23–50:2; Compl. Pt. II at 5).

In addition to the physical injuries, Simms suffered extreme and extensive mental pain. Not only was he humiliated and shocked by the search, but for the entire time he was housed at the Penitentiary, he was anxious and terrified that Bennett, Lewis, and Wright were going to beat or kill him—either by themselves or by encouraging other inmates—and cover it up. Simms felt hopeless. He became depressed and contemplated suicide. To this day, Simms suffers from nightmares about the attack. (Simms Aff. ¶ 29; Simms Dep. 49:15–51:12, 52:14–15; Compl. Pt. II at 5).

On January 18 and 19, Simms made several visits to the Mental Health Clinic. He was depressed, aggravated, and in despair. He did not want to be housed in protective custody where no one could witness any further attack. (Mental Health Evaluation Sheet, dated January 18, 1990). One nurse specifically noted that the "Problem" was that Simms was harassed by corrections officers because of his charge. (*Id.*)[23]. Simms also received help for his psychological pain from Mark Denby, a Muslim mullah (religious leader) in Simms' community, and Dr. Margaret Phillips, Simms' therapist.

23. "Id" means that the author is citing to the same source that the author cited to immediately prior. In this case, "Id" refers to the Mental Health Evaluation Sheet, dated January 18, 1990.

These individuals visited Simms on numerous occasions while he was at the Penitentiary. After Simms finished serving his sentence in 1995, he continued to meet with Dr. Phillips, with whom he often spoke about the assault. (Simms Aff. ¶ 26; Simms Dep. 44:16–17, 53:18–19, 57:14–28; Compl. Pt II at 5–7).

(d) Robert Simms' Complaint and the "Investigation"

On January 19, two days after the attack, Simms wrote a letter to Warden Frank Boston detailing the physical abuse and death threats prompted by his child pornography charges. He also noted Sergeant Wright's unconcerned reaction. (Simms Aff. ¶ 28). Captain Sharon Grant conducted an investigation, then wrote a report to Warden Boston on January 26. Of course, Grant concluded that there was no merit to Simms' Claim. (Grant Report).

2. ARGUMENT

The standards for summary judgment[24] are well settled. The moving party[25] bears the burden of establishing that there are no genuine issues of material fact in dispute[26]. *See, e.g.*, *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993). This standard bars the court from resolving disputed issues of fact. If there are material factual issues, the court must deny summary judgment. *See, e.g.*, *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). In evaluating whether there are factual issues, the court is to view the evidence in the light most favorable to the non-moving party[27] and draw all permissible inferences[28] in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). However, assessments of credibility, conflicting versions of events, and the weight to be assigned to evidence are for the jury, not the court. *See id.* at 255.

A. Officer Bennett's Attack On Robert Simms Violated The Eighth Amendment

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain"[29] and is the source of claims for excessive force under Section 1983. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Analysis of an excessive force claim contains both objective and subjective inquiries.[30] An official's conduct violates the Eighth Amendment when (i) the conduct is "objectively, sufficiently serious," and (ii) the prison official acts with a "sufficiently culpable [guilty] state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted).

(a) Officer Bennett's Conduct Was Sufficiently Serious.

Defendants argue that summary judgment should be granted because (i) Simms' physical injuries, if any, were *de minimis*,[31] and (ii) Simms' psychological injuries are not serious enough to justify continuing this Section 1983 case. As demonstrated below, however, the physical injuries and psychological pain suffered by Robert Simms were sufficiently serious to satisfy the Eight Amendment standard.

(i) The Use of Force Was More Than *De Minimis*

The objective component of a claim for excessive force under the Eighth Amendment is satisfied if the injury suffered results from something more than a *de minimis* use of force. *See Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992);

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24. "Summary judgment" is a legal term which means that a judge can decide the case in one party's favor without the case ever going to a jury because the facts are not in dispute and the judge can make a ruling on the law.

25. The "moving party" is the person who made the motion to the court asking the court to do something. In this case, the moving party is Officer Bennett, who is asking the court to decide the case in his favor at the summary judgment stage instead of going forward to a trial.

26. When a party claims that there are "no genuine issues of material fact in dispute," that means that all the parties agree about the facts, or a neutral third party would have to say that the facts seem to heavily favor one party's story over the other's as the real version of events.

27. The "non-moving party" is the person who did not make the motion to the court. Here, the non-moving party is Simms, who is opposing Officer Bennett's motion for summary judgment. Simms wants the case to go forward to a trial, instead of being decided in Officer Bennett's favor by a judge.

28. To "draw all permissible inferences" means that the court should take the facts and make any and all favorable assumptions that the facts can support which would favor the non-moving party, Simms. Because a judge ruling on summary judgment is ending the case before it goes to trial, the judge must give "the benefit of the doubt" to the party opposing summary judgment.

29. "Wanton infliction of pain" means excessive, cruel, or immoral infliction of pain.

30. "Objective" means as viewed by an outsider, sometimes referred to as the ordinary "reasonable person." "Subjective" means how a specific person viewed the incident.

31. "De minimis" is a legal term that means something has occurred in such a small quantity that it is not significant, and there is thus no legal remedy. Here, Officer Bennett is arguing that Simms' physical injuries were *de minimis*. This means Officer Bennett is trying to claim that Simms was not hurt badly enough for the law to take notice of his injuries.

Davidson v. Flynn, 32 F.3d 27, 29 (2d Cir. 1994). Significant injury, that is "injury that requires medical attention or leaves permanent marks," is not required. *Hudson*, 503 U.S. at 7–8, 13 ("The absence of serious injury is .†.†. relevant to the Eighth Amendment inquiry but does not end it.").

As an initial matter, defendants contend that Officer Bennett never used force against Robert Simms or even had any physical contact with him. (Def. Mem. 7). This argument, however, is hotly disputed and thus summary judgment must be denied. *See, e.g.*, *Allah v. Cox*, No. 96-CV-1225, 1998 WL 725939, at *2 n.2 (N.D.N.Y. Oct. 9, 1998) (summary judgment denied where corrections officer's version of events is expressly contradicted by inmate).

Alternatively, defendants contend that the force used by Bennett—which defendants dismiss as mere grabbing and pulling—was *de minimis.* (Def. Mem. 5–7). But the evidence shows that Simms was shoved, pushed into a wall, swung around the search room, and punched—all while being threatened with further beatings and death for approximately forty-five minutes in the search room. (Simms Aff. ¶¶ 12–13; Simms Dep. 25:24–26:16, 32:2–3; Simms Stmt., dated January 19, 1990).

Defendants cite a number of cases to support their argument that the use of force against Simms was *de minimis* as a matter of law. None of these cases is on point. They are either decided on grounds other than the use of force or involve momentary uses of force dramatically different from the repeated and continuous physical assault and death threats inflicted on Robert Simms. *See Reyes v. Koehler*, 815 F. Supp. 109, 114 (S.D.N.Y. 1993) (summary judgment granted for defendant where inmate did not allege malice or intent to cause harm and where defendant's pushing plaintiff against wall was "a momentary act, of such limited duration as to belie any inference of malicious or sadistic intent to cause harm") (internal quotation marks omitted); *Harris v. Keane*, 962 F. Supp. 397, 408 n.12 (S.D.N.Y. 1997) (squeezing inmate's finger once is *de minimis*) (emphasis added); *Candelaria v. Coughlin*, 787 F. Supp. 368, 374–75 (S.D.N.Y. 1992) (use of force de minimis where inmate did not allege any "repeated or continuous grabbing" or any physical injury), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

Simms suffered bruises to his arms, legs, and face. (Simms Aff. ¶ 20; Simms Dep. 54:10–24). Such visible injuries are more than sufficient to sustain an Eighth Amendment action. *See, e.g.*, *Griffin v. Crippen*, 193 F.3d 89, 91–92 (2d Cir. 1999) (reversing district court's determination that inmate's bruised shin and swelling over left knee were *de minimis* as a matter of law); *Smith v. Marcellus*, 917 F. Supp. 168, 171–73 (W.D.N.Y. 1995) (abrasion under left eye, small laceration near right ear, four superficial skin tears on upper calf, and slightly swollen wrist, resulting from attack by corrections officers, constitutes sufficient injury).

Defendants make much of the fact that plaintiff was not given medical treatment for his bruises. (Def. Mem. 7–8). However, Simms asked for treatment. (Simms Aff. ¶ 1). Defendants cannot be relieved of responsibility for the physical abuse of Robert Simms because they refused him medical treatment for at least a week after abusing him. The provision of medical treatment, in any event, is merely one fact to be weighed by the jury in assessing whether the physical force was more than *de minimis*. *See Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987) (plaintiff's failure to seek medical treatment for injuries not fatal to Section 1983 claim).

(ii) Simms Can Recover for His Psychological Pain

Were there any question as to Bennett's use of more than *de minimis* physical force on Simms—and there should be none—Simms' psychological pain provides a separate basis for recovery. The intentional infliction of psychological pain can form the basis of a Section 1983 claim where the pain suffered is more than *de minimis*. The Supreme Court has stated:

[T]he Eighth Amendment prohibits the unnecessary and wanton infliction of "pain," rather than "injury." "Pain" in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable[32] for constitutional purposes.

Hudson, 503 U.S. at 16 (Blackmun, J., concurring) (internal citation omitted); *see also St. Germain v. Goord*, No. 96-CV-1560 (RSP/DRH), 1997 WL 627552, at *3–4 (N.D.N.Y. Oct. 8, 1997) (inmate's misery, anguish, psychological pain, and fear found actionable).

Defendants argue that verbal threats alone are not enough to bring a claim under Section 1983. But this is not a case about a verbal argument. Simms was threatened while he was being assaulted. Verbal threats, accompanied by some physical force or injury, can violate the Eighth Amendment. As the case law makes clear, when threats are accompanied by conduct that increases the credibility of the threats, an inmate's constitutional rights are violated. *See Northington v. Jackson*, 973 F.2d 1518, 1522–24 (10th Cir. 1992) (alleged psychological injury resulting from sheriff's

32. "Cognizable" means that a court can recognize or identify something. Here, when the Court declares that psychological pain is cognizable for constitutional purposes, the Court means that psychological pain is something that the Court can take into account when considering a case alleging a constitutional violation has taken place.

placement of revolver to inmate's head, accompanied by threats to shoot, held more than *de minimis*); *Burton v. Livingston*, 791 F.2d 97, 100–01 (8th Cir. 1986) (guard drawing weapon and threatening to shoot while using racially offensive language held more than *de minimis* use of force); *Douglas v. Marino*, 684 F. Supp. 395, 397–98 (D.N.J. 1988) (allegation that prison employee brandished knife while threatening to stab prisoner stated Section 1983 claim).

It is clear even from the cases on which defendants rely that threats accompanied by physical conduct violate the Eighth Amendment. In *Jermosen v. Coughlin*, for example, the court held that verbal threats do not amount to a constitutional violation "*unless* accompanied by physical force or the present ability to effectuate the threat." 878 F. Supp. 444, 449 (N.D.N.Y. 1995) (emphasis added). Similarly, in *McFadden v. Lucas*, the court stated, "*mere* threatening language" is not a constitutional violation where the "plaintiff has nowhere alleged that he was physically assaulted [or that] any touching of his person occurred at all." 713 F.2d 143, 146 (5th Cir. 1983), *cert. denied*, 464 U.S. 998 (1983) (emphasis added); *see also Harris v. Keane*, 962 F. Supp. 397, 406 (S.D.N.Y. 1997) ("Allegations of threats, verbal harassment or profanity, *without any injury or damage*, do not state a claim under Section 1983.") (emphasis added).

Unlike the cases cited by defendants—where the threats were unaccompanied by other conduct or the plaintiff was not physically abused—Robert Simms was threatened with beatings and death even as he was physically attacked. (Simms Aff. ¶ 12–13). The lack of any justification for these threats indicates that their purpose was to inflict psychological harm. *See infra* Part B. Simms' placement in protective custody, where he might be assaulted without witnesses, only bolstered the threats' credibility. *See Hudspeth v. Figins*, 584 F.2d 1345, 1347–48 (4th Cir. 1978) (guard's threat that inmate would be shot supported by subsequent transfer to work detail supervised by armed guards).

Simms' psychological pain was not *de minimis*. During the search process, he experienced humiliation, anxiety, and the terror of death or severe injury. Afterwards, fearing that Bennett, Lewis, and Wright were going to beat or kill him, Simms sank into a deep depression and contemplated suicide. Defendants' argument that Simms' suicidal thoughts should be disregarded because he could not actually kill himself misses the point that he suffered psychological pain. (Def. Mem. 6 n.1). He received psychological treatment from the Mental Health Clinic, which specifically noted that Simms had been harassed by corrections officers and that he was "depressed." (Mental Health Evaluation Sheets). Simms also received counseling from Mullah Mark Denby and Dr. Margaret Phillips. To date, he suffers from nightmares of the incident. (Simms Aff. ¶ 22; Simms Dep. 43:15–44:2, 49:18–51:18; Simms letter, dated January 24, 1990). Thus, Simms' mental pain is actionable.

Defendants characterize Simms' psychological pain as not "rational" because (i) the threats were conditional; (ii) an investigation was conducted; and (iii) the threats of beatings and killing were never effectuated. (Def. Mem. 11–13). None of these arguments withstands scrutiny [close examination]. First, defendants' suggestion that Simms' fear of beating and death would only be justifiable had Bennett phrased his threats in the present tense—"I'm going to kill you now"—and that Simms should have taken comfort from the use of the conditional perfect in Bennett's actual statement—"I should kill you"—assumes that Simms has a high-level understanding of grammar and an ability to identify different verb tenses under those circumstances.

Defendants' second point, that Simms' fear and terror during the assault on January 17, 1990, should have been ameliorated [made better] by defendants' investigation taking place on January 26, 1990, is similarly far-fetched. Even after the attack, Simms could have derived little comfort from an internal investigation, given his previous experience with Penitentiary personnel. As to the merits of the investigation, the quality of internal reports rests on credibility—a jury issue. *See Payne v. Coughlin*, No. 82 Civ. 2284 (CSH), 1987 WL 10739, at *3 (S.D.N.Y. May 6, 1987).

Finally, as discussed above, verbal threats are indeed actionable where accompanied by physical force. It is not necessary for Simms to have actually been beaten, shot, stabbed, or killed to maintain this lawsuit. *See St. Germain*, 1997 WL 627552, at *3–4 (holding actionable inmate's mental pain and fear resulting from corrections officers' threats to "beat the hell out of plaintiff" which never materialized). Defendants rely on *Doe v. Welborn*, 110 F.3d 520 (7th Cir. 1997), in arguing that Simms' fear of beating and death are not compensable since the threats never materialized. That reliance is misplaced. *Doe* is a conditions-of-confinement case; this is a case about excessive use of force. As *Doe* itself states: "What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends on the claim at issue." 110 F.3d at 524. Thus, while the psychological harm of the plaintiff in *Doe* did not rise to "the extreme deprivations" required to make out a conditions-of-confinement claim, Simms' psychological injury is actionable because "a plaintiff in an excessive force case need not allege significant injury in order to survive dismissal." *Id.* (internal citations and quotation marks omitted). Under the circumstances, the fear and other mental pain, which Simms suffered due to Bennett's threats of beating and death, accompanied by Bennett's aggressive physical actions, were clearly rational.

(b) Officer Bennett Acted Maliciously and Sadistically to Cause Harm

For claims of excessive force, the state of mind requirement turns on whether the prison official applied the force "'maliciously and sadistically to cause harm.'" *Hudson*, 503 U.S. at 6 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)). In making that determination, the trier of fact is to consider the following factors: (i) "the extent of the plaintiff's injuries;" (ii) "the need for the application of force;" (iii) "the correlation [relationship] between that need and amount of force used;" (iv) "the threat reasonably perceived by the defendants;" and (v) "any efforts made by the defendants to temper [decrease] the severity of a forceful response." *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993) (citing *Hudson,* 503 U.S. at 7).

(i) Plaintiff Simms Suffered Physical and Mental Harm

As a result of Bennett's use of excessive force and threats of beating and death, Simms suffered physical and mental injury. *See supra* Sections 1(b) and (c)

(ii) There Was No Need for Force or Death Threats

Where, as here, there is evidence that an attack by a corrections officer is unprovoked or without sufficient justification, courts generally will deny summary judgment. *See, e.g.*, *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (reversing summary judgment where jury could find defendant initiated argument and struck inmate without justification); *Moore v. Agosto*, No. 93 civ. 4835, 1996 WL 125660, at *2 (S.D.N.Y. Mar. 20, 1996) (summary judgment denied where plaintiff maintained defendants initiated the confrontation), *aff'd*, 164 F.3d 618 (2d Cir. 1998).

Defendants claim Bennett was justified in using force because of Simms' "admitted" refusal to follow defendants' instructions to submit to a strip-search, stand away from the bullpen bars, stand where directed in the search room, and place his clothing in the designated place. (Def. Mem. 6–8).

Defendants' arguments are undermined by the simple fact that Bennett attacked Simms *prior* to the issuance of any of these instructions. The threats of violence began as Simms sat in the bullpen, and the physical attack began as soon as Simms entered the search room. (Simms Aff. ¶¶ 8, 11; Simms Dep. 19:20–20:3, 24:25–25:9, 25:14–25:14). Moreover, when Simms was ordered to strip, he complied. (Simms Aff. ¶¶ 15, 18; Simms Dep. 32:15–21; Simms letter dated January 24, 1990).

The other so-called "instructions" illustrate the malice and sadism motivating Bennett's attack. For example, Bennett's alleged "instruction" to stand away from the bullpen bars was in fact stated as follows:

> You revolting cradle robber. Get the hell out of my face, you pedophile. You nauseate me! Get the hell away from the bars before I beat you senseless.

(Simms Aff. ¶ 9; Simms Dep. 21:2–15). In addition, the purported "instruction" to stand in a particular spot was nothing but a malicious taunt. Bennett indeed told Simms to stand in a particular spot. However, each time Simms moved to the place indicated, Bennett screamed, pointed to a different spot, grabbed Simms' arm, and swung him to the new location. (Simms Aff. ¶ 14; Simms Dep. 27:22–27:2).

The expressions of disgust and hatred, which continued throughout the beating and accompanied the death threats, were a product of Bennett's personal feelings, not a good faith effort to maintain discipline. The evidence is clear that Bennett knew Simms' charges prior to the attack:

(1) Felding, the booking officer who prepared the booking sheet stating Simms' charges, stood in the search room while Simms was assaulted and searched (Booking Sheet; Bennett Dep. 31:10–25, 41:20–42:3, 49:3–7, 52:8–53:8; Def. Interrog. Resp. No. 7);
(2) Bennett, Lewis, and Wright admitted to talking about inmates' charges (Bennett Dep. 56:17–25; Lewis Dep. 26:2–18; Wright Dep. 41:16–19);
(3) Bennett admitted that he had access to inmates' charges (Bennett Dep. 53:2–54:8; see also Lewis Dep. 26:2–18); and
(4) The threats are replete with references of Simms being a child pornographer (Simms Aff. ¶¶ 7, 8, 9, 11, 14, 18; Simms Dep. 19:14–25, 25:6–7).

The fact that malice motivated Bennett's acts against Simms are explained, in part, by Bennett's testimony that he finds sex offenses committed against minors more disgusting than other crimes committed by inmates. (Bennett Dep. 58:3–10). Moreover, Bennett was emboldened by his "amused" audience of corrections officers in the search room. (Simms Aff. ¶ 12; Simms Dep. 27:23–28:2; Def. Interrog. Resp. No. 7).

Defendants contend that the force used was necessary to avoid the "potential" security risks associated with a backlog of detainees waiting to be processed. (Def. Mem. 8). However, the "potential" risk could never have been a reality

here. The morning of January 17, 1990, only Simms and one other detainee were waiting to be processed. (Simms Aff. ¶ 6).

(iii) The Amount and Type of Force Used Were Disproportionate to the Need

There is no correlation here between the need for force and the amount of force used. Given that Simms offered no physical or verbal resistance nor refused any orders, Bennett's pushing, shoving, swinging, punching, and simultaneous threatening with death and severe injury were clearly excessive.

Even assuming *arguendo* (for the sake of argument) that Simms did refuse to strip, the circumstances would not require the amount of physical force that Bennett used. Bennett himself admitted that Simms was not violent during the strip-search. (Bennett Dep. 48:14). *See Martinez v. Rosado*, 614 F.2d 829, 831–32 (2d Cir. 1980) (violation of prison rule and refusal to obey direct order do not alone justify physical assault without evidence of physical resistance by inmate or other indication that amount of force was proper); *see also Corselli*, 842 F.2d at 27 (even where there is evidence that inmate may have failed to follow an order, officer can still be found to have used excessive or gratuitous force). Moreover, it is hard to see how threatening to shoot, beat, and stab Simms would get Simms to perform the desired action of stripping. At a minimum, this is a question for the jury. *See, e.g.*, *Trice v. Strack*, No. 94 Civ. 4470 (BSJ), 1998 WL 633807, at *3 (S.D.N.Y. Sept. 14, 1998) (whether force was applied maliciously and sadistically left for jury where defendants struck, tackled, and kicked plaintiff who may have precipitated conduct by waving underwear in one defendant's face).

(iv) Bennett Could Not Reasonably Have Perceived Simms as a Threat.

It is clear that Bennett could not reasonably have seen Simms as a threat. On January 17, 1990, Simms was 5'4" and approximately 135 pounds, as compared to the taller, more muscular defendant Bennett. (Simms Aff. ¶ 8; Simms Dep. 19:6–9; Booking Sheet). In addition, while Bennett was accompanied by Lewis and four to six other corrections officers in the search room, Simms was the only inmate present. (Bennett Dep. 39:9–14, 48:3–11; Def. Interrog. Resp. Nos. 2, 7).

(v) Bennett Has Demonstrated No Effort to Temper His Response.

Finally, defendants have suggested no efforts by Bennett to temper the severity of the response. As noted above, Bennett assaulted and threatened Robert Simms *prior* to any peaceful request that Simms strip, and continued to do so for another 45 minutes.

B. DEFENDANT WRIGHT EVINCED DELIBERATE INDIFFERENCE WHEN HE FAILED TO PROTECT ROBERT SIMMS FROM BENNETT'S PHYSICAL ASSAULT AND ACCOMPANYING DEATH THREATS.

Defendants argue summary judgment should be granted for Sergeant Wright because (i) Wright did not participate in or witness the physical attack and death threats directed toward Simms, and (ii) Wright took adequate steps to ensure that Simms' constitutional rights were not violated. (Def. Mem. 5–6). However, summary judgment is not appropriate because Wright acted with deliberate indifference when he failed to protect Simms from Bennett's physical assault and death threats.

The legal standard is that a supervisor may be liable under Section 1983 for the actions of his supervisees where, as here, the supervisor exhibits "deliberate indifference" to an inmate's safety. There is no requirement of direct participation in the constitutional violation. *See, e.g.*, *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). Deliberate indifference exists where (1) there is a substantial risk of serious harm to an inmate, and (2) the prison official knows of the risk and disregards it by failing to take steps to prevent harm to the inmate. *See Farmer*, 511 U.S. at 834; *see also Hayes v. New York City Dept. of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996).

(a) Robert Simms was at a substantial risk of serious harm.

Here, the first requirement for a finding of deliberate indifference, "substantial risk of serious harm," is clearly met. A violent assault perpetrated without justification and solely for the purpose of causing harm creates a substantial risk of serious harm. *See supra* I.B.

(b) Wright knew of and disregarded the harm to Simms by not acting to prevent it.

The second requirement of deliberate indifference, culpable intent, is also met. The evidence establishes Wright had knowledge that Robert Simms faced a substantial risk of serious harm on the morning of January 17, 1990, regardless of whether Wright actually witnessed the physical abuse and death threats. Specifically:

(1) Wright admitted in deposition that he proceeded into the search room after hearing "loud screaming" coming from that room. (Wright Dep. 26:23–28:23, 48:23–25, 54:4–6). Wright's Incident Report, stating that Wright "heard noise" coming from the search room, confirms this. (Incident Report of Sgt. Wright).
(2) Once the strip-search was completed, Simms told Wright that Bennett physically assaulted him and threatened him with his life. (Simms Aff. ¶ 16; Simms Dep. 37:13–22).
(3) Wright admitted in deposition that Simms had filed a complaint about Officer Bennett. (Wright Dep. 13:02–16:20).

The evidence further establishes that Wright disregarded the substantial risk of serious harm that he knew Simms faced. Even after hearing suspicious noises coming from the search room and being told that Bennett had attacked Simms, Wright did not immediately investigate the situation, reprimand (warn or punish) Bennett, or even stay in the search room until the booking and search process was complete. After Simms told Wright he needed Wright's help, Wright told Simms to "shut the hell up and take off your clothes." (Simms Dep. 38:18–20). Then, after specifically being informed of the abuse, Sergeant Wright merely told Simms, "Well, this is jail!" and walked out of the search room. (Simms Aff. ¶ 17; Simms Dep. 39:12–14; Simms letter, dated January 24, 1990). Given the evidence indicating that Wright had knowledge of the risk Simms faced, this indifferent response cannot be held reasonable as a matter of law.

That Wright failed to prevent any further harm to Simms is proven by the fact that Wright left Simms in the room with Bennett to suffer further abuse. Simms was indeed subjected to more abuse when Wright left the search room. Once Wright exited, Bennett shoved Simms, sending him reeling across the search room. Bennett screamed, "You are a piece of crap! You are a disgusting kiddie porn loving animal who deserves to die. I am going to make sure someone's going to kill you. Your days are numbered." (Simms Aff. ¶ 19; Simms Dep. 34:9–15; Compl. Pt. III at 6).

The failure to intervene to prevent harm to an inmate constitutes deliberate indifference, subjecting the supervisor to liability. *See, e.g.*, *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (summary judgment denied where defendants were present but failed to intervene to prevent another prison official from firing a shotgun at inmate); *Buckner v. Hollins*, 983 F.2d 119, 122–23 (8th Cir. 1993) (where defendant failed to prevent prison official from beating plaintiff, jury could find deliberate indifference for defendant's failure to intervene); *see also Hayes*, 84 F.3d at 621 (reversing summary judgment for corrections officers where plaintiff advised officer he was in danger prior to attack, and record revealed no protective measures taken); *Livingston v. Rivera*, No. 94-CV-5319, 1999 WL 26902, at *3 (E.D.N.Y. Jan. 20, 1999) (officer's statement and other circumstances, suggesting defendant had knowledge that inmate was exposed to imminent serious harm, precluded summary judgment). Here, there is substantial evidence that Wright disregarded a clear and obvious risk of harm to Simms. As a result, Simms suffered further physical assault and threats of beating and death. Wright's failure to take any steps—much less any reasonable ones—to prevent this abuse makes him liable, and at minimum, precludes summary judgment in his favor.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

Dated: _____
<<date submitted>> <<City, State>>

Respectfully submitted,
<<Attorney Firm Name>>[33]
By:_____
Rachel A. Felder (RF-XXXX)[34]
<<Attorney's Address>>
<<City, State>>
<<Phone number>>
Attorney for Plaintiff
Robert K. Simms

33. If you are submitting your memorandum of law *pro se*, you should put your name here.

34. If you are submitting your memorandum of law *pro se*, you should put your name, address, and contact information (including your inmate number, if applicable,) here.

A Jailhouse Lawyer's Manual

Chapter 7:
Freedom of Information

Columbia Human Rights Law Review

Ninth Edition 2011

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CHAPTER 7

FREEDOM OF INFORMATION*

A. Introduction

This Chapter describes laws that allow you to request copies of government documents and files. There are several reasons why these documents might be useful to you: you may want to review copies of your files and rap sheets to make sure they are accurate and complete; you may want to get copies of internal memoranda and manuals that lay out procedures prison officials must follow; and, if you are preparing to sue the government, you can use a freedom of information request to gather support for your case.

All fifty states and the District of Columbia have passed some sort of state open records laws.[1] Many of these laws are modeled on the federal Freedom of Information Act. Only *state* freedom of information laws grant access to state and local government records; the federal Freedom of Information Act does not apply to state or municipal agencies, including state correctional systems.

There are specific procedures that you must follow depending on the type of information you are requesting. Each agency has a different procedure for accessing information. It would be impossible in this Chapter to outline the procedures for every agency. Instead, this Chapter will give you an overview as to the law itself and what rights you have under the Freedom of Information Act ("FOIA"), the Privacy Act ("PA"), and the New York Freedom of Information Law ("FOIL"). Be sure to check the specific procedures for your particular request before filing an information request.

Part B of this Chapter outlines the laws that allow you to get documents from the federal government. Part C discusses New York's Freedom of Information Law. Prisoners in other states should still read Part C to get an idea of the types of documents prisoners most often request, and look carefully at the provisions of their state's freedom of information statute. Part D contains an address for the Federal Citizen Information Center—if you need help figuring out which federal agency to contact, write or call the Federal Citizen Information Center for help. Appendix A contains a list of state freedom of information laws. Appendix B of this Chapter contains a form to use to request information from the Department of Justice ("DOJ") and other federal agencies. Appendix C contains sample letters for filing a FOIA/PA request and/or appeal. Appendix D lists addresses of organizations and federal governmental agencies that can provide more help.

B. The Federal Freedom of Information Act

1. Overview & History

Your right to access the files of the United States government is established by two federal laws: the Freedom of Information Act[2] and the Privacy Act.[3] These laws have been tremendously successful in enabling public access to government files. The Freedom of Information Act ("FOIA") allows you to request all public documents, including records that relate to you. The Privacy Act ("PA") deals only with personal files. It gives you the right not only to look at your own records, but to correct, change, or remove records that contain incorrect, irrelevant, or incomplete information about you. If your request is incorrectly denied or ignored, you can sue under both laws in federal court.

FOIA and the PA implement one of the basic principles of democracy—the public's right to know what its government is doing. As written, FOIA gives access to all government records unless they fall into one of nine categories of materials that agencies are allowed, but not required, to withhold.[4] In practice, however, there are often bureaucratic roadblocks to getting records, and you will probably not always get immediate access to everything you think you are entitled to.

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* This Chapter was written by Benjamin Van Houten based in part on previous versions by Laura Burdick, Geraldine R. Eure, Susan Widule, and Saleemah Ahamed.

1. *See* Appendix A.
2. 5 U.S.C. § 552 (2008).
3. 5 U.S.C. § 552a (2008).
4. 5 U.S.C. § 552(b) (2008). These exemptions are discussed in Part B(3) of this Chapter.

2. What Agencies Are Covered & What Records Are Available

FOIA applies to documents held by agencies in the executive branch of the *federal* government. These agencies include:

- Military departments;
- Cabinet departments, including the Department of Justice (which controls both the Federal Bureau of Investigation ("FBI") and federal prisons;
- Departments of the Executive Branch (such as the Department of Defense);
- Independent federal agencies (such as the Environmental Protection Agency ("EPA"));
- Government-controlled corporations (such as the United States Postal Service ("USPS"));

FOIA does not apply to documents held by federal courts or by Congress.[5] FOIA also does not apply to documents held by "the President's immediate personal staff or units within the Executive Office whose sole function is to advise and assist the President."[6] FOIA does not apply to state or local governments, including state prison systems; these are usually covered by separate laws.[7]

FOIA allows you to look at almost all records under a federal agency's control.[8] The Supreme Court has defined an "agency record" as a document that is (1) either created or obtained by the agency, and (2) under control of the agency at the time of the FOIA request.[9] Agency records may include many different types of information, such as papers, reports, letters, films, computer tapes, photographs, and sound recordings in the possession, custody, or control of an agency. In 1996, Congress made clear that electronically stored information meets the definition of a "record" under FOIA.[10] In addition, the agency must provide you records in any form or format you request, as long as the document is "readily reproducible" by them in that form or format, and the agency must make reasonable efforts to meet your request.[11]

FOIA does not allow you to demand answers to questions. The information must already be contained in an existing agency record. An agency is not obligated to create a new record, collect information it does not have, or research or analyze data to meet your request. Your requests for records must "reasonably describe" the material you want.[12] This does not mean you need to know a specific document or file number, but your request should be specific enough that a government agency employee familiar with the subject area of your request can locate the records with a reasonable amount of effort. Also, a records request under FOIA and the PA must be in writing, and must include proper identification.

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5. 5 U.S.C. §§ 551(1)(A)–(B) (2008).

6. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156, 100 S. Ct. 960, 971, 63 L. Ed. 2d 267, 285 (1 980) (finding that telephone notes taken by Kissinger in his capacity as Assistant to the President did not constitute "agency records" under FOIA); *see also* Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993) (holding that the determination of whether an entity is an "agency" depends on how close operationally the group is to the President, the nature of its delegation from the President, and whether it has a self-contained structure); Sweetland v. Walters, 60 F.3d 852, 854 (D.C. Cir. 1995) (holding that the Executive Residence is not an agency under FOIA as it does not exercise independent authority).

7. State government records can be obtained using state freedom of information laws. The New York Freedom of Information Law is discussed in Part C of this Chapter. See Appendix A of this Chapter for a list of the freedom of information laws of all 50 states and the District of Columbia.

8. 5 U.S.C. § 552(a)(3) (2008).

9. U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 144–45, 109 S. Ct. 2841, 2848, 106 L. Ed. 2d 112, 125 (1989) (holding that court opinions in agency files are "agency records").

10. 5 U.S.C. § 552(f)(2) (2008) reads: "For purposes of this section, the term ... 'record' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format." This language includes computer disks, CD-ROMs, microfiche, microfilm, and all other digital or electronic media.

11. *See* Miller v. U.S. Dept. of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (noting that a department must only make reasonable, but not exhaustive, efforts to respond to a FOIA request); Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) (holding that when the diligence of an agency's attempt to respond to a FOIA request is at issue the agency should issue an affidavit which should describe how the search was conducted and how the agency's filing system would make further search difficult). The new statute rejects *Dismukes v. Dept. of the Interior*, where the court held that an agency "has no obligation under the FOIA to accommodate the plaintiff's preference." 603 F. Supp. 760, 763 (D.D.C. 1984).

12. 5 U.S.C. § 552(a)(3)(A) (2008).

The PA grants you the power to look at any record within an agency's files that pertains to you.[13] Under the PA, as long as you are either a U.S. citizen or an alien lawfully admitted for permanent residence ("LPR"), you may apply to look at any records about yourself that are kept in the executive branch of the federal government.[14] In other words, a U.S. citizen or LPR can look at any records that are filed according to his or her name, social security number, or some other personal identifier. Detailed information about how to access agency records can be found in Part B(4) of this Chapter, "How to Make Your Request."

3. Exemptions to Record Availability Under FOIA and the PA

FOIA exempts nine categories of materials; in other words, the government does not need to disclose material fitting into any one of these nine categories. However, an agency may not withhold an entire file or document just because part of it is exempt; the agency can only withhold those parts of the record falling within the exemption.[15] In addition, FOIA exemptions are not mandatory. Agency officials can choose to waive the exemptions and release the material(s) even if they fall within one of the nine categories, unless another statute specifically limits or prohibits disclosure of that kind of information.

The seven most common of the nine FOIA exemptions are:[16]

Records that are "properly classified" in the interests of national defense or foreign policy;

Documents "related solely to the internal personnel rules and practices of an agency." In practice, this is a very limited exemption because if a person outside the agency can show a legitimate interest in the records, the material cannot be of "solely" agency interest;[17]

Matters "specifically exempted from disclosure" by other federal statutes. In order for this claim of exemption to stand up in court, the agency must point to a statute that either (a) requires that the category of information must be withheld, or (b) establishes particular criteria for withholding information. The agency must also show that the material it is withholding falls under the statute.[18] This exemption is complicated by the fact that there is no complete list of statutes that meet these criteria and some statutes have their own provisions governing disclosure, disclosure procedures, and exemptions. However, you should always make your request for records under FOIA;

"Trade secrets and commercial or financial information" given to the government with the expectation that they would be kept secret;

"Inter-agency or intra-agency memorandum or letters." This exemption protects communications that are meant to be distributed only within the government and that contain advice, opinions, and recommendations that officials offer to each other. This exemption may not be used to withhold facts, agency decisions, or policies;

"Personnel and medical files and similar files" which could not be released to someone other than the subject of the file without resulting in an "unwarranted invasion of personal privacy." The files must contain information about someone so intimate that the person could claim an invasion of privacy. Such information includes marital status, legitimacy of children, welfare payments, family fights and reputation,[19] medical details and conditions,[20] "rap sheets,"[21] and the incarceration of United States citizens in foreign prisons.[22]

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13. For exemptions, see 5 U.S.C. §§ 552a(j)–(k) (2008).

14. 5 U.S.C. § 552a(a)(2) (2008). This is different from FOIA, which gives access rights to "any person" regardless of citizenship status. 5 U.S.C. § 552(a)(3) (2008).

15. 5 U.S.C. § 552(b) (2008).

16. 5 U.S.C. §§ 552(b)(1)–(7) (2008). The other two rarely used exceptions to FOIA concern government regulation of financial institutions and geological/geophysical information. Please refer to the statute, 5 U.S.C. §§ 552(b)(8)–(9) (2008), for more information.

17. *See* Dept. of Air Force v. Rose, 425 U.S. 352, 369–370, 96 S. Ct. 1592, 1603, 48 L. Ed. 2d 11, 26 (1976) (holding that Exemption 2 does not apply to matters of "genuine and significant public interest" and observing that Congress' purpose in enacting Exemption 2 was "to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest.").

18. *See* McDonnell v. United States, 4 F.3d 1227, 1249 (3d Cir. 1993) (noting that burden of showing a document falls within scope of statute rests on the government); *see generally*, Church of Scientology of California v. U.S. Dept. of Army, 611 F.2d 738, 742 (9th Cir. 1979) (observing that the burden of showing a document is exempt from disclosure falls on the agency resisting disclosure.).

19. *See* Rural Hous. Alliance v. U.S. Dept. of Agric., 498 F.2d 73, 76–77 (D.C. Cir. 1974) (holding that an investigation report containing detailed personal and medical information of persons allegedly discriminated against by

All "records or information compiled for law enforcement purposes." In addition to federal law enforcement, this exemption may also apply to records compiled to enforce state law.

Exemption 7 covers a good deal of records.[23] For example, law enforcement manuals satisfy the requirements of exemption 7 and may not be subject to disclosure. Other materials will fall under the Exemption if they might:

(a) "Interfere with [law] enforcement proceedings." This includes federal and state court proceedings. If release of records could, for example, reveal the government's evidence or strategy in a criminal case, then that release can be properly excluded;[24]
(b) Deprive a person of a fair trial;
(c) "Constitute an unwarranted invasion of personal privacy." The majority of courts have held the identities of law enforcement personnel are exempt unless you can show proven, significant misconduct on the part of the investigators;[25] in other words, the names of law enforcement personnel will usually not be revealed;
(d) "Disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis." Confidentiality includes any information supplied by a confidential source.[26] If the information is of a confidential nature, given to the agency by one source only, and collected in the course of a criminal investigation, agencies are permitted to withhold all of the information provided by that source;
(e) Disclose investigative techniques, procedures or guidelines for law enforcement investigations or prosecution. This exemption is limited to techniques, procedures or guidelines not generally known to the public, or not generally known by the public to be useful.[27]

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the Department of Agriculture were "within the class of similar files" and its disclosure depended on whether it would result in a "clearly unwarranted invasion of personal privacy").

20. *See* McDonnell v. United States, 4 F.3d 1227, 1254 (3d Cir. 1993) (noting that a "living individual" may have a "strong privacy interest in withholding his medical records" that outweighs a public request."); Rural Hous. Alliance v. U.S. Dept. of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974) (holding that Exemption 6 of FOIA covered a USDA report that included, among other things, individual's medical condition and history); Brown v. FBI, 658 F.2d 71, 74–75 (2d Cir. 1981) (upholding denial of plaintiff's request for FBI files that included an individual's possible involvement with illegal drugs as information that falls within Exemption 6). CD

21. *See* U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780, 109 S. Ct. 1468, 1485, 103 L. Ed. 2d 774, 800 (1989) (holding that a third-party request for an individual's rap sheet when the request does not seek "official information" about a government agency is an "unwarranted" invasion of privacy).

22. *See* Harbolt v. Dept. of State, 616 F.2d 772, 774 (5th Cir. 1980) (holding disclosure of names and addresses of U.S. citizens imprisoned in foreign countries on narcotics offenses would be an unwarranted invasion of their privacy).

23. 5 U.S.C. § 552(b)(7) (2000); *see* U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9, 109 S. Ct. 1468, 1473 n.9, 103 L. Ed. 2d 774, 785 n.9 (1989) (explaining that the shift from "the would constitute" standard to "the could reasonably be expected to constitute" standard "represents a considered congressional effort 'to ease considerably a federal law enforcement agency's burden in invoking [Exemption 7]'").

24. *See* Lynch v. Department of the Treasury, U.S. App. LEXIS 1392 (9th Cir. Cal. 2000) (stating that even though the agency that was party to the trial had closed its investigation, an ongoing interagency task force was sufficient reason for the Department of the Treasury to deny access to the information); Manna v. U.S. Dept. of Justice, 51 F.3d 1158, 1164–65 (3d Cir. 1995) (affirming a district court's finding that government records were properly denied under Exemptions (b)(7)(A) and (D) because disclosure of such information would interfere with future prosecutions and deny sources confidentiality that they were assured).

25. *See, e.g.,* Sutton v. IRS, U.S. Dist. LEXIS 299 (N.D. Ill. 2007) (explaining the questions to ask to determine if the IRS must disclose documents. Fist are the documents compiled for a law enforcement purpose? The next question is whether disclosure of the information in the documents can reasonably be considered an unwarranted invasion of the personal privacy of a third parties or Service personnel. TO answer this question, the court is supposed to balance the public interest in disclosure against the interest Congress intends the exemption to protect.); Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (holding that government employees have a privacy interest in concealing their identities); Anderson v. United States DOJ, 1999 U.S. Dist. LEXIS 4731 (D.D.C. Mar. 31, 1999) (finding that the names of government witnesses clearly constitute information compiled for law enforcement purposes.)

26. Hale v. United States DOJ, 226 F.3d 1200 (10th Cir. 2000) (finding that the government could withhold information requested under the FOIA because they were protecting confidential government sources, sources that had a reasonable fear of retribution or to a special or a close relationship with defendant or the victim.)

27. Mayer Brown LLP v. IRS, 562 F.3d 1190 (D.C. Cir. 2009), 2009 U.S. App. LEXIS 8104 (D.C. Cir. 2009), 2009-1 U.S. Tax Cas. (CCH) P50,338 (D.C. Cir. 2009), 103 A.F.T.R.2d (RIA) 1799 (D.C. Cir. 2009) (affirming that the IRS did not have to disclose documents if revealing them could reasonably be expected to risk someone breaking the law, there does not have to be certainty revealing the information would result in lawbreaking, just that it would risk someone breaking

(f) "Endanger the life or physical safety of any individual." This is the most frequently claimed exemption,[28] because while it is similar to (7)(c), it does not require the court to consider the public interest in its decision.[29]

While FOIA requesters are generally sent copies of the information they have requested, there may be instances when the agency may only allow you to *see* the documents. In *Tax Analysts v. United States Department of Justice*,[30] one court noted an agency need not respond to a FOIA request for copies of documents when the agency has provided an alternative way of accessing the same information.[31] For example, if an agency makes the requested information available in a public reading room, this is enough to satisfy that agency's obligation under FOIA.[32] Therefore, if an agency declines to send you copies of the requested information, it must provide you with an alternative form of access.[33]

The Privacy Act (PA) also has exemptions to disclosure. These exemptions are much broader than the FOIA exemptions. The nine PA exemptions are:[34]

(1) Material "maintained by the Central Intelligence Agency" ("CIA");[35]
(2) Material maintained by a law enforcement agency. This includes police, corrections, and prosecutors' offices.[36]
(3) Material that is "properly" secret in the interests of national defense or foreign policy;
(4) Material compiled for criminal investigative law enforcement purposes by agencies whose principal function is not law enforcement;[37]
(5) Material contained in Secret Service record systems, relating to protection of the President and others whom the Secret Service protects;[38]
(6) Material required by statute to be maintained and used solely as statistical records;[39]

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the law or having someone who has already broken the law escape the legal consequences.)

28. *See*, *e.g.*, Anderson v. United States DOJ, U.S. Dist. LEXIS 4731 (D.D.C. Mar. 31, 1999) (finding the prisoner could not obtain witness names from a police lineup because they were protected by FOIA and privacy act exemptions covering information compiled for law enforcement purposes and protecting witness safety and privacy.); Ferreira v. Drug Enforcement Admin., 874 F. Supp. 15, 17 (D.C. Cir. 1995) (holding that the DEA properly withheld the names and identities of agents when the disclosure could reasonably be expected to endanger their life or physical safety).

29. *See, e.g.*, Anderson v. United States DOJ, U.S. Dist. LEXIS 4731 (D.D.C. Mar. 31, 1999)) (finding the prisoner could not obtain witness names from a police lineup because they were protected by FOIA and privacy act exemptions covering information compiled for law enforcement purposes and protecting witness safety and privacy.)

30. Tax Analysts v. U.S. Dept. of Justice, 845 F.2d 1060, 1067; 269 U.S. App. D.C. 315 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information), *aff'd*, 492 U.S. 136, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989).

31. Tax Analysts v. U.S. Dept. of Justice, 845 F.2d 1060, 1067 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information), *aff'd*, 492 U.S. 136, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989).

32. Tax Analysts v. U.S. Dept. of Justice, 845 F.2d 1060, 1067 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information), *aff'd*, 492 U.S. 136, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989); *see also* Oglesby v. U.S. Dept. of the Army, 920 F.2d 57, 70 (D.C. Cir. 1990) (finding an agency is not required to mail information in response to a FOIA request when that information has been made available to the public in another format); Grunfeld & Harrick v. U.S. Customs Serv., 709 F.2d 41, 42–43 (11th Cir. 1983) (holding an agency was not required to mail documents in response to a FOIA request when the documents were available for viewing and copying at the custom house in Puerto Rico).

33. Tax Analysts v. U.S. Dept. of Justice, 845 F.2d 1060, 1067 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information).

34. 5 U.S.C. §§ 552a(j)–(k) (2000). *See, e.g.,* Bassiouni v. FBI, 436 F.3d 712 (7th Cir. 2006) (where the FBI refused to amend a person's file, which contained 25 to 30-year-old memoranda pertaining to his activities concerning the Middle East, the district court properly granted the FBI summary judgment on the person's action under the Privacy Act because the memos were pertinent to the FBI's law enforcement activity.)

35. 5 U.S.C. § 552a(j)(1) (2008).

36. 5 U.S.C. § 552a(j)(2) To be exempt, the record by an agency under this section must consist of information compiled to identify individual criminal offenders and alleged offenders; information compiled for criminal investigation, including reports of informants and investigators; or reports identifiable to an individual that were compiled at any stage of the process of enforcement of the criminal laws.

37. 5 U.S.C. § 552a(k)(2) (2008).

38. 5 U.S.C. § 552a(k)(3) (2008).

39. 5 U.S.C. § 552a(k)(4) (2008).

(7) Material that identifies individuals whose identity was promised concealment when they provided information used in conducting background checks of job applicants to and employees of the federal government;[40]
(8) Material related to testing or examination used solely to determine individual qualifications for appointment or promotion in the federal service;[41] or
(9) Material that would identify individuals whose identity was promised concealment when they provided information used in promotion decisions for members of the armed forces.[42]

You should always request information under both FOIA and the PA. Agencies may not withhold information that is exempt under one statute but not exempt under the other.[43] In other words, "[I]f a FOIA exemption covers the documents, but a Privacy Act exemption does not, the documents must be released under the Privacy Act; if a Privacy Act exemption but not a FOIA exemption applies, the documents must be released under FOIA."[44]

Do not let the exemptions stop you from making requests, as the records may be available under an agency or court interpretation. In addition, agencies are not required to withhold information just because a particular exemption *could* be applied. Agency officials can choose to waive the exemptions and release the material(s) you requested. If information is withheld, you can challenge that decision by writing an administrative appeal letter or filing a lawsuit.

4. How to Make Your Request for Information from the Department of Justice

As noted above, every agency has a very specific procedure that must be followed in order for a FOIA or PA request to be granted. This Subsection will only describe the procedure that must be followed if you are seeking to request information from the Department of Justice ("DOJ"). For information from other agencies, or if you do not know which agency holds the information you want, you can consult any government directory or the "United States Government Manual."

To order a $27 copy of the "United States Government Manual," send requests to:

Superintendent of Documents
P.O. Box 371954
Pittsburgh, PA 15250-7954,

You can also call (202) 512-1800 or 1-866-512-1800, or access http://www.gpoaccess.gov/gmanual on the Internet to buy or download the manual.

In general, if you request information from the DOJ, you should try to send your request to the specific division that has the records you want.[45] If you are uncertain about which division to write, you can send your request to the DOJ's FOIA/PA Mail Referral Unit, and someone in that division will forward your letter to the division they think most likely to have the information you want. All requests should be in writing.

Send requests to:

FOIA/PA Mail Referral Unit, Justice Management Division
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
(301) 583-7354
Fax (301) 341-0772 Attn: FOIA Request

The rest of this section addresses how to make a request for information from two divisions of the DOJ: the Federal Bureau of Prisons ("BOP") and the FBI. It discusses the fees that you will be charged for making

40. 5 U.S.C. § 552a(k)(5) (2008).
41. 5 U.S.C. § 552a(k)(6) (2008).
42. 5 U.S.C. § 552a(k)(7) (2008).
43. 5 U.S.C. §§ 552a(t)(1)–(2) (2008).
44. Martin v. Office of Special Counsel, 819 F.2d 1181, 1184–89 260 U.S. App. D.C. 382 (D.C. Cir. 1987) (denying disclosure of information requested by Appellee as such disclosure was exempted by both the PA and the FOIA).
45. See http://www.usdoj.gov/oip/attachmentbmay99.htm for more information about each division.

such requests, the types of responses you may receive from either the FBI or the BOP, and the appeals process, which may be useful if your request is denied.

(a) Requesting Information from the Federal Bureau of Prisons

The BOP maintains records on current and former prisoners of the federal penal and correctional institutions as well as records relating to the administration of the agency. This Subsection will describe (i) how to request information from your institution and (ii) how to request information from the BOP under FOIA and the PA.

(i) Requesting information from your institution[46]

If you would like access to your Inmate Central File, the BOP encourages you to request this information from your institution. Many records within the Inmate Central File can be disclosed without you filing a FOIA request. These include records relating to your sentence, detainer, participation in programs, classification data, parole information, mail, visits, property, conduct, work, release processing, and general correspondence. You can also request access to some medical records from your institution.

The Warden of your institution should have designated a staff member to receive requests for access to these records. In order to request access to your Inmate Central File or medical records, you should submit a request to this person, who must promptly schedule a time for you to review your file.

Staff members must tell you if there are documents in your Inmate Central File or medical records withheld from disclosure. If you would like access to these documents, you should make a FOIA request.

(ii) Requesting information from the BOP under the Privacy Act or FOIA

To file a request for information from the BOP under FOIA, including any information withheld from your review of your Inmate Central File or your medical records, or any other records, your request should:[47]

(1) Be in writing;
(2) Be clearly marked "Freedom of Information Act/Privacy Act Request" on the front of the letter *and* the envelope;
(3) Clearly describe the records you seek, including the approximate dates covered by the records;
(4) Include your full name, current address, date of birth, place of birth, and social security number (if you have one); and
(5) Include your Federal register number and institution where last housed

You must also verify your identity in one of the following ways:

(1) Complete and sign Form DOJ-361 (See Appendix B);
(2) Have the signature on the request witnessed by a notary; or
(3) Include the following statement before the signature on the requested letter: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

The DOJ has stated that "if you request information about yourself and do not follow one of the procedures [described above], your request cannot be processed."[48] If you are seeking personal information, make sure that you provide the necessary identification information.

If you are requesting information under the PA about someone other than yourself, the information will not be disclosed unless:

(1) You provide a statement by the other person specifically authorizing the release of information; the statement must be signed by that person and either witnessed by a notary or include a declaration made under penalty of perjury; or

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46. All of the information regarding making requests from your institution can be found in Bureau of Prisons Program Statement 1351.05, issued on September 19, 2002, *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc by clicking on General Administration and Management and then by clicking on Document Name: "Release of Information."

47. Bureau of Prisons Program Statement 1351.05, issued on September 19, 2002, *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc (click on General Administration and Management; then click on Document Name: "Release of Information"); U.S. Dept. of Justice, "Freedom of Information Act Reference Guide," http://www.usdoj.gov/oip/04_3.html (last visited Sept. 17, 2008).

48. U.S. Dept. of Justice, "Freedom of Information Act Reference Guide," updated May 2006, http://www.usdoj.gov/04foia/referenceguidemay99.htm#how (last visited Mar. 9, 2008).

(2) You provide evidence that the subject of the request is deceased, such as a death certificate, or some comparable proof of death such as a newspaper obituary.

Having completed these steps, you may mail your request to:[49]

Chief, FOIA/PA Section
Office of General Counsel
Federal Bureau of Prisons
Department of Justice
Room 841, HOLC Building
Washington, D.C. 20534

If you have access to the Internet, you may also submit a request on-line through the BOP website. The website can be accessed at http://www.bop.gov/foia/submit.jsp. The FOIA Requester Service Center can be reached by telephone at (202) 616-7750, and the FOIA Public Liaison can be reached at (202) 514-6655.

(b) Requesting Information from the FBI

The FBI collects evidence in legal cases in which the United States is or may be an interested party and investigates violations of certain federal statutes.[50] Requests for information under FOIA and/or under the PA from the FBI should be addressed to:

Record/Information Dissemination Section
Federal Bureau of Investigation
Department of Justice
170 Marcel Drive
Winchester, VA 22602-4843

To request any information from the FBI, under either FOIA or the PA, your request must:

(1) Be in writing;
(2) Provide your full name;
(3) Provide your date and place of birth; and
(4) Either be notarized by a notary public, or include the following statement before the signature on the letter: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

Call FOIA Requester Service Center at (540) 868-4591 to access recorded information on how to submit a new FOIA/PA request to the FBI. Call (540) 868-4593 about the status of an existing FOIA/PA request to the FBI.

If you are requesting information about someone else and that person is alive, your request must include a waiver signed by that person and verified by a notary public. You must also include the person's full name and date and place of birth. If you are requesting information about someone who is deceased, you must provide the name of the deceased, and proof of death, either in the form of an obituary, death certificate, or published record that indicates the person is, in fact, dead.[51]

(c) Fees

Within a reasonable amount of time after your request, staff should provide you with copies of the disclosable documents from your Inmate Central File and/or medical records. Copies cost ten cents per page. In addition, you will be charged a fee for the search time required to process your request. The cost of search

49. U.S. Dept. of Justice, "Freedom of Information Act Reference Guide," updated June 2009, http://www.justice.gov/oip/foia_guide09.htm (last visited Feb. 10, 2010).

50. *See* 28 U.S.C. § 531–540(C) (2000) (describing various crimes that the FBI is authorized to investigate, for example, crimes involving government officers and employees and killing of state or local law enforcement officers).

51. Telephone Interview with staff member of the Federal Bureau of Investigations (Nov. 13, 2006).

time is $2.25 per fifteen minutes for clerical staff, $4.50 per fifteen minutes for professional staff, and $7.50 per fifteen minutes for managerial staff. You will not be charged for the first 100 pages of duplication or the first two hours of search time, and you will only be charged for fees that total above $8.00.[52]

When you file either a FOIA or PA request with the DOJ, the Department assumes that you are willing to pay fees up to $25. Most of the time, no fees are ever charged.[53] However, if you cannot pay $25, or you are not willing to, you should state how much you can pay in your request letter. If the DOJ estimates that your fees will be more than $25, they will let you make a cheaper request or ask you to agree to pay the estimated amount before they process your request. According to the DOJ website, "[y]ou ordinarily will not be required to actually pay the fees until the records have been processed and are ready to be sent to you."[54]

The DOJ charges for copies (ten cents per page), the cost of computer print-outs and tapes, and labor. The cost of labor is $4.00 per fifteen minutes for clerical staff, $7.00 per fifteen minutes for professional staff, and $10.25 per fifteen minutes for managerial staff. The DOJ will not charge you for the first two hours of search time or the first 100 pages of copies. If the total fee is less than $14, the DOJ will not charge any fee.

You can also request a fee waiver. To get a fee waiver, you must show you are requesting the information to benefit the public, not your own interests.[55] Inability to pay is not a basis for a fee waiver.[56] If you are entirely without a way to pay, you can attempt to request a fee waiver for that reason, but the DOJ usually denies such requests.

(d) Initial Response to Requests

Once a division of the DOJ has processed your request and any fee issues have been resolved, the division will send you a response. This response may either be (1) the information you requested, (2) some of the information you requested and a letter explaining why part of your request was denied, or (3) a letter explaining why your entire request was denied. If information is being withheld, the letter will tell you whether the information is being withheld because of one of the exemptions to the PA or FOIA.

The BOP should respond to your request within twenty business days, not counting Saturdays, Sundays, and legal holidays. The twenty-day period begins when the BOP's FOIA office receives your request. The BOP may extend the initial response time an additional ten business days when one of the following applies:

(1) Records must be collected from field offices;
(2) A "voluminous" (large) quantity of records must be located, compiled, and reviewed in response to the request; or
(3) The request requires that the BOP consult with another agency that has a substantial interest in the information, or among two or more other DOJ Divisions.[57]
(4) When the BOP needs more time to process your request, they will inform you in writing and give you the opportunity to modify your request.

5. What to Do if Your Request is Denied

If your initial request is denied, you should first file an administrative appeal with the agency from which you are requesting information. If your administrative appeal is also denied, you can file a lawsuit.

(a) Filing an Appeal

You should file an appeal if you are not satisfied with the response you have received to your FOIA request. Your appeal should be:

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52. *See* U.S. Dept. of Justice Fed. Bureau of Prisons, Program Statement 1351.05, (Sept.19, 2002), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc (click on "General Administration and Management" and then on Document Name: "Release of Information," last visited Sept. 15, 2009).

53. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, http://www.usdoj.gov/oip/referenceguide may99.htm#fees (last visited Sept. 15, 2009).

54. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, http://www.usdoj.gov/oip/referenceguide may99.htm#fees (last visited Sept. 15, 2009).

41. .U.S. Dept. of Justice, Freedom of Information Act Reference Guide, http://www.usdoj.gov/oip/referenceguide may99.htm (last visited Sept. 15, 2009).

56. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, http://www.usdoj.gov/oip/referenceguide may99.htm (last visited Sept. 15, 2009).

57. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, http://www.usdoj.gov/oip/referenceguide may99.htm (last visited Sept. 15, 2009).

(1) In writing;
(2) Marked "Freedom of Information Act Appeal"—both on the front of the envelope and on the appeal itself;
(3) Received within sixty days of the date on the DOJ's initial letter; and
(4) Addressed to:

Office of Information Policy
United States Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001
Attn: Freedom of Information Act Appeal

Your appeal should include the name of the Component (office within the agency) that denied your request, the initial request number the Component assigned to the request, and the date of the BOP's action.[58] If no request number has been assigned, you should try to enclose a copy of the BOP's determination letter with your appeal. You should also explain your reasons for disagreeing with the BOP's denial of your request. Do not attach specific documents unless they are directly related to a point you are making in the appeal. Once your appeal has been received, it will be reviewed by an attorney in the Office of Information Policy ("OIP"). At that point, the OIP will either (1) affirm the BOP's decision, (2) affirm part of the BOP's decision and release other information requested, or (3) return or "remand" the request to the BOP to reprocess the request.[59]

(b) Filing a Lawsuit

If the appeal does not get you the information you requested, you can file a lawsuit to force the agency to release the documents. You technically have up to six years after the date on which your administrative appeal was denied to file a lawsuit,[60] but you should try to file as soon as possible to demonstrate to the court that you need the information.

Filing a FOIA complaint should be relatively inexpensive and simple.[61] Sometimes, as soon as the complaint is filed, the government will release the documents without further litigation. If you are denied documents that you think are clearly covered by FOIA, you may wish to draft and file your own short-form complaint. In addition, you should consider filing a "Motion for a *Vaughn* Index" using the sample *Vaughn* motion reproduced in Appendix C-5 at the end of this Chapter.[62] This is a routine motion under which the government agency will be required to give you an itemized index describing the documents it is withholding and the justification it claims for withholding each.

After you file your complaint, the burden is on the government to come forward and justify why it is withholding the information.

C. New York's Freedom of Information Law

1. Right of Access to Information

(a) Generally

The New York Freedom of Information Law[63] ("FOIL") grants New York state prisoners access to some of their prison records, and to statements and memoranda that lay out the Department of Correctional Services' policies. This law was patterned after the FOIA (the federal Freedom of Information Act) and was "designed to make available to the public all documents generated by, and in the possession of, the government unless a compelling reason requires their confidentiality."[64]

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58. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, http://www.usdoj.gov/oip/referenceguide may99.htm#appeals (last visited Sept. 15, 2009).

59. 28 C.F.R. § 16.9 (2009).

60. 28 U.S.C. § 2401(a) (2006).

61. Various resources are available to help jailhouse lawyers filing FOIA lawsuits. The names of several organizations that will advise, though usually not represent, FOIA litigants can be found in Appendix D of this Chapter.

62. This procedure was adopted in *Vaughn v. Rosen*, 484 F.2d 820, 157 U.S.App.D.C. 340 (D.C. Cir. 1973).

63. N.Y. Pub. Off. Law §§ 84–90 (McKinney 2008 & Supp. 2009).

64. Ralph J. Marino, *The New York Freedom of Information Law*, 43 Fordham L. Rev. 83, 83 (1974). Senator

FOIL provides that governmental agencies shall make rules and regulations enabling the public to access agency records.[65] The law also provides for certain exceptions to the general rule of public access, which closely follow the exceptions to the federal FOIA.[66] The FOIL exemptions are[67]

(1) Records that do not have to be disclosed under other state or federal statutes. For example, personnel records of corrections officers and police officers that are "used to evaluate performance toward continued employment or promotion" are protected from disclosure under N.Y. Civil Rights Law Section 50-a;[68]
(2) Records that, if disclosed, would unlawfully invade personal privacy under the provisions of subsection 89(2) of FOIL. Under Section 89, employment, medical or credit history, or personal information reported in confidence to an agency that is not relevant to the agency's ordinary work does not have to be disclosed under FOIL;[69]
(3) Records that, if disclosed, would interfere with agreements over contract awards that have been made or are about to be made, or negotiations over working conditions;
(4) "Trade secrets," or confidential information, submitted to an agency by a commercial business, or derived from information obtained from a commercial business, which would substantially hurt the position of the business if disclosed;
(5) Records made or gathered for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. For example, evidence seized from a crime scene may be excluded from disclosure because the evidence may identify a confidential source or reveal "non-routine" techniques or procedures relating to a criminal investigation. Disclosure is also restricted where it would deny a person of the right to a fair trial;[70]
(6) Records that, if disclosed, would endanger the life or safety of any person, including another prisoner, prison official, or a member of the general public. For this reason, records that would jeopardize prison security, such as a list of correctional records and the location of such records, may be excluded from disclosure;[71]
(7) Inter-agency or intra-agency materials such as agency proposals, recommendations, deliberations, opinions, evaluations, or other agency materials that do not constitute factual information, instructions to staff that affect the public, final agency policy determinations, or external audits;[72]
(8) Examination questions or answers that are requested before the final administration of such questions;
(9) Records that, if disclosed, would place the security of an agency's information technology assets, including its computer systems at risk; and
(10) Records that are photographs, microphotographs, videotape or other recorded images prepared as allowed by Section 1111-a of the vehicle and traffic law.[73]

Marino was the Senate sponsor of the law; *see also* N.Y. Pub. Off. Law § 84 (McKinney 2008).

65. N.Y. Pub. Off. Law § 87(1)(b) (McKinney 2008 & Supp. 2009).
66. N.Y. Pub. Off. Law § 87(2) (McKinney 2008 & Supp. 2009).
67. N.Y. Pub. Off. Law § 87(2)(a) (McKinney 2008 & Supp. 2009).
68. N.Y. Civ. Rights Law § 50-a(1) (McKinney 1992).
69. N.Y. Pub. Off. Law § 89(2)(b)(i), (v) (McKinney 2008).
70. N.Y. Pub. Off. Law § 96(2)(d) (McKinney 2008).
71. *See* Fournier v. Fish, 83 A.D.2d 979, 979, 442 N.Y.S.2d 823, 824 (3d Dept. 1981) (holding that correctional facility had properly excluded from its subject matter lists of records kept by the Department of Correctional Services and records kept by the correctional facility, specifically information relating to the exact location in prison facility of documents requested, on basis that disclosure would jeopardize prison security); Lonski v. Kelly, 149 A.D.2d 977, 977–78, 540 N.Y.S.2d 114, 114 (4th Dept. 1989) (finding that a videotape showing a prisoner's transfer to a special housing unit could not be released because it revealed the geographical layout of the unit and disclosed identities of prisoners and offices, and therefore could "endanger the life or safety" of the people involved); Buffalo Broad. Co. v. N.Y. State Dept. of Corr. Servs., 155 A.D.2d 106, 112–13, 552 N.Y.S.2d 712, 715 (3d Dept. 1990) (holding that state correctional facilities could properly be required to disclose videotapes, but could, subject to judicial approval, delete parts to prevent interference with criminal prosecutions and personal privacy concerns, and to protect the safety of inmates and corrections staff).
72. *See, e.g.,* Russo v. Nassau County Cmty. Coll., 81 N.Y.2d 690, 699, 623 N.E.2d 15, 19, 603 N.Y.S.2d 294, 298 (2d Dept. 1993) (finding "inter-agency or intra-agency materials" to mean communications exchanged for discussion purposes, but not communications constituting final policy decisions); *see also* Miracle Mile Assocs. v. Yudelson, 68 A.D.2d 176, 182-183, 417 N.Y.S.2d 142, 147 (4th Dept. 1979) (holding that developer seeking city documents was improperly denied access to materials that did not contain any advice or opinion which was part of an agency's deliberative process, but rather were materials stating or reflecting an agency's final determination).

The law also requires that certain records be kept. For example, each agency must keep a reasonably detailed list, by subject matter, of all records in its possession.[74] This requirement ensures that you will be able to find out what kinds of records exist so that you may decide if you need a copy of them.

(b) Freedom of Information and the Department of Correctional Services

The Department of Correctional Services ("DOCS") has issued regulations to comply with FOIL.[75] These regulations set forth the DOCS rules about what types of records you may obtain, as well as the procedures you can use to get those records. Where the DOCS regulations conflict with FOIL, FOIL applies. In other words, DOCS regulations cannot keep you from obtaining information that FOIL permits you to obtain.

Procedures for obtaining each type of record available under the DOCS regulations are described in more detail in Part C(3) of this Chapter.

2. General Procedure to Obtain Access to Records

Requests to obtain access to records must be in writing and must reasonably describe the record that you want. Whenever possible, the request should include the title, file number, and date of the record, as well as any other details that may help to locate and identify it. In *Konigsberg v. Coughlin*, the New York State Supreme Court held that a prisoner's request for "any and all files or records kept on me" was a reasonable description. In that case, however, the prisoner records coordinator collected around 2,300 pages of records.[76] Because you may be charged for the records you receive, it is in your best interest to be as specific as possible when describing the records you want. Always include your name, address, New York identification number, and inmate number in your request. Keep a copy of your request letter. If you are requesting records regarding a specific incident, include the exact date and location (address if possible) of the incident.[77] A sample FOIL request letter that you can use is included in Appendix C-3.

Within five business days after receiving a request for a DOCS record, the state must determine if the record is in state custody.[78] The custodian/records access officer should send you acknowledgment of receipt of your request and notification of the approximate date when your request will be granted or denied.[79] If the record is not found after a diligent (careful) search, the custodian must indicate that the record cannot be found, is in the custody of another specified agency, or does not exist.[80] If the agency you have written has the record, the custodian must either: (1) deny your request for access under the exemption(s) specified under FOIL Section 87(2); (2) produce the record for inspection at the agency office, and make and certify copies upon payment; (3) advise you that the record is in custody and make arrangements for copying and payment of fees at a later date; (4) mail you copies upon payment; or (5) provide you with the information in the record instead of making a copy if you so agree.[81] As a practical matter, it may take much longer than five business days before you receive a response to your request.

If the agency cannot locate the records you requested, then the agency must provide proof that it conducted a "diligent search" for the records.[82] You may ask the custodian for a written certification of that

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73. N.Y. Veh. & Traf. Law § 1111-a (McKinney 2008 & Supp. 2009).

74. N.Y. Pub. Off. Law § 87(3)(c) (McKinney 2008 & Supp. 2009).

75. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 5 *et seq.* (2005). The N.Y. Comp. Codes R. & Regs. contains rules and regulations issued pursuant to laws passed by the Legislature. Title 7 covers the regulations issued by the Department of Correctional Services. *See also* N.Y. State Dept. of Corr. Servs. Directive # 2010, Nov. 18, 2003 (issuing the regulations found in Title 7). The New York State Division of Parole has issued similar regulations covering its parole records. These regulations can be found at N.Y. Comp. Codes R. & Regs. tit. 9, §§ 8000.5, 8008 (2009); see also Part C(3)(d) of this Chapter for a discussion of how to obtain parole records.

76. Konigsberg v. Coughlin, 68 N.Y.2d 245, 247, 501 N.E.2d 1, 2, 508 N.Y.S.2d 393, 394 (1986).

77. *See* Johnson Newspaper Corp. v. Stainkamp, 94 A.D.2d 825, 286, 463 N.Y.S.2d 122, 123 (3d Dept. 1983) (holding that the request must be "sufficiently detailed" to allow the governmental agency to locate the requested records).

78. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.35(a) (2005).

79. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.35(b) (2005).

80. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.35(c) (2005).

81. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.35(d) (2005).

82. *See* Key v. Hynes, 205 A.D.2d 779, 781, 613 N.Y.S.2d 926, 928 (2d Dept. 1994) (holding that the allegations made on information and belief that prosecutor's office did not have the report that prisoner had requested was insufficient, since entirely conclusory statements do not constitute evidentiary proof), *overruled by* Rattley v. New York City Police Dept., 96 N.Y.2d 873, 875, 756 N.E.2d 56, 58, 730 N.Y.S. 2d 768, 770 (2d Cir. 2001) (holding that Public

proof. If any part of the records arrives deleted, or if your entire request is denied, the agency must provide you with a reason in writing and tell you that you have a right to appeal.[83]

While there are no fees for the agency's searching for the records or for making the records available for inspection, DOCS does charge fees for the photocopying of records. The current fee for photocopies of DOCS records is twenty-five cents ($.25) per page not exceeding nine inches by fourteen inches in size.[84] DOCS may, at its discretion, provide the records along with a bill for the fees due, require assurance of payment before the copies are delivered, or require payment before delivering the copies to you. Any fees you owe for photocopying may be waived at the discretion of the custodian of the records. You should consider asking in your request that you be notified before your request is filled if there will be fees (or to limit the request to within a specific dollar amount in fees). The sample FOIL request letter in Appendix C-3 contains wording like this which you can use to prevent being billed for unexpected fees.

If you are denied access to a record, you can appeal the denial to Counsel of the Department of Correctional Services.[85] The FOIL provides that you must appeal all denials within thirty days.[86] This appeal must be in writing and must contain your name and address, the date of your request, the specific record requested, the place of request if not DOCS, the date of the denial, and, if known, the person denying your request. A sample FOIL appeal letter that you can use is included in Appendix C-4. Send the appeal to:

Counsel, New York State Department of Correctional Services
1220 Washington Avenue, Building No. 2
State Campus
Albany, NY 12226
(518) 457–4951

The Counsel for the Department of Correctional Services has ten business days to review the issue after receiving your appeal. He must allow access to the record or explain in writing the reason for the denial. Again, as a practical matter, it may take much longer to receive a response. If you do not receive a response from Counsel, you may go directly to court for review of the denial.

You may bring a legal proceeding for review of such denial[87] under Article 78 of the New York Civil Practice Law and Rules.[88] *JLM,* Chapter 22 discusses how to file an Article 78 petition. You must, however, exhaust all administrative remedies before turning to the courts for relief. If your request for agency records is denied, follow the appeal procedure of that agency. For example, if your request for DOCS records is denied, you must appeal to DOCS Counsel before bringing your Article 78 petition to challenge the denial.[89]

3. Procedures to Obtain Copies of Indices, Medical Records, Administrative Records, Parole Records, Criminal History Records & Inmate Records

(a) The Index

The Department of Correctional Services must keep an index, which is a reasonably detailed, current list, organized by subject matter, of all records in its possession. The master index may enable you to determine the title or name of the record containing the information you want. Because all indices contain subject-matter references, the index may be helpful if you want a copy of an administrative memorandum but are unable to identify the particular record you want. To obtain a copy of the master index, write to:

Officers Law § 89(3) does not specify the manner in which an agency must certify that documents cannot be located, and therefore that the Police Department's statement that it had conducted a diligent search for the documents it could not locate met the certification requirement).

83. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.35(e) (2005).

84. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.36 (2005). As noted in the section on medical records, the fee for medical records is fifty cents per page.

85. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.45 (2005).

86. N.Y. Pub. Off. Law § 89(4)(a) (McKinney 2008 & Supp. 2009).

87. N.Y. Pub. Off. Law § 89(4)(b) (McKinney 2008 & Supp. 2009).

88. N.Y. C.P.L.R. 7801 *et seq.* (McKinney 2008 & Supp. 2009).

89. *See* Sommer v. Jones, 96 A.D.2d 624, 624, 464 N.Y.S.2d 879, 880 (3d Dept. 1983) (holding that the administrative remedies provided under sections 5.20, 5.50, 5.51, and 5.52 of the New York Codes, Rules and Regulations must be exhausted before the prisoner can ask a court to review the case).

Deputy Commissioner for Administration
New York State Department of Correctional Services
1220 Washington Avenue, Building No. 2
State Campus
Albany, NY 12226–2050

Each prison is required to keep a master index of its documents. To obtain a copy of your prison's master index, you should write to the prison Superintendent or Director, or the prison "inmate records coordinator," if one has been designated. Note that no prison is required to keep an index of records on individual prisoners. If you want to obtain indices of records of an agency other than the DOCS (for example, you may want a city or county corrections department's index), you should call or write that agency's Freedom of Information Officer (sometimes called a "Records Access Officer") to request a copy.

The current fee for a copy of the index is twenty-five cents ($.25) per page for photocopies not larger than nine inches by fourteen inches in size.[90]

If you cannot pay to copy the index, you should say in your request that you are a prisoner and unable to pay the fee. Any custodian of records has the authority to excuse you from paying the fee or some portion of it. It has been the practice to allow prisoners to obtain copies of the master index free of charge. Once the fee is paid or waived, a copy of the index will be sent to you.

D. Medical/Health Records

You may wish to get a copy of your medical records (DOCS uses the term "health records"). DOCS has established a separate policy for prisoners to access their health records. This means that FOIL is not the way to acquire copies of these records. Instead, health records are handled by a different set of procedures that are described within this Subsection.[91] For more information about how to request your health records, you should consult the DOCS Division of Health Services' Health Services Policy Manual Section 4.10 or ask your institution's Nurse Administrator.

Health records are defined as any departmental records created or received by a health care provider, including information on an individual's past, present, or future physical health, mental health. This includes information received from other providers about prior examinations or treatment of a patient. Health records do not include substance or alcohol abuse records, or mental health records.

Generally, a New York State prisoner can obtain a copy of his medical records by submitting a request to the Nurse Administrator, designated as the "record access officer" for health records. If you are at a Regional Medical Unit, make the request to the Health Information Management Technician.[92] All requests must be in writing, signed and dated. Health record copies cost fifty cents per page; in addition, you may be charged for the labor it takes to find and copy the health record, at a cost of $3.25 for every fifteen minutes of labor.

Even if access to part of your health record is denied, the rest of the record must be provided. You will receive a written explanation for the denial, as well as notice about how to appeal the denial. According to the manual, where confidentiality and safety concerns prevent the release of your health record, the decision not to release this information is not reviewable.[93] However, other concerns that lead a health care provider to deny you information are reviewable. To appeal the denial, you should notify the Facility Health Services Director in writing. The Director will review the appeal and rule on it within thirty days.[94] Once a decision has been made, you will be notified in writing. If a decision is made to deny the appeal, you may make a complaint to the HIPAA Privacy Officer. If you have a complaint about your attempts to get access to, release of, or disclosure of your health records, you should contact the Nurse Administrator or file a grievance through the Inmate Grievance Program. Chapter 15 of the *JLM* has information about prisoner grievance procedures.

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90. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.36 (2005).

91. FOIL is the proper way to request health services policies and documentation, but not to get copies of your health records. *See* N.Y.S. Dept. of Corr. Serv. Div. of Health Serv., Health Service Policy Manual § 4.10 (2003).

92. N.Y.S. Dept. of Corr. Servs. Div. of Health Serv., Health Service Policy Manual § 4.10 (2003).

93. N.Y.S. Dept. of Corr. Servs. Div. of Health Serv., Health Service Policy Manual § 4.10 (2003).

94. N.Y.S. Dept. of Corr. Servs. Div. of Health Serv., Health Service Policy Manual § 4.10 (2003).

E. Administrative Records

Administrative records are the memoranda and directives that describe DOCS policies. They may also include manuals and rulebooks for DOCS employees, as well as Inmate Grievance Committee decisions. To obtain a copy of the DOCS administrative records, send a written request describing the record or records sought, to:[95]

Records Access Officer
New York State Department of Correctional Services
1220 Washington Avenue, Building No. 2
Albany, NY 12226–2050

F. Parole Records

The New York State Division of Parole keeps records on every prisoner eligible for parole or parole release. If you are eligible for parole, your case record, maintained by your "street" parole officer, will contain a comprehensive set of the records the Division of Parole maintains about you.[96] Parole regulations provide that the Division of Parole will only grant you access to those records prior to (1) a scheduled appearance before the Board; (2) a scheduled appearance before an authorized hearing officer; or (3) the filing of an administrative appeal of a final decision of the Board.[97] Also, you will only be allowed to see the portions of the record that will be considered by the Board or hearing officer during your appearance or hearing.[98]

To make a request for those parts of your case record that you are allowed to see, write to the senior parole officer at your prison, or the area parole office that serves the area where your institution is located.[99] Your letter should include (1) your name and identification number; (2) whether you have a release interview, revocation hearing, or appeal pending; (3) the prison or jail in which you are confined; (4) and your signature.[100] Explain in the letter that in order to prepare for your upcoming hearing or appeal, you want to review all of the information in your file that will be considered by the Board of Parole. Your request must be received at least ten days before the scheduled date of a final revocation hearing or the final date to perfect an administrative appeal, and at most one day after receiving notice of the scheduled date of any other hearing.[101] The fee for copies of parole records is twenty-five cents ($.25) per page.[102]

For more information on parole records and procedures, refer to Chapter 32 of the *JLM* on Parole.

G. Criminal History Records[103]

A prisoner's criminal history record is filed with the Division of Criminal Justice Services ("DCJS"). The procedure for obtaining these records varies slightly from other records.[104] A written request for your criminal history data should include your name, any other name you have used or may be known by, your birth date, your DIN (Department of Corrections "Department Identification Number"), and, if you have it, your NYSID ("New York State Identification Number"). In addition, it is helpful to include your race, sex, and Social Security number. You must also state in your request how long you will be incarcerated. There

95. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.11 (2009).

96. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 8000.5(a)–(b) (2009). Your case record may contain the following information about you: a complete statement of the crime(s), the circumstances of each crime, all pre-sentence memoranda, the nature of the sentence, the sentencing court, the name of the judge and district attorney, probation reports, and reports as to your social, physical, mental, and psychiatric condition and history.

97. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 8000.5(c)(5)–(6) (2009).

98. Access is further restricted by content. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(2)(i) (2009).

99. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(3) (2009).

100. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(8) (2009).

101. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(3)(ii) (2009).

102. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(7) (2009).

103. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.1 (2009) (providing prisoners the right to review their own criminal history records and to challenge the accuracy or completeness of the record).

104. The information in this paragraph is drawn from the Legal Action Center's "How to Get and Clean Up Your New York State Rap Sheet," available online at http://lac.org/doc_library/lac/publications/NYS_Rap_Sheet_Final.pdf (7th ed. 2007) (last visited Sep. 18, 2009). The Legal Action Center also publishes versions of this guide for California, Illinois, Pennsylvania, and Virginia. These can be found at http://lac.org/index.php/lac/132 (last visited Sep. 18, 2009). Contact information for the Legal Action Center can be found in Appendix D-1.

may be forms available in your prison library that you can use instead of writing your own written request. Send your request to:

Record Review Unit
New York State Division of Criminal Justice Services
4 Tower Place
Albany, NY 12203–3764
(518) 485–7675

DCJS will only send you a copy of your record free of charge if you will be incarcerated for longer than forty-five days. If you are not currently incarcerated or if you will be incarcerated for less than forty-five days, you can receive a copy of your record by sending DCJS a form called Request for Record Review. You can obtain this form by writing to DCJS at the above address. The Record Review Packet includes directions to help you complete and submit a fingerprint card to DCJS. There is no fee for the application packet itself, but a fee of fifty dollars ($50) must be included when you complete the materials and return them to DCJS to obtain a copy of your record.

If, after reviewing your criminal history data, you find it is inaccurate or incomplete, you may challenge the errors.[105] To correct your file you must submit a "Statement of Challenge" to the DCJS, in which you must identify the specific information that you believe is incorrect and include any documentation or proof.[106] Also, be sure to list any other agencies that may have the erroneous data.[107] A blank Statement of Challenge form should be included with the copy of your criminal history record that you have received.

DCJS will review your file within a reasonable time period after receiving your Statement of Challenge form and any supporting documentation.[108] DCJS will check the errors you pointed out in your form against the records kept by the Director of the Bureau of Identification and Criminal History Operations ("BICHO"). If it finds that you are right about the errors, DCJS will make the necessary corrections to your file and will notify you in writing of those corrections.[109] DCJS also will forward the corrections to agencies listed on the Statement of Challenge form.[110] If it does not agree with your challenge after checking the BICHO records, DCJS will notify you in writing. You may appeal a negative finding by BICHO by notifying the Commissioner of DCJS in writing within a reasonable time period after receiving notification from DCJS. Within a reasonable time after receiving your request, the Commissioner will notify you of the result of your appeal and order any appropriate corrections to be made.[111]

H. Inmate Records

New York State prisoners can also gain limited access to their inmate records. An inmate record includes the documents in a prisoner's central office folder (or institutional folder); it does not include medical records.[112] The regulations give you access to your "personal history" and "correctional supervision history data."[113] Your personal history records contain information like your age, date of birth, birthplace, city of prior residence, occupation, physical description, correctional facilities in which you have been incarcerated, commitment information, and departmental actions about your sentence, and release or re-imprisonment.[114]

Your correctional supervision history data record contains records of disciplinary charges and dispositions, good behavior allowance reports, warrants and cancellations of warrants, legal papers, court orders, transportation orders, records of institutional transfers and changes in program assignments, reports of injury to prisoners, and property records, including the personal property list and postage account card.[115]

105. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 6050.2(a)–(b) (2009).
106. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.2(a) (2009).
107. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.2(c) (2009).
108. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.2(b) (2009).
109. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.2(b) (2009).
110. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.2(c) (2009).
111. N.Y. Comp. Codes R. & Regs. tit. 9, § 6050.3 (2009).
112. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.5(g) (2009).
113. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.5(g) (2009). For medical records, see Part (C)(3)(b) of this Chapter.
114. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.5(i) (2009).
115. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.5(a) (2009).

If you would like access to these records, you should request them from your assigned counselor, who serves as the "records access officer."[116] If you disagree with a decision not to release a part of your record, you may appeal to Counsel of the Department of Correctional Services. If the appeal is denied, you may then challenge it in court with an Article 78 petition. *JLM,* Chapter 22 tells you how to file an Article 78 petition.

It is often easier to get records than the regulations suggest. There is now a presumption that all records should be available for public inspection except those specifically excluded. Furthermore, the agency has the burden of proving that a record should be excluded.[117] The courts have held that public disclosure laws are to be read broadly,[118] and statutory exemptions from disclosure read narrowly, to allow maximum access.[119]

I. Correcting Errors in Your Personal History or Correctional Supervision History Records

If you notice anything incomplete or inaccurate in your records, you should tell the custodian of the records. This is the person from whom you received the records (if they were inmate records, then it should be your counselor).[120] You may only correct incorrect information that appears in your personal history or correctional supervision history.[121]

Once you have expressed an objection concerning your record, the custodian must, within a reasonable time, investigate the accuracy and completeness of the information, unless there are reasonable grounds to believe that your objection is frivolous.[122] If the custodian determines that the disputed information is incorrect or incomplete, she must make the changes in the record that are necessary. The custodian must also report the results of the investigation to you and tell you of any changes made to your record no later than forty-five days after being notified of your objection.[123]

If you still dispute the accuracy or completeness of the information after investigation and a determination by the custodian, you may appeal the custodian's determination to the Inspector General of the Department of Correctional Services.[124] This appeal must be in writing and sent to:

Inspector General
New York Department of Correctional Services
1220 Washington Avenue, Building No. 2
Albany, NY 12226–2050

The Inspector General can affirm, modify, or reverse the custodian's determination. He must notify you within thirty days of the decision in your case.[125] If the record is found to be incorrect and is then corrected, the Department must notify all those who were given the erroneous information and tell them about the corrected information.[126] You can request that you be given a list of all agencies, individuals, or organizations that were given the erroneous or incomplete information about you.[127] If the Inspector General decides against you, you may challenge his decision in court.

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116. N.Y.S. Dept. of Corr. Servs., Directive No. 2010, Departmental Records 3 (rev. 2006), *available at* http://www.docs.state.ny.us/Directives/2010.pdf.

117. N.Y. Pub. Off. Law § 89(4)(b) (McKinney 2001 & Supp. 2007).

118. *See, e.g.,* Burke v. Yudelson, 81 Misc. 2d 870, 878, 368 N.Y.S.2d 779, 787 (Sup. Ct. Monroe County 1975), *aff'd,* 51 A.D.2d 673, 673, 378 N.Y.S.2d 165, 166 (4th Dept. 1976) (noting that disclosure laws should be liberally construed, and that the burden of proving that release is not allowed falls on the agency seeking to deny the disclosure request).

119. N.Y. Comp. Codes R. & Regs. tit. 21, § 1401.1(d) (2009) ("[C]onflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.").

120. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.50 (2009). On amending your record, *see* N.Y. Comp. Codes R. & Regs. tit. 7, §§ 6.8–6.11 (2007).

121. *See, e.g.,* Rowland D. v. Scully, 152 A.D.2d 570, 570, 543 N.Y.S.2d 497, 498 (2d Dept. 1989), *aff'd*, 76 N.Y.2d 725, 557 N.E.2d 112, 557 N.Y.S.2d 876 (holding that a prisoner was not entitled to examine forms in order to challenge their accuracy, unless the forms contained information relating to his correctional supervision or personal history).

122. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.51(a) (2009).

123. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.51(b) (2009).

124. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.52 (2009).

125. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.52 (2009).

126. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.54 (2009).

127. N.Y. Comp. Codes R. & Regs. tit. 7, § 5.53 (2009).

1. The Committee on Open Government

If you have problems obtaining information under New York's FOIL, you may want to complain to the Committee on Open Government established by FOIL.[128] This committee is charged with monitoring the program that gives the public access to records. The committee tries to make sure that agencies have complied with the law, and can also furnish an advisory opinion to any person who wants one. The committee also has a staff that is responsible for answering any questions about the FOIL. Its address is:

Committee on Open Government
One Commerce Plaza, 99 Washington Avenue, Suite 650
Albany, NY 12231
(518) 474–2518

J. Federal Citizen Information Center

If you need help determining which federal agency to contact for your request, call the Federal Citizen Information Center for assistance.

Federal Citizen Information Center
Toll free number: (800) 333–4636
http://www.info.gov

K. Conclusion

If you would like access to information in government files, there are laws allowing you to ask for documents from federal and state agencies. If you want records from the federal government, you can file a FOIA request or a Privacy Act request. If you would like records from a New York state agency, you should file a request under New York's Freedom of Information Law ("FOIL"). Appendix A contains citations to other states' freedom of information laws. You should direct your request to the agency with the records you want. Appendix D lists the addresses of some government agencies. Remember: each agency has specific procedures, so it is important to check to see what information you need to provide in your request.

128. N.Y. Pub. Off. Law § 87(1)(a) (McKinney 2009).

APPENDIX A

STATE FREEDOM OF INFORMATION LAWS

Alabama	Ala. Code §§ 36-12-40 to 36-12-43 (LexisNexis 2001 & Supp. 2008).
Alaska	Alaska Stat. §§ 40.25.100 to 40.25.295 (Lexisnexis 2008).
Arizona	Ariz. Rev. Stat. Ann. §§ 39-121 to 39-128 (West 2001 & Supp. 2008).
Arkansas	Ark. Code Ann. §§ 25-19-101 to 25-19-109 (LexisNexis 2002 & Supp. 2007).
California	Cal. Gov't Code §§ 6250 to 6270 (West 2008 & Supp. 2009).
Colorado	Colo. Rev. Stat. Ann. §§ 24-72-201 to 24-72-206 (West 2008 & Supp. 2008).
Connecticut	Conn. Gen. Stat. Ann. §§ 1-200 to 1-242 (West 2007 & Supp. 2009).
Delaware	Del. Code Ann. tit. 29, §§ 10001 to 10005 (2003 & Supp. 2008).
Dist. of Columbia	D.C. Code Ann. §§ 2-531 to 2-540 (LexisNexis 2001 & Supp. 2009).
Florida	Fla. Stat. Ann. §§ 119.01 to 119.15 (West 2008 & Supp. 2009).
Georgia	Ga. Code Ann. §§ 50-18-70 to 50-18-77 (LexisNexis 2009).
Hawaii	Haw. Rev. Stat. Ann. §§ 92F-1 to 92F-42 (LexisNexis 2007 & Supp. 2008).
Idaho	Idaho Code Ann. §§ 9-337 to 9-350 (2004 & Supp. 2008).
Illinois	5 Ill. Comp. Stat. Ann. §§ 140/1 to 140/11 (West 2005 & Supp. 2009).
Indiana	Ind. Code Ann. §§ 5-14-3-1 to 5-14-3-10 (LexisNexis 2006).
Iowa	Iowa Code Ann. §§ 22.1 (West 2001 & Supp. 2009).
Kansas	Kan. Stat. Ann. §§ 45-215 to 45-250 (2000 & Supp. 2008).
Kentucky	Ky. Rev. Stat. Ann. §§ 61.870 to 61.884 (LexisNexis 2004 & Supp. 2008).
Louisiana	La. Rev. Stat. Ann. §§ 44:1 to 44:41 (West 2007 & Supp. 2009).
Maine	Me. Rev. Stat. Ann. tit. 1, §§ 401 to 412 (West 1989 & Supp. 2008).
Maryland	Md. Code Ann., State Gov't §§ 10-611 to 10-630 (LexisNexis 2004 & Supp. 2008).
Massachusetts	Mass. Ann. Laws ch. 4, § 7(26) (Lexis Nexis 1999) and ch. 66, § 10 (LexisNexis 2002 & Supp. 2009).
Michigan	Mich. Comp. Laws Ann. §§ 15.231 to 15.246 (West 2004 & Supp. 2009).
Minnesota	Minn. Stat. Ann. §§ 13.03 to 13.04 (West 2000) and 138.17 (West 2005 & Supp. 2009).
Mississippi	Miss. Code Ann. §§ 25-61-1 to 25-61-17 (LexisNexis 2006 & Supp. 2008).
Missouri	Mo. Ann. Stat. §§ 109.180 to 109.190 (West 1997 & Supp. 2009).
Montana	Mont. Code Ann. §§ 2-6-101 to 2-6-112 (2008).
Nebraska	Neb. Rev. Stat. §§ 84-712 to 84-712.09 (2008).
Nevada	Nev. Rev. Stat. Ann. §§ 239.005 to 239.030 (LexisNexis 2005 & Supp. 2007).
New Hampshire	N.H. Rev. Stat. Ann. §§ 91-A:1 to 91-A:9 (LexisNexis 2001 & Supp. 2008).
New Jersey	N.J. Stat. Ann. §§ 47:1A-1 to 47:1A-13 (West 2003 & Supp. 2009).
New Mexico	N.M. Stat. Ann. §§ 14-2-1 to 14-2-12 (2003 & Supp. 2008).
New York	N.Y. Pub. Off. Law §§ 84 to 90 (McKinney 2008 & Supp. 2009).
North Carolina	N.C. Gen. Stat. §§ 132-1 to 132-10 (LexisNexis 2007 & Supp. 2008).
North Dakota	N.D. Cent. Code §§ 44-04-18 to 44-04-19.2 (LexisNexis 2007).
Ohio	Ohio Rev. Code Ann. §§ 149.43 to 149.44 (West 2002 & Supp. 2009).
Oklahoma	Okla. Stat. Ann. tit. 51, §§ 24A.1 to 24A.29 (West 2008).
Oregon	Or. Rev. Stat. §§ 192.410 to 192.505 (2007).
Pennsylvania	65 Pa. Cons. Stat. Ann. §§ 66.1 to 66.9 (West 2000 & Supp. 2009).
Rhode Island	R.I. Gen. Laws §§ 38-2-1 to 38-2-15 (1997 & Supp. 2008).
South Carolina	S.C. Code Ann §§ 30-4-10 to 30-4-165 (West 1976 & Supp. 2008).
South Dakota	S.D. Codified Laws §§ 1-27-1 to 1-27-33 (West 2004 & Supp. 2008).
Tennessee	Tenn. Code Ann. §§ 10-7-503 to 10-7-509 (LexisNexis 1999 & Supp. 2007).
Texas	Tex. Gov't Code Ann. §§ 552.001 to 552.029 (Vernon 2004 & Supp. 2008).
Utah	Utah Code Ann. §§ 63G-2-201 to 63G-2-405 (LexisNexis 2008 & Supp. 2008).
Vermont	Vt. Stat. Ann. tit. 1, §§ 315 to 320 (LexisNexis 2003 & Supp. 2008).
Virginia	Va. Code Ann. §§ 2.2-3700 to 2.2-3714 (LexisNexis 2008).
Washington	Wash. Rev. Code Ann. §§ 42.56.001 to 42.56.904 (West 2006 & Supp. 2009).
West Virginia	W. Va. Code Ann. §§ 29B-1-1 to 29B-1-7 (LexisNexis 2007 & Supp. 2008).
Wisconsin	Wis. Stat. Ann. §§ 19.31 to 19.39 (West 2003 & Supp. 2008).
Wyoming	Wyo. Stat. Ann. §§ 16-4-201 to 16-4-205 (LexisNexis 2009).

APPENDIX B

SAMPLE DEPARTMENT OF JUSTICE CERTIFICATION OF IDENTITY FORM

U.S. Department of Justice Certification of Identity

Privacy Act Statement. In accordance with 28 CFR Section 166.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of US Department of Justice systems of records are not wrongfully disclosed by the Department. Failure to furnish this information will result in no action being taken on the request. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(I)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to Director, Facilities and Administrative Services Staff, Justice Management Division, US Department of Justice, Washington, DC 20530 and the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103?0016), Washington, DC 20503.

Full Name of Requester _____

Current Address _____

Date of Birth _____ Place of Birth_____

Social Security Number _____

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than $10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than $5000.

Signature _____ Date_____

Optional: Authorization to Release Information to Another Person (or organization)
(This portion is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person or organization.)

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

_____

Print or Type Name (and Organization, if applicable)

1. Name of individual who is the subject of the record sought.
2. Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.
3. Signature of individual who is the subject of the record sought.

FORM DOJ-361,
USNCB Website
Version, Original
form approved
OMB No. 1103-
0016

Last updated: 5/14/07
usdoj/usncb/lds

APPENDIX C

SAMPLE LETTERS

C-1. Sample FOIA Request Letter (Federal)

Return Address
Date

Freedom of Information Officer
Name of Agency
Address

Dear Sir or Madam:

This request is made under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552 [and the Privacy Act 5 U.S.C. Section 552a].

Please send me copies of the following documents: [describe the documents you want as clearly as possible includingnames, places, and period of time about which you are inquiring].

As you know, the Freedom of Information Act provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. Therefore, I will expect you to send me all nonexempt portions of the records which I have requested, and ask that you justify any deletions with reference to specific exemptions of FOIA. The information requested is not to be used for commercial benefit, so I do not expect to be charged fees for your review of the material to see if it falls within one of FOIA's exemptions.

[Option I]

I promise to pay reasonable search and duplication costs in connection with this request. However, please notify me ahead of time if you estimate that total fees will exceed $ _____ so I can approve the additional amount.

[Option II]

FOIA provides for the waiver or reduction of search and duplication fees where the "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." This request should be exempt from all fees because [here explain how you intend to distribute the information you receive, and how those to whom you distribute it will be better informed about the operations of the government]. If you deny this request, however, please notify me if fees will exceed $_____ so I can decide whether to pay the fees or appeal your denial of my request for a waiver.

Sincerely,
[Signature]

C-2. Sample FOIA Appeal Letter (Federal)

Return Address
Date

Administrator
Name of Agency
Address
To the Administrator:

This is an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552. On [date] I made a FOIA request to your agency for [brief description of the materials sought]. On [date] your agency denied my request because [state the ground for denial cited by that agency] [or, if the agency has not to you within the legal limit of 20 days, say how long they have delayed your request.] Copies of the correspondence are attached.

Please be informed that I consider the requested material clearly releasable under FOIA and consider your agency's policy to be arbitrary and capricious.

[Here insert any arguments in favor of disclosure, if you wish.]

I expect that upon reconsideration, you will reverse the decision to deny my request. However, if you do deny this appeal, I intend to file a lawsuit to compel disclosure.

Sincerely,
[Signature]

C-3. Sample FOIL Request Letter (New York State)

Return Address
Date

Records Access Officer
Name of Agency
Address of Agency
City, NY ZIP code

Re: Freedom of Information Law Request

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to _____ [identify the records in which you are interested as clearly as possible].

If there are any fees for copying the records requested, please inform me before filling the request [or: Please inform me if the fees associated with this request exceed $____.]

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,
[Signature]

C-4. Sample FOIL Appeal Letter (New York State)

Return Address
Date

Records Access Officer
Name of Agency Official
Appeal Officer
Address of Agency
City, NY ZIP code

Re: Freedom of Information Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ [date] and sent to _____ [records access officer, name and address of agency].

The records that were denied include:_____ [list and describe the records that were denied].

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within ten business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, New York Department of State, One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231.

Sincerely,
[Signature]

C-5. Sample *Vaughn* Motion[129]

[Use the proper court caption]

Motion Under *Vaughn v. Rosen* to Require
Detailed Indexing, Justification, and Itemization

Plaintiff [your name] moves this Court for an order requiring Defendants [name of agency and agency head] to provide within 30 days of the filing of the Complaint in this action, a detailed justification for allegations contained in the Defendant's Answer and previous administrative denial that the requested documents are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, including an itemization and index of the documents claimed to be exempt, correlating specific statements in such justification with actual portions of the requested documents. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. den.*, 415 U.S. 977 (1974).

Respectfully Submitted,

[Name of plaintiff or plaintiff's attorney]
Address

Dated: [date] [city and state]

129. It is difficult to determine the proper federal court in which to file your *Vaughn* motion. To find out how to proceed, write or call the clerk of the federal district court that has jurisdiction over the agency from which you are trying to get information. Most federal agencies are headquartered in Washington, D.C. The address for the federal district court of D.C. is: Clerk's Office, United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, D.C. 20001. The phone number is (202) 354-3000.

APPENDIX D

ADDRESSES

D-1. Additional Information & Assistance

American Civil Liberties Union ("ACLU")
125 Broad St., 18th Floor
New York, NY 10004
Phone: (212) 549–2500
ACLU chapters can give you information about FOIA or "open records" laws, like FOIL, if you are seeking state or local government records.

Freedom of Information Clearinghouse
1600 20th Street N.W.
Washington, D.C. 20009
Phone: (202) 588-1000
http://www.citizen.org/litigation/free_info
The Clearinghouse gives legal and technical assistance to public interest groups, journalists, and individual citizens using the laws granting access to information that is held by the government.

Legal Action Center
225 Varick Street
New York, NY 10014
Phone: (212) 243–1313 or
Toll free 1–800–223–4044;
Fax: (212) 675–0286
E-Mail: lacinfo@lac.org
http://www.lac.org
The Legal Action Center publishes the very useful "How to Get and Clean Up Your State Rap Sheet," with editions covering New York, California, Illinois, Pennsylvania, and Virginia.

ACLU National Prison Project
915 15th Street N.W.
7th Floor
Washington, D.C. 20005
Phone: (202) 393–4930
http://www.aclu.org/prison/index.html
The Prison Project will refer prisoners to local aid groups where requests for information from state authorities are addressed.

D-2. Federal Government Agencies

Remember, always mark the outside of the envelope, "Freedom of Information Act Request."

Divisions of the Department of Justice

Civil Rights Division
Chief, FOIA/PA Branch
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue N.W.
NALC Building, Room 311
Washington, D.C. 20530
Phone: (202) 514–4209
Fax: (202) 514–6195

Criminal Division
Chief, FOIA/PA Unit
Criminal Division
Department of Justice
Keeney Building, Suite 1127
950 Pennsylvania Ave, NW
Washington, D.C. 20530–0001
Phone: (202) 616–0307

Drug Enforcement Administration
Drug Enforcement Administration
Freedom of Information Operations Unit
Department of Justice
700 Army Navy Drive
West Building, 6th Floor
Arlington, VA 22202
Phone: (202) 307–7596

Federal Bureau of Investigation
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Department of Justice
170 Marcel Drive
Winchester, VA 22602-4843
Phone: (540) 868-4593 (ask for Freedom of Information or FOI/PA)

United States Parole Commission
FOIA/PA Specialist
United States Parole Commission
Department of Justice
Suite 420, 5550 Friendship Boulevard
Chevy Chase, MD 20815
Phone: (301) 492–5959
Fax: (301) 492–5563

Immigration
Requests for the Board of Immigration Appeals ("BIA"), the Office of the Chief Immigration Judge, and the Office of the Chief Administrative Hearing Officer (OCAHO) should be addressed to:
U.S. Immigration and Customs Enforcement
800 North Capitol St. NW
5th floor, Suite 585
Washington, D.C. 20528
Phone: (202) 732-0300
Fax: (202) 732-0310

Office of the Attorney General
Requests should be addressed to:
Office of Information Policy
Department of Justice
1425 New York Avenue N.W.
Suite 11050,
Washington, D.C. 20530-0001
(202) 514–FOIA

Justice Management Division
Justice Management Division
FOIA Contact
Department of Justice
Room 1111 RFK
950 Pennsylvania Ave NW
Washington, D.C. 20530–0001
(301) 583–7354
The Justice Management Division can help you with questions regarding requests within the Justice Department, such as which division to write to, and how to write the request.

Bureau of Citizenship and Immigration Services (formerly INS)
U.S. Citizenship and Immigration Services
National Records Center
FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010
Phone: (816) 350-5570
Fax: (816) 350-5785

U.S. Commission on Civil Rights
U.S. Commission on Civil Rights
FOIA Officer
624 Ninth Street, N.W.
Suite 621
Washington, D.C. 20425
Phone: (202) 376–7796
Fax: (202) 376-1163

Equal Employment Opportunity Commission
Equal Employment Opportunity Commission
Legal Counsel/FOIA
131 M St. NE, Suite 5NW02E
Washington, D.C. 20507
Phone: (202) 663-4500 (FOIA Service Center) or (202) 663-4634
Fax: (202) 663-4639

Department of Health and Human Services
Department of Health and Human Services
Director, FOIA/Privacy Division
Room 5416, Mary E. Switzer Bldg
330 C St, SW
Washington, D.C. 20201
Phone: (202) 690–7453
Fax: (202) 690–8320

Internal Revenue Service
Internal Revenue Service
FOIA Disclosure Manager
Office of Disclosure
1111 Constitution Avenue, N.W.
Washington, D.C. 20224
Phone: (202) 622–6200

A Jailhouse Lawyer's Manual

Chapter 8:
Obtaining Information To Prepare Your Case:
The Process of Discovery

Columbia Human Rights Law Review
8th Edition 2009

LEGAL DISCLAIMER

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER 8

OBTAINING INFORMATION TO PREPARE YOUR CASE: THE PROCESS OF DISCOVERY*

A. Introduction

This Chapter is an overview of the general rules of discovery. Discovery is the process that allows you to ask your opponent and other parties for information they possess that you need to present your case. Your opponent can also use the discovery process to get information from you. Discovery allows you to get information not only from your opponent but also from other sources, like co-defendants or other potential witnesses. Discovery usually takes place before the trial begins. In a civil action, the process starts after the legal papers that begin a suit have been filed. In a criminal action, it generally starts after the defendant has been arraigned (or brought before the court to plead to the charge brought against him).

Discovery is governed by a fairly complicated set of rules.[1] It is important to know the rules because they: (1) instruct you on how to get the information you need; and (2) inform you of what information you have to give an opponent to avoid the court penalizing you. The rules tell you how to get information and limit what information needs to be disclosed. The judge supervises the discovery process in each case.

Discovery rules differ depending on the type of case (civil or criminal) and the type of court (state or federal) in which you are appearing. Civil discovery is very broad and has relatively few restrictions. Criminal discovery, on the other hand, is quite different and relatively limited. Regardless of the depth of treatment given to a particular rule in this Chapter, you must always check the appropriate rule yourself, in addition to any cases interpreting the rule. You should also Shepardize (or update) the rules and the cases, since the rules change quite frequently. Chapter 2 of the *JLM*, "Introduction to Legal Research," explains Shepardizing and other methods of legal research.

There are two reasons to be aware of discovery procedures. First, you should use discovery to fully prepare your case for trial. Second, you must also know how to respond to your opponent's requests for information from you. Discovery is a privilege and a responsibility: when you file a suit, you have the right to information from your opponent but you also must respond to your opponent's requests for discovery. If you refuse to comply with proper discovery requests from the other side, your lawsuit may be dismissed.

Discovery is intended to:

(1) narrow and clarify the issues that will be presented to the court;
(2) find out the claims of each party;
(3) find out the important facts and details of your case and your opponent's case;
(4) obtain testimony from witnesses while their memory is fresh or before they might for some reason become unable to testify in court; and
(5) eliminate the delay and undue surprise that would occur if each party knew nothing about the other side's case until the trial itself.

Once you have completed the discovery process you will know much more about what you will have to prove and disprove to win your case. You will also know what information you still need to be successful.

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* This Chapter was revised by Paula M. McManus and Roslyn R. Morrison based in part on previous versions by Colleen Romaka, David Lamoreaux, and members of the 1977–78 *Columbia Human Rights Law Review*.

1. In federal court, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) are used in civil cases, and the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) are used in criminal cases. New York state court uses the Civil Practice Law and Rules (N.Y. Civ. Prac. L. & R. or N.Y. C.P.L.R.) in civil cases and the Criminal Procedure Law (N.Y. Crim. Proc. L.) in criminal cases. N.Y. Crim. Proc. L. is also commonly referred to as C.P.L. Each set of rules contains discovery procedures for the appropriate type of case. For other states, you can find rules of civil and criminal procedure in the state's Annotated Code or Annotated General Statutes. Also, for most states, West or LexisNexis publishes a yearly volume for the state that contains current rules of civil and criminal procedure. West's publication is Rule of Court–State. (For example, if you are looking for information on Connecticut, look to West's 2007 Connecticut Rules of Court–State.) LexisNexis' publication is called Court Rules Annotated. (For example, if you are looking for information on New Hampshire, look to LexisNexis' 2007 New Hampshire Court Rules Annotated.) You can often request the volume you need through inter-library loan if your library does not carry it.

This Chapter gives you an overview of the discovery rules. Part B addresses the discovery rules for civil lawsuits, while Part C focuses on the discovery rules for criminal cases. Each of these Parts is further divided between discovery in federal cases and discovery in state cases.

B. Civil Discovery

C. Introduction

Specific rules of civil procedure govern the various tools of civil discovery.[2] They vary depending on whether you bring your case in federal or state court.[3] The federal rules governing civil discovery are discussed in Part B(2) of this Chapter; the New York State rules are discussed in Part B(3). Although the basic ideas are the same, it is important to know the specific rules of the court where you bring your claim. Otherwise, your case may be dismissed early. Also, individual courts and judges can set their own special procedural rules. These rules cannot conflict with the law, but you should try to find out if your judge has a special system you should follow. You can do this by writing to the clerk of the court. The addresses of the federal and state courts in New York are listed in Appendices I and II at the end of the *JLM*.

There is no required form for filing a discovery request, but you should state clearly the information you are seeking and the rule under which you are making your request. Many legal formbooks contain examples of the many different types of discovery requests.[4] Selected federal forms are provided in the Appendix at the end of this Chapter. *Do not tear them out of the book*; you must copy them on your own paper and insert the particular information that you need.

D. Federal Discovery Procedures

(a) Introduction

In a civil action in federal court, discovery is governed by the Federal Rules of Civil Procedure, Rules 26–37.[5] The rules are fairly straightforward and should be relatively easy to follow. There is one basic rule to keep in mind: *you should show that any material you seek is reasonably relevant to your case.* Courts will not look kindly on you if you deliberately harass the person you are suing with burdensome requests not important to the case and requiring him to spend a great deal of time or money answering. The judge may impose penalties on anyone who abuses the discovery process in this way.[6] At the same time, the discovery rules are usually applied liberally so that all sides may get the information they need to pursue their case.

(b) Scope of Discovery

In a civil action, only information not "privileged" may be discovered. Information that is privileged may be kept secret. In addition, information must be "relevant" to your case for it to be discoverable.

One category of privileged information is communication between certain people that the law, as a matter of public policy, wishes to protect by keeping private. Examples of privileged relationships are those existing between lawyer and client, doctor and patient, priest and confessor, and husband and wife. Any information given by one person to another within any of these relationships, and meant to be kept confidential or secret, is considered "privileged." This means, for example, that if your opponent requested copies of your personal correspondence, you would not have to give him letters that you wrote to your spouse, lawyer, etc. Of course, it also means that your opponent can withhold such privileged material from you.

Another category of privileged material, which is often the largest barrier to getting information, is trial preparation material, also called "attorney work product."[7] The work product rule is complicated and an in-

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2. *See* Fed. R. Civ. P. 26–37 (Depositions and Discovery) (federal courts); N.Y. C.P.L.R., art. 31 (Disclosure) (New York state courts). These rules of civil procedure also apply to attacks on a conviction after appeal, such as federal or state habeas corpus petitions, or Article 440 motions in New York. *See JLM* Chapters 13, 20, and 21 for information on habeas corpus and Article 440. Note: discovery in habeas proceedings is only available for "good cause." *See* Henard v. Newkirk, 987 F. Supp. 691, 694 (N.D. Ind. 1997) (directing prisoner to show good cause to authorize discovery).

3. Useful summaries of the law governing discovery in federal courts include Charles Alan Wright & Mary Kay Kane, Law of Federal Courts, 580–647 (6th ed. 2002) and 6, 7 James William Moore, Moore's Federal Practice 26–37A (3d ed. 2007).

4. *See*, *e.g.*, James William Moore, Moore's Federal Practice 26–37A (3d ed. 2007).

5. Note that habeas corpus rules differ slightly from discovery rules. *See* Chapter 13 of the *JLM*, "Federal Habeas Corpus," and 28 U.S.C. §§ 2246, 2247 (2000).

6. Fed. R. Civ. P. 37(a)(4)(B). Sanctions are discussed in Part B(2)(f) of this Chapter.

7. The rule protecting attorney work product is also called the "Hickman-Taylor rule" because it is based upon the

depth analysis of it is not included in this Chapter. Briefly, the rule covers information, analysis, arguments, and opinions prepared by attorneys for trial. Facts may be available if you can show "substantial need"[8]—that is, if you cannot get the information anywhere else and it would be unfair if you did not have it—but your opponent's lawyer's opinions and analysis are not available to you through discovery.[9]

If you feel your opponent has requested privileged material from you, it is your responsibility to show the court the privilege applies to you. If you refuse to respond to a discovery request because you think the information is privileged, you must give the reason for the privilege (without giving away the information), and you must respond to any other discovery requests not calling for privileged material. The court will then decide your claim of privilege and may order you to turn over the material if it decides it is not privileged.

A second requirement for discovery is that the material must be "relevant" to the case. Information is relevant when it supports the truth or denial of a point which either side is trying to prove. Imagine, for example, that you have filed a civil lawsuit for police misconduct at the time of your arrest.[10] In proving misconduct you would have to identify the officer who you feel was abusive. The arrest record directly supports your proof on this point because it would state the officer's name. The arrest record would then be relevant, and you could ask for it in discovery. On the other hand, if you asked for the officer's high school report card, that information would probably be irrelevant. If you asked for it and the other side objected, the judge would probably rule that the report card is not discoverable.

Information is also relevant when it *may lead* to other relevant information. Even though the information may be inadmissible at trial because it is "irrelevant" under the rules of evidence, it may still be discoverable. You may request information if there is any reasonable possibility that it will lead you to admissible evidence that you can present at trial.[11] Still using the police misconduct example above, assume that you have found out the officer's name. When suing the officer personally (you would probably also sue the police department), it would be helpful to know his background. You might then request the names and addresses of other members of the police department, for example, because these other officers might know whether the officer has a violent disposition. Since you *might* find important information showing the officer's abusive work practices, you should be able to find out these other officers' names and possibly depose them (depositions are discussed in Part B(2)(d)(i) of this Chapter below). Even though you might not find any useful information or information that is admissible in court, the discovery rules permit you to try to build your case by following leads that may provide you with relevant information.

(c) Mandatory Discovery: Rule 26

Rule 26 of the Federal Rules of Civil Procedure attempts to ensure a smooth and quick exchange of basic information between you and your adversary. The rule requires both an early meeting between you and your adversary and mandatory disclosure of certain information. Below is a brief overview of the rule's requirements. But, since the rule is fairly detailed, you should also read over that section of the Federal Rules if you are involved in a federal civil suit. Also, it is important to note that local courts have the option of suspending Rule 26 requirements. You should therefore always check with the clerk of the court in order to determine what your responsibilities are.

Under Rule 26(f), you and your adversary must meet "as soon as practicable" to discuss your case. The goal of this meeting is to see if there is any possibility of settling and therefore no need to have a trial. In addition, the Rule requires the parties to create a "discovery plan." This means you and your opponent need to make deadlines for discovery. Note that if you have a federal criminal case and are incarcerated, your attorney will usually draft a motion in which she requests all discovery materials. She will often discuss this discovery motion with you after your arraignment, either at the courthouse or at the prison facility.

Supreme Court case *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

8. *See*, e.g., *In re* Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180 (2d Cir. 2007) (finding "substantial need" for the documents requested because they were unique evidence and could not be obtained through other means).

9. You cannot, for example, ask your opponent to tell you in advance the argument that he will make at trial. Work product privilege is covered in Fed. R. Civ. P. 26(b)(3), to which you should refer if work product protection becomes an issue in your case.

10. In *Mercado v. Division of New York State Police*, 989 F. Supp. 521, 523 (S.D.N.Y. 1998), the court held that N.Y. Civ. Rights L. § 50-a, which says a police officer's personnel files may only be turned over if the officer consents or if a judge issues an order requiring the release of these records, does not necessarily apply to discovery in federal litigation.

11. Fed. R. Civ. P. 26(b)(1).

Within fourteen days after the Rule 26(f) meeting, Rule 26(a)(1)(A) requires that you and your adversary exchange certain basic information such as the names, addresses, and phone numbers of any persons who may have discoverable information. Since your adversary is entitled to Rule 26(a)(1) information without making any particular request of you, you should read this rule carefully to determine what information you are required to send. Also, you should be familiar with the Rule's requirements in order to determine whether your adversary has given you all of the information to which you are entitled. If you or your adversary plans to call expert witnesses at trial, Rule 26(a)(2) makes such information discoverable and you should refer to this Rule for the exact information that may be discovered. In addition, Rule 26(a)(3) requires you and your adversary to inform each other of people you plan to call as witnesses in a trial and to exchange summaries of any evidence that you plan to introduce at a trial. The exchange of information under Rule 26(a)(3) must take place at least thirty days before trial.

Lastly, Rule 26(e) requires both parties to voluntarily supplement or correct any information already exchanged if they later obtain information which makes the initial information either incomplete or inaccurate. Under Rule 26(g), you must sign and write your address on all information that you supply to your adversary. By doing so, you indicate that to the best of your knowledge the information is complete and correct. Also, remember that Rule 26(g) requires you to tell the truth and disclose all information.

(d) Additional Methods of Obtaining Information

(i) Depositions: Rules 27, 28, 30, 31, and 32

In a deposition, a party or any other person who may have useful information is questioned. Depositions are usually conducted by the attorney for the party who is seeking the information.

Oral depositions take a similar form to the examination of witnesses at a trial. Basically, a meeting is set up by you or your lawyer with the person you want to depose (the defendant or a potential witness),[12] the opposing lawyer (the other side normally will have one), and a stenographer.[13] Under Rule 26(d), depositions (as well as any other forms of discovery) may be sought only after the initial mandatory meeting between the parties has taken place, unless the court gives permission.[14] Rule 30(a)(2)(A) limits the number of depositions each side may take to a maximum of ten. Nevertheless, if you feel that you need to take more depositions, you may seek the court's permission. To determine whether to grant your request for more depositions, the court will look at several factors, including (1) whether the information you are seeking is unreasonably cumulative or duplicative[15] or if it can be obtained more conveniently from another source; (2) whether you have already had and passed on the opportunity to get the information you are seeking; and (3) whether the burden or expense of the proposed discovery outweighs its likely benefit.[16]

At the deposition, you may ask a broad range of questions. Depositions are particularly useful because they give you the opportunity to obtain an uncoached, spontaneous response from the deponent (the person being questioned).[17] Depositions are often considered the most beneficial form of discovery because they provide the parties with face-to-face contact, unlike other discovery methods.

The problem with depositions, however, is that they tend to be time-consuming and expensive. If you depose someone, you must usually hire a stenographer and pay the costs of having the stenographer's notes typed out in readable form. Both sides, their attorneys, and the witness must arrange a suitable time and place for the deposition. Rule 29 of the Federal Rules of Civil Procedure can offer some relief by providing for the use of stipulations.[18] If you and your opponent agree, you can hold the deposition in a place convenient for you (such as the jail or prison), and you can tape record the deposition instead of hiring a stenographer.

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12. The "defendant" (sometimes called "respondent") is the party being sued. The "plaintiff" (sometimes called "petitioner") is the party who filed the papers to bring the suit. The "deponent" is the person questioned in a deposition.

13. The "stenographer" is a professional secretary who types in shorthand everything said during the deposition.

14. Fed. R. Civ. P. 26(d).

15. "Cumulative" refers to discovery requests so broad and including so much material they are difficult or impossible to fulfill within a reasonable time period. "Duplicative" means discovery requests repeating earlier discovery requests needlessly. These requests are often made with the goal of making it hard for the other side to meet requests.

16. Fed. R. Civ. P. 26(b)(2)(C).

17. The deponent may not be as well prepared by his attorney as he will be at the trial, and the attorney will not have an opportunity to review the deponent's responses before you receive them.

18. A "stipulation" is a written agreement between the parties to a court proceeding which states that they agree to a certain fact, rule, or way of proceeding.

If your opponent is unwilling to stipulate to alternative methods of taking a deposition, you can also make a motion to the court to order him to cooperate.[19] Be prepared to show specific reasons for your request (for example, that you cannot afford a stenographer). Another option is to obtain written depositions. If you choose to use written depositions, you should refer to Rule 31 for the exact procedure. However, you should note that the use of written depositions does not allow you to get the face-to-face, un-coached answers which you can probably get with oral depositions.

(ii) Interrogatories: Rule 33

Interrogatories are written questions that must be answered in writing under oath. Only parties to a suit (you and your opponent) can be ordered by the court to respond to interrogatories. Unlike depositions, outside witnesses cannot be ordered to respond to interrogatories. Apart from this important limitation, interrogatories are a very useful device because they are inexpensive. Rule 33(a) limits the number of questions each party may ask to twenty-five. Nonetheless, if you feel you need to ask more than twenty-five questions, you may ask the court for special permission to do so. To determine whether your request should be granted, the court will consider whether the information you are seeking is unreasonably repetitive, whether you have already had the opportunity to obtain the information, and whether the burden or expense of the additional interrogatories would outweigh their likely benefit.[20] Interrogatories may be sent as soon as you and your opponent have attended the mandatory meeting under Rule 26(f). Note that many local courts and individual judges have their own special rules for handling interrogatories. If you are considering serving interrogatories, you should check with the clerk of the court to find out if special rules apply to you.

After sending the interrogatories to your opponent, he must answer within thirty days unless there is a court order stating otherwise, or you and your opponent agree that there should be more or less time allowed.[21] As with depositions, your questions must be relevant to the case, they cannot ask for privileged material, and they cannot be unduly or unreasonably burdensome to the other side. If you are suing a prison official for assault, for example, you might ask the following questions in your interrogatory:

(1) Were you on Block 8 at or around 8:00 P.M. on January 30, 1999?
(2) Why were you on Block 8 at 8:00 P.M. on January 30, 1999?
(3) At 8:00 P.M. on January 30, 1999, did you hear any noise coming from the east dayroom?
(4) Did you go inside the east dayroom shortly after 8:00 P.M. on January 30, 1999?

You will notice that in order to obtain specific answers, you will need to ask specific questions. You should be careful not to phrase your questions in a manner that allows only a "yes" or "no" answer if you want more information. Questions (1), (3) and (4) above are types of questions that would be answered with only a "yes" or "no." But question (2) *cannot* be answered by a "yes" or "no."

If you have trouble getting answers to your interrogatories and there is no legitimate reason for your opponent's failure to respond (such as a claim that you are seeking privileged or irrelevant information), then you can submit a motion for an order compelling discovery under Rule 37(a)(2)(B). However, in order for a court to grant your motion, you must be able to show that, before asking the court for help, you made every effort to get the answers from your opponent. If the judge does grant your motion, your opponent will be penalized by the court if he does not respond to your interrogatories. Some judges are reluctant to issue orders compelling discovery, so you should read the Federal Rules of Civil Procedure closely and prepare an argument to show why you need the information requested and that you have a right to receive it.

(iii) Production of Documents: Rule 34

Rule 34 of the Federal Rules of Civil Procedure enables you to obtain documents and other physical objects in your opponent's possession. Once again, you may only get those materials that are relevant to your case and are not privileged. Like other forms of discovery, permission of the court is not generally required and it is assumed by the Rule that the parties will cooperate in disclosing the needed material.

You can request materials after you have met with your opponent under Rule 26(f), or you can ask the court for permission to request materials sooner. As with interrogatories, there is a thirty-day period in which to respond. If your opponent refuses to cooperate with a reasonable request, you can file an order to

19. Fed. R. Civ. P. 26(c)(2).
20. Fed. R. Civ. P. 26(b)(2)(C).
21. Fed. R. Civ. P. 33(b)(3).

compel discovery under Rule 37(a)(2)(B). If your opponent does not comply with the order, you can make a motion asking the court to sanction your opponent under Rule 37(b).[22]

A request for production must describe the name and date of each document or object as specifically as possible. You should try to find out as much as you can about the documents or objects your opponent has that might be useful to you. Note: when prison officials provide documents in discovery, they often "redact," or blacken out, information they think is secret or sensitive. If you think your opponent is hiding information you need and are entitled to see, you can move for an order compelling discovery under Rule 37(a)(2)(B).

Remember that Rule 34 does not limit you to requesting documents that might be found in an official file; you can ask for books, accounts, memoranda, letters, photographs, charts, physical evidence, or any other object you can describe specifically. It is possible that you might request such a large volume of material that it is only feasible for your opponent to send you copies. In that case, you should be prepared to pay copying costs or ask the court to pay them under a poor person's order.[23]

(iv) Subpoenas: Rule 45

Rule 45 allows you to compel witnesses who are not parties to the suit to attend a deposition or trial. You can also ask the witness to bring with them documents or other discoverable materials that fall under Rule 34. A subpoena to a third party to produce such material is often called a subpoena *duces tecum*. If you serve a subpoena on a third party—either to testify or to produce documents—and the party refuses, the court may hold that party in contempt for failure to comply. In order to file a subpoena, you must obtain a form by writing to the clerk of the court.

(v) Admissions: Rule 36

Rule 36 is a convenient tool allowing you to serve a written "request for admission" to your opponent. You do not need the court's permission to serve this request but you must wait until after you attend the Rule 26(f) meeting with your opponent. The form of a request for admission is similar to an interrogatory, except that you must prepare a list of statements for your opponent to admit or deny. The court will consider the statements admitted unless your opponent submits a written denial within thirty days.

Here are some statements that you might include in a request for admission, using the prison assault example presented earlier in Section B(2) of this chapter:

(1) Admit that you were in Block 8 at 8:00 P.M. on January 30, 1999.
(2) Admit that you heard noises coming from the east dayroom at 8:00 P.M. on that evening.
(3) Admit that you went inside the east dayroom shortly after 8:00 P.M. on that evening.
(4) Admit that the attached copy of the incident report is a true and accurate copy of the original on file.

Note that in requests for admission, you cannot make open-ended information requests, like in question (2) of the interrogatory examples in Part B(2)(d)(ii) above.[24] Also, requests for admission under the Federal Rules are intended primarily to resolve issues that are preliminary, incidental, or without substantial disagreement. If you ask your opponent to admit a fact that presents a "genuine issue for trial," he must respond but may deny the matter until evidence is presented. But, Rule 37(c)(2) states if you prove a fact your opponent has refused to admit, your opponent may be required to pay some of your attorney's fees.

(e) Duty to Disclose

Both parties have the right to discover important information from the other side, and both parties have the responsibility to cooperate in making discoverable material available. If you believe, however, that your opponent has made an unreasonable discovery request of you—for example, one that asks for privileged information or that is meant to intimidate you or needlessly consume your time and money—you can move for a protective order under Rule 26(c) instead of preparing a response to the request.

In a motion for a protective order, you must give the judge a good reason why your opponent's request for information was improper or unreasonable. You must also show that you have made every effort to resolve

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22. A sanction is a penalty or punitive measure that results from one's failure to comply with a law, rule, or order. *See Black's Law Dictionary* (8th ed. 2004). Usually, sanctions are monetary fines, but they can also be imprisonment or dismissal of a lawsuit.

23. A poor person's order is a statement signed under oath and submitted to the court that requests a waiver of court costs and states that the applicant is financially unable to pay.

24. "Why were you on Block 8 at 8:00 P.M. on January 30, 1999?"

this issue with your opponent before you sought help from the court (for example, you told your opponent that you thought his request was unreasonable and he refused to make any changes). If the judge grants a protective order, your opponent's request will either be thrown out (in which case you will not have to respond) or be limited (in which case you will only have to respond to part of the request).

(f) Sanctions: Rule 37

Rule 37 allows the court to issue sanctions (monetary fines) against any person who fails to comply with the rules of discovery. This provides a way for the court to enforce discovery rules.

If your opponent has not responded to your request for discovery and you have made every effort to get him to respond, you can move for an order compelling your opponent to comply with your request. If your motion is granted but your opponent still does not comply, the court may hold your opponent in contempt of court, and your opponent may face fines or even imprisonment. If the plaintiff refuses to comply with discovery requests, the court may dismiss the lawsuit. All of these punishments are available under Rule 37. Often, parties will be encouraged to comply with discovery requests if they find out that their opponent has moved for sanctions.

E. New York Discovery Procedure

Introduction

For the most part, the rules governing discovery procedures in civil suits brought in New York state courts are similar to the federal rules discussed above. The following is a brief description of the New York statutes, noting some of the differences between the federal and New York state rules. If you have a case in a New York state court, you will need to carefully examine both these rules and the cases that apply them. This Section should help you get started.[25]

New York statutes use the term "disclosure" instead of "discovery," but the procedures are basically the same. The statutes governing disclosure are contained in Article 31 of the New York Civil Practice Law and Rules ("N.Y. C.P.L.R.").

A major difference between New York disclosure and federal discovery is that under the New York rules, parties are not required to meet or give out information voluntarily.[26] As a result, you must request any information that you want from your opponent, and vice-versa. Also, you and your opponent do not need to wait until after you meet to begin making requests for information. Generally, information can be requested after a complaint is filed, but only after the defendant has responded or the time period for the defendant's response has expired, whichever comes sooner.

Another difference between the two systems of discovery lies in how to deal with difficulties that arise during the discovery process. Under N.Y. C.P.L.R. 3104, you may request that the court appoint a referee to oversee the process. This may be helpful if you have difficulty getting your opponent to cooperate. But if you make this request, the court has the option of requiring you to pay the referee's expenses. If you are thinking about this option, you may wish to write to the clerk of the court to see how your particular judge generally handles such situations. You should keep in mind the provisions for and costs of getting language translation. According to N.Y. C.P.L.R. 3114, if a witness does not understand English, translation must be provided to that person for all questions and answers. The cost of this translation must be paid by the party seeking the information. If you need information from a person who needs a translator but you cannot pay for this, you should check with the court to see if you have other options.

Methods of Obtaining Information

(i) Depositions

Depositions in New York state court require twenty days notice, unless the court orders otherwise.[27] A subpoena is required to depose someone who is not a party to the proceeding.[28] The federal rules do not

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25. J. Weinstein et. al., New York Civil Practice Law and Rules Manual (2d ed. 1997), provides a great deal of information on New York civil procedure and disclosure. Its organization follows the structure of the N.Y. C.P.L.R., so you can simply consult the section of the Weinstein/Korn/Miller Manual that corresponds to the N.Y. C.P.L.R. section you want to research.

26. For the opposite federal rule, *see* Fed. R. Civ. P. 26(a).

27. N.Y. C.P.L.R. 3107 (McKinney 2005).

28. N.Y. C.P.L.R. 3106(b) (McKinney 2005).

normally require advance notice or a subpoena. As with the federal rules, any material that is requested through disclosure in New York courts must be relevant and not privileged. If you are in a situation where you think information that you want to request, or information requested from you, may be "privileged," you should refer to N.Y. C.P.L.R. 3101, which details what types of information are privileged and what information may be requested through discovery.

Section 3106(c) of the N.Y. C.P.L.R. requires the court's permission before a deposition can be taken from a person in prison. This rule affects both parties: it applies if you need to depose a fellow prisoner and/or if your opponent wishes to depose you. If your opponent does depose you, Section 3116(a) requires that you read your statement (or have it read to you) after the deposition. At this point you are required to sign your deposition. However, before you sign, you should feel comfortable that everything in the deposition is true to the best of your knowledge. If you feel that a change needs to be made, you may write in the change at the end of the deposition. You must also state the reasons for making the change. Once your deposition is finished, Section 3101(e) states that you are allowed to keep a copy. It is always a good idea to request a copy so that you have a record of your testimony.

(ii) Interrogatories

The practice and form for interrogatories is similar to that used in the federal courts; however, some differences exist. Under New York law, without a court order, a *plaintiff* may not serve a defendant with an interrogatory until after the time limit for the defendant to answer the plaintiff's complaint has expired. On the other hand, a *defendant* can serve interrogatories on any other party whether or not he has answered the plaintiff's complaint. In other words, after receiving the complaint, the defendant may immediately serve an interrogatory.[29] Also in New York, the answering party has only twenty days to answer the interrogatory or to object to the questions.[30] Finally, unlike the Federal Rules, New York does not limit the number of interrogatories that may be requested.[31]

(iii) Requests for Production

In New York, requests for production of documents and other materials are similar to requests in federal court under Federal Rules of Civil Procedure. New York also allows the discovery of materials in the custody and control of non-parties, if the court grants permission.[32]

New York courts require that requests for production are not unduly burdensome. This means you must know what you are seeking and it must be relevant to the case. Production requests used for "fishing expeditions" will be thrown out. For example, in *Konrad v. 136 East 64th Street Corporation*, a New York court ruled that even though N.Y. C.P.L.R. 3120(2) does not require requested documents to be "specifically" identified, an overbroad discovery request, without a clear target or focus, would be thrown out.[33] The court noted requests must be relevant and the documents sought described with "reasonable particularity," not impose an undue burden, and represent a "fishing expedition."[34] Returning to the prison assault example earlier in Section B(2)(d) of this chapter, an example of a "fishing expedition" would be a discovery request for the entire file of every police officer who worked in the precinct in which you were arrested.

(iv) Subpoenas

New York rules regarding subpoenas are very similar to the federal rules. Both allow the subpoena *duces tecum* (ordering the witness to appear and to bring specified items), which must be issued by a judge in certain proceedings.[35]

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29. N.Y. C.P.L.R. 3132 (McKinney 2005).
30. N.Y. C.P.L.R. 3133(a) (McKinney 2005).
31. N.Y. C.P.L.R. 3130(1) (McKinney 2005).
32. N.Y. C.P.L.R. 3111, 3120(1) (McKinney 2005).
33. Konrad v. 136 East 64th Street Corp., 209 A.D.2d 228, 228, 618 N.Y.S.2d 632, 633 (1st Dept. 1994) (finding that an overbroad discovery request constituted an undue burden).
34. Konrad v. 136 East 64th Street Corp., 209 A.D.2d 228, 228, 618 N.Y.S.2d 632, 633 (1st Dept. 1994) (requiring that discovery requests be relevant).
35. N.Y. C.P.L.R. 2301–08 (McKinney 1991 & Supp. 2007).

(v) Admissions

With respect to admissions, the N.Y. C.P.L.R. follows the federal rules closely.[36] A request for an admission may be served by the plaintiff after the defendant has answered the complaint, but no later than twenty days before trial. The person receiving a request for admission has twenty days to admit or deny the allegation or give a detailed explanation of why he cannot admit or deny the allegation.[37]

(vi) Motions to Compel Disclosure and Sanctions

If you are having difficulty obtaining information to which you are entitled, you may move the court to compel disclosure under N.Y. C.P.L.R. 3124. If the court grants your motion and your opponent still does not provide you with the information, the court may impose penalties under N.Y. C.P.L.R. 3126. You should also keep in mind that N.Y. C.P.L.R. 3101(h) requires all persons to amend or supplement information they have submitted if at any time they obtain or remember new information that makes their initial statements incomplete or wrong. If this requirement is not followed, the court is authorized under N.Y. C.P.L.R. 3101(h) to make "whatever order may be just." In some instances, this may mean that the court will not allow into the trial any evidence concerning the subject matter that should have been supplemented.

Section 3103 of the N.Y. C.P.L.R. allows the court to issue orders "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." If you feel your opponent obtained information improperly,[38] you may make a motion to the court under N.Y. C.P.L.R. 3103(c), and the court may keep that information from being used as evidence at trial.

This is only a brief overview of the New York Rules. Although they are generally similar to the Federal Rules, if you are suing in a New York state court, be sure to study the relevant sections of the N.Y. C.P.L.R. noted above before proceeding.

F. Criminal Discovery

The rules governing discovery in a criminal prosecution differ from those that govern a civil proceeding. In general, discovery in criminal cases is more restrictive and limited.

The following section, Part C(1), discusses criminal discovery in federal cases. It explains that the prosecution must turn over certain materials to the defendant in all criminal cases under the Sixth Amendment of the United States Constitution. Part C(2) presents an outline of the discovery rules that apply in New York criminal cases. Finally, there is a brief note about federal discovery procedures. The New York rules were modeled on the federal rules. Remember that this part does not treat criminal discovery rules in detail. If you are involved in a criminal case, you should refer to the applicable rule and research any cases that apply the rule.

Federal Constitutional Requirements

According to the rule laid down by the U.S. Supreme Court in *Brady v. Maryland*, a prosecutor may not refuse a request by the defendant for evidence that is favorable to him and is material either to guilt or to punishment.[39] Suppression of such "exculpatory" evidence (evidence which helps the defendant), even as a mistake, is unacceptable under *Brady*.

This does not mean that a prosecutor must disclose *all* evidence favorable to a defendant. The *Brady* rule only requires disclosure of favorable evidence that is crucial to the defendant's case. Any evidence that is crucial to proving your innocence *must* be disclosed as a matter of right. The prosecutor's failure to reveal

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36. *See* N.Y. C.P.L.R. 3123 (McKinney 2005); Fed. R. Civ. P. 36.

37. N.Y. C.P.L.R. 3123 (McKinney 2005). For a more detailed explanation of an admission, see Part B(2)(d)(v) of this Chapter.

38. For an example of information obtained in an "improper manner," see *Juskowitz v. Hahn*, 56 Misc. 2d 647, 648, 289 N.Y.S.2d 870, 871–72 (Sup. Ct. Nassau County 1968), where the defendant obtained evidence from the plaintiff without notifying the plaintiff's attorney. The court, while declining to make a judgment on whether the defendant's actions were unethical, decided that the circumstances were sufficient to warrant suppression of the evidence.

39. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963). However, under *Arizona v. Youngblood*, if the police lose evidence that is potentially exculpatory, the defendant must show bad faith on the government's part in order to prevail in court. Arizona v. Youngblood, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988).

such evidence may have a number of consequences, including a new trial or the striking of evidence offered by the prosecution.[40]

Federal courts have indicated several limitations to the *Brady* rule. First, the prosecution is only required to disclose evidence that helps the defendant ("exculpatory evidence") if it is "material"—that is, if it would affect the outcome of the trial.[41] Withholding "*Brady* information" may not result in a new trial if there is enough other evidence to convict the defendant. Furthermore, *Brady* does not require the prosecution to turn over evidence the defense knew existed or should have been able to take advantage of without the help of the prosecution.[42] An example of this rule, as applied in federal court, is a situation in which the prosecution does not give the defense a witness' pretrial statement, but instead suggests that the defense may want to interview the witness. Even though the prosecution withheld the statement, it cannot be said to have "suppressed" the evidence.[43]

Second, *Brady* imposes a duty upon the prosecution to turn over evidence that might help to show the defendant's innocence, but it does not give the defense "unsupervised authority to search through the [state's] files" in search of exculpatory material.[44] It is the state that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision not to disclose is final.[45]

Exculpatory evidence does not have to directly show that the defendant is innocent. It may simply weaken the prosecution's case. One example would be material that casts doubt on a witness' credibility. This material is called "impeachment evidence." The prosecution can be required to turn over a witness' pretrial statements if they are inconsistent with the witness' in-court testimony, because the defense can use the pretrial statement to weaken the witness' testimony.[46]

You should understand that *Brady* represents the minimum standard of discovery guaranteed by the U.S. Constitution in all criminal cases in the United States. Thus, the states are obligated to provide a criminal defendant with this material, as well. State discovery rules, such as those found in New York, may supplement this minimum standard and entitle you to more discovery. In a federal case, however, exculpatory material that must be disclosed under *Brady* is the only discovery material the government must provide to a criminal defendant.

G. New York Procedures

(a) Introduction

New York has been at the forefront of a movement to permit criminal defendants freer access to information. The results have been good. Though criminal defendants are still limited in obtaining information before trial, the New York legislature has passed a set of laws governing discovery, found under Article 240 of the New York Criminal Procedure Law (N.Y. Crim. Proc. L.).[47] Article 240 is patterned on Rule 16 of the Federal Rules of Criminal Procedure. So, if you run into a discovery problem and find federal cases

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40. For specific examples of various applications of the *Brady* rule, see Marvin Waxner, New York Criminal Practice §17.03[8] (2d ed. 2005). *See also* Chapter 13 of the *JLM*, "Federal Habeas Corpus."

41. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40, 57 (1987)) (noting that "the government has an obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment," and defining "material" to indicate that there is a "reasonable probability" that had that evidence been disclosed, the result of the proceeding would have been different (citing States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481, 491 (1985)).

42. United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988) (holding that the government was not required to provide allegedly exculpatory grand jury testimony when the defendant knew or should have known the essential facts).

43. *See* United States v. Salerno, 868 F.2d 524, 542 (2d Cir. 1989) (rejecting the defendant's argument that the government should have had to turn over grand jury testimony of a potential witness when the defendant knew that he might be interviewed). Note that in New York, witnesses' pretrial statements must generally be disclosed even if they are not *Brady* material. People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450 (1961) (finding that justice entitles the defendant to see a witness' prior statement "as long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential").

44. Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40, 58 (1987).

45. Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40, 59 (1987).

46. Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 506 (1995) (noting, in discussing United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that there is no difference between exculpatory and impeachment evidence for *Brady* purposes).

47. N.Y. Crim. Proc. L. §§ 240.10–240.90 (McKinney 2002).

interpreting Rule 16 in your favor, the New York state courts usually will consider the case as persuasive (that is, supportive of your case) for interpreting Article 240.[48]

A general overview of discovery rules found in Article 240 of the N.Y. Crim. Proc. L. follows. Specific problems that may arise will require you to refer to the statutory provisions themselves and any accompanying notes.[49]

(b) Scope of Discovery

a. Discovery Between the Accused and the Prosecutor

You may request a limited amount of information that is "material" to your case. Article 240 allows you to inspect, photograph, copy, or test certain types of "property,"[50] like police reports or recordings of statements.

One type of discoverable material that you may request is any written, recorded, or oral statement you made to the police or to persons acting under police direction "other than in the course of the criminal transaction."[51] You are also entitled to similar statements made by a co-defendant who will be tried jointly with you. This will generally apply where you or a co-defendant have made a statement following arrest. A statement made at the police station is an example. Notice that this does not cover statements made during "the criminal transaction". For example, ordinarily the prosecution is not obligated to turn over copies of conversations between you and an undercover officer during a drug transaction. An exception exists where the statement is recorded electronically; if a conversation is recorded on tape, you are entitled to it through discovery.[52] This can be very helpful in setting up certain defenses, such as entrapment. In an entrapment defense, you need to show that the police induced you to commit a crime you would not have committed if they had left you alone.

Discovery of any statement made before the criminal transaction began can also be important. Such evidence might be important in establishing whether you had the motive or intent to commit the crime. For instance, if you made a statement before a homicide was committed indicating that you hated the victim, it could be used to prove motive. It is important, then, that you discover any material of this sort if it exists.

Another type of discoverable "property" is a transcript of testimony you or a co-defendant made before a grand jury.[53] A transcript of your testimony could be helpful in revealing any weaknesses in your case because it could indicate whether you gave any damaging testimony. It might also help you to maintain a consistent version of your story. If, for instance, you make a statement at trial inconsistent with the testimony you gave before the grand jury, the prosecution could point this out. This inconsistency could weaken your credibility with the judge or the jury. You will want to anticipate and, if possible, prevent this.

Article 240 also allows you to discover scientific evidence,[54] such as a written report or document concerning a physical or mental examination; scientific test or experiment which relates to the crime for which you are charged; psychological reports; ballistics reports (scientific gun examination that can determine whether a bullet was fired from a particular gun); drug tests; semen tests; and blood-typing. Tape or electronic recordings constitute yet another type of discoverable property.[55] The prosecutor must disclose any tape or electronic recording that he intends to introduce at trial if you request such material.

You are also entitled to reports that reveal the approximate date, time, and place of the crime and of the arrest.[56] This information may be useful if you have an alibi. Also you may discover "any other property"

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48. People v. Copicotto, 50 N.Y.2d 222, 226, 406 N.E.2d 465, 468, 428 N.Y.S.2d 649, 652 (1980) (stating that the criminal discovery procedure in Article 240 was adopted from Fed. R. Civ. P. 16).

49. Chapter 17 of Waxner's New York Criminal Practice also provides helpful information about New York criminal discovery. Marvin Waxner, New York Criminal Practice (2d. ed. 2005).

50. "Property" is defined as "any existing tangible personal or real property, including, but not limited to, books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings or handwriting specimens, but excluding attorneys' work product." N.Y. Crim. Proc. L. § 240.10(3) (McKinney 2002).

51. N.Y. Crim. Proc. L. § 240.20(1)(a) (McKinney 2002).

52. N.Y. Crim. Proc. L. § 240.20(1)(g) (McKinney 2002).

53. N.Y. Crim. Proc. L. § 240.20(1)(b) (McKinney 2002).

54. N.Y. Crim. Proc. L. § 240.20(1)(c) (McKinney 2002).

55. N.Y. Crim. Proc. L. § 240.20(1)(g) (McKinney 2002).

56. N.Y. Crim. Proc. L. § 240.20(1)(i) (McKinney 2002).

obtained from you or a co-defendant.[57] This might include weapons, clothing, drugs, tools, cars, or other items. Discovery of this type of property can help you in preparing your case since it gives you insight into what the prosecutor is going to present at trial as a means of linking you to the crime.

b. Discovery Between the Accused and Third Parties: Subpoena *Duces Tecum*

The subpoena *duces tecum* is a process whereby the court orders a witness to bring documents relevant to the court proceedings with them when they come to testify. It is frequently used when information is in the hands of third parties—parties other than the prosecutor (and his staff) and the defendant.[58] Article 240 does not allow the prosecutor or defendant to discover third party material by the usual means of a demand to produce or motion for discovery. Therefore, the subpoena *duces tecum* is the method used in seeking disclosure of this material.

In order to obtain a subpoena *duces tecum* for pretrial discovery purposes under N.Y. Crim. Proc. L. Section 610.20(3), in your motion you must show the following:[59]

(1) The materials are relevant and evidentiary;
(2) The request is specific;
(3) The materials are not otherwise reasonably obtainable before trial by the exercise of due diligence;
(4) You cannot properly prepare for trial without production and inspection of the material before the trial and the failure to procure the information may tend to unreasonably delay the trial; and
(5) The application is made in good faith and is not intended to be a general "fishing expedition."
(6) In addition, your motion for a subpoena *duces tecum* should indicate a specific time and place for inspection of the desired materials.

(c) Non-discoverable Material

The two types of material that are generally not discoverable under Article 240 are (1) attorney's work product, and (2) records of any statement made in the course of the criminal transaction, with the exception of any electronic recordings that the prosecutor intends to introduce at trial.[60] "Attorney's work product" is defined in the statute as "property to the extent that it contains the opinions, theories, or conclusions of the prosecutor, defense counsel or members of their legal staffs."[61] The prosecutor is not required to turn over memoranda, or other documents containing his legal theories or opinions. In the same manner, you are not required to produce yours if a prosecutor's demand is made. If you have, for instance, several notes laying out the defense of consent in a rape charge, you do not need to reveal the means by which you are going to attempt to show consent. This rule is very similar to the work product rule found in civil discovery.

(d) Procedures to Obtain Information

Under N.Y. Crim. Proc. L. Section 240.10(1), you may obtain access to any discoverable material before the trial begins by serving a "demand to produce" on the prosecutor.[62] A demand to produce is a written notice that you may serve on your adversary without first getting permission from the court. It will include information as to what "property" you want to inspect, and it must provide a reasonable notice of the time at which you desire to conduct the inspection. It is important to be fairly specific in making your demands. You are not permitted to go on a "fishing expedition" by requesting in very general terms to inspect property. For

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57. N.Y. Crim. Proc. L. § 240.20(1)(f) (McKinney 2002).

58. *See* State *ex rel*. Everglades Cypress Co. v. Smith, 139 So. 794, 795, 104 Fla. 91, 93 (Fla. 1932) (stating that the process of subpoena *duces tecum* is applicable to witnesses other than the adverse party to the case).

59. People v. Price, 100 Misc. 2d 372, 379, 419 N.Y.S.2d 415, 420 (Sup. Ct. Bronx County 1979). The list cited above is not a direct quote from the case, but rather reflects clarifications of the case's meaning as subsequent case law has interpreted it.

60. *See* United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988) (stating that a prosecuting party only has the duty to disclose exculpatory evidence which is known to the prosecution but unknown to the defense).

61. N.Y. Crim. Proc. L. § 240.10 (McKinney 2002). However, if any exculpatory *Brady* material exists, see Part C(1) of this Chapter, then a duty to disclose that particular evidence is imposed, despite the fact that the material might include some work product. *See* People v. Finkle, 103 Misc. 2d 985, 986, 427 N.Y.S.2d 374, 375 (Sup. Ct. Sullivan County 1980). Routine police records containing information required to be filed in the normal course of business are not exempt from discovery. People v. Simone, 92 Misc. 2d 306, 312–13, 401 N.Y.S.2d 130, 134 (Sup. Ct. Bronx County 1977).

62. See N.Y. Crim. Proc. Law §§§ 240.80, 240.90, and 255.20 (McKinney 2002) for information on filing a motion for an order of discovery.

example, it would be improper for you to demand inspection of any and all information in the prosecutor's files that might be material to the case.

According to N.Y. Crim. Proc. L. Section 240.80, a demand to produce must be filed within thirty days following your arraignment.[63] However, if you are not represented by counsel, the thirty-day period does not start until counsel initially appears on your behalf—provided you have requested an adjournment to obtain such assistance.

Discovery mechanisms are not limited to the defendant. The prosecutor, too, may take advantage of reciprocal discovery under N.Y. Crim. Proc. L. Section 240.30.[64] In addition to discovery, you may also be ordered to provide non-testimonial evidence, such as appearing in a line-up, providing a hand writing sample, fingerprinting, posing for photographs so long as they are not a re-enactment of the crime, or submitting to a reasonable physical or medical inspection.[65] As a defendant, you must respond to the prosecutor's demands to produce by either providing the desired information or filing a refusal of demand under N.Y. Crim. Proc. L. Section 240.35.

The discovery process does not end once the trial begins. Under N.Y. Crim. Proc. L. Section 240.45, certain materials can be discovered at the initial stages of the trial. These materials could prove to be very important to your case. After the jury has been sworn and before the prosecutor's opening address,[66] the prosecutor must turn over to you the following documents or information:

(1) Any statement (including testimony before a grand jury or a videotaped examination) made by a person the prosecutor plans to call as a witness that relates to the subject matter of the witness's testimony;[67]
(2) Any conviction record of a witness to be called at trial if the prosecutor is aware of the record; and
(3) Information concerning any pending criminal action against any witness the prosecution intends to call, if the prosecutor is aware of such action.
(4) You have the same duty to reveal such information before presenting your case.[68]

This information can be helpful because it may permit you to attack the credibility of prosecution witnesses. For instance, if you find out that a potential witness for the prosecution has been previously convicted of perjury, or lying under oath, you may use this information at trial to impeach the witness (that is, to attack his credibility). Revealing this fact to a jury may cast doubt on the truth of the witness' testimony. This could give you an advantage.

(e) Duty to Disclose

Throughout the entire discovery process, there is a duty to disclose properly requested information in the discovery process. This means that both the prosecutor and the defendant must hand over to the other side any important documents or information that the other side has requested. You must be careful not to ignore the prosecutor's demands for discoverable material. Otherwise, you could face court sanctions by the court.[69]

Despite the general duty to disclose, there are situations where a prosecutor or defendant may refuse to reveal requested information. The main requirement for refusing to disclose is that you must have a reasonable belief that the requested material is not discoverable. For example, material may not be discoverable where it is irrelevant, privileged, or subject to a protective order.[70] When refusing to comply with a demand, you must do so in writing and explain the reasons for your refusal.[71] This must be done within fifteen days from the time you are served with the demand unless you can show good cause why you

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63. For an example of a demand form, see Marvin Waxner, New York Criminal Practice, Form No. 17:1 (2d. ed. 2005).

64. However, the prosecutor may only ask for material that is similar in kind and character to the material you are asking for from him.

65. N.Y. Crim. Proc. Law § 240.40(2)(b) (McKinney 2002).

66. In the case of a non-jury trial, the information must be turned over prior to the offering of evidence.

67. This is commonly called *Rosario* material. *See* People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 882–83, 213 N.Y.S.2d 448, 450 (1961). In federal practice these documents are governed by the Jencks Act, 18 U.S.C. § 3500 (2000).

68. N.Y. Crim. Proc. Law § 240.45(2) (McKinney 2002).

69. N.Y. Crim. Proc. Law § 240.70 (McKinney 2002).

70. N.Y. Crim. Proc. Law § 240.35 (McKinney 2002).

71. N.Y. Crim. Proc. Law § 240.35 (McKinney 2002).

need more time.[72] Your refusal must be served upon the demanding party and a copy of it must be filed with the court.[73]

If the prosecutor demands information from you and you refuse, but your refusal is unjustified, the court may order you to disclose the material anyway.[74] Similarly, if the prosecutor refuses to provide information that you demand, but the court finds the prosecutor's refusal of your demand unjustified, it will order that the prosecutor give you the material you requested.[75] The court may also order discovery of any other materials the prosecutor intends to use at trial if you show that such property is material to your case and that the request is reasonable.[76]

If you feel there is good reason for refusing to turn over some of your material, you can apply for a protective order, which will deny or limit discovery. Likewise, if the prosecutor thinks there is a good reason not to turn over information to you, the prosecutor can apply for a protective order. Even other parties affected in your case can apply for a protective order if they think there is a good reason not to turn over information. The court can also issue a protective order on its own initiative.[77]

In order to be granted a protective order denying or limiting discovery by the other side, you must show good cause. Good cause includes constitutional limitations; danger that physical evidence may be destroyed or damaged; substantial risk of physical harm; the possibility of intimidation or bribery (usually a prosecutor's defense); a risk of unjustified annoyance or embarrassment to any person; any potential negative effects on the legitimate needs of law enforcement, such as protection of informants; or any other factor that outweighs the usefulness of discovery.[78] When filed, a motion for a protective order suspends discovery of the particular matter.[79] This means that you or (the prosecutor) won't be forced to hand over the disputed material until the judge makes a decision on your request for the protective order.

It is extremely important that you follow these rules. If you refuse to disclose information requested by the prosecutor, you must be sure to establish that you have a "good cause." If you do not, the court may order sanctions.[80] The court may, for example, prohibit the use of certain evidence or prohibit you from calling of certain witnesses at your trial. It may also take "any other appropriate action" that it thinks is reasonable to sanction you. Therefore, it is important that you pay special attention to the procedures involved, particularly to the time limits (deadlines for filing certain motions and requests) found throughout N.Y. Crim Proc. L. Section 240.

It is also important to remember that there is a continuing duty to disclose any additional information subject to discovery.[81] This means that if you have made a demand for material and the prosecutor later receives information that is covered by your original request, the prosecutor must turn it over that information to you. Similarly, you must turn over material that you later become aware of if it is covered by a prosecutor's earlier demand to produce.

(f) Summary

This description of various discoverable materials and information is meant only to give you a very general picture of the tools that are available to you in a criminal proceeding. Effective use of these tools requires a careful reading of Article 240 of the N.Y. Criminal Procedure Law and the particular sections relating to types of discoverable material. You must also look at the case law interpreting the various provisions, particularly if you are looking for the answer to a very specific question. Much of the case law can be found in the annotations to the New York statutes, which are listed directly after the statute provisions. Supplemental treatises (other articles) may also be helpful.

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72. N.Y. Crim. Proc. Law § 240.80(2) (McKinney 2002).
73. N.Y. Crim. Proc. Law § 240.35 (McKinney 2002).
74. N.Y. Crim. Proc. Law § 240.40(2)(a) (McKinney 2002).
75. N.Y. Crim. Proc. Law § 240.40(1)(a) (McKinney 2002).
76. N.Y. Crim. Proc. Law § 240.40(1)(c) (McKinney 2002).
77. N.Y. Crim. Proc. Law § 240.50(1) (McKinney 2002).
78. N.Y. Crim. Proc. Law § 240.50(1) (McKinney 2002).
79. N.Y. Crim. Proc. Law § 240.50(3) (McKinney 2002)
80. N.Y. Crim. Proc. Law § 240.70(1) (McKinney 2002).
81. N.Y. Crim. Proc. Law § 240.60 (McKinney 2002).

H. Federal Discovery

If your criminal case is in federal court, you should refer to Rule 16 of the Federal Rules of Criminal Procedure for the discovery rules. Since Article 240 of N.Y. Criminal Procedure Law is very similar to Rule 16 of the Federal Rules of Criminal Procedure, there are really no major differences in form. Federal Rule 16 provides for basically the same types of discoverable material,[82] and has similar rules for limiting the discovery process by protective orders.[83] There are also provisions for sanctions if a party does not follow the Rule[84] or violates the continuing duty to disclose.[85]

It is important to note, however, that although Federal Rule 16 is very similar in form to Article 240 of the N.Y. Crim. Proc. L., the federal rule is applied differently in practice. Discovery is harder to get in federal courts than in New York state courts, which makes it harder for you to get information that you want from the prosecutor. This is because federal courts allow the prosecutor to make more decisions about what he will and will not disclose to you. The courts will usually support those decisions.

When you make a specific request or motion, be sure to cite the relevant subsections of Rule 16 as authority for your specific requests and motions. If you need to subpoena a third party to produce documents or evidence (subpoena *duces tecum*), refer to Rule 17(c) of the Federal Rules of Criminal Procedure.

I. Conclusion

Discovery is a process by which you and your opponent can find out important information from each other about your case. The rules of discovery govern when you may request information from your opponent and when you are required to disclose information to your opponent. These rules differ depending on whether your case is a civil or criminal matter and whether you are in state or federal court. It is important to find out the rules that apply to the court you are in, since failing to comply with the appropriate rules of discovery may result in the judge imposing penalties on you or even throwing your case out of court.

82. *See* Fed. R. Crim. P. 16(a) and (b).
83. *See* Fed. R. Crim. P. 16(d)(1).
84. *See* Fed. R. Crim. P. 16(d)(2).
85. *See* Fed. R. Crim. P. 16(c).

APPENDIX A

SAMPLE DISCOVERY DOCUMENTS

A-1 Sample Request For Production of Documents
A-2 Sample Request For Admission
A-3 Sample Notice of Interrogatory
A-4 Sample Notice of Motion for Order Compelling Discovery

Selected legal forms for conducting discovery in federal court follow. ***Do not tear these forms out of the book***. You must copy them onto your own paper, filling in appropriate information that applies to you. You may be able to adapt these forms to state procedure if your state's discovery law is similar to that contained in the Federal Rules of Civil Procedure. In that case, you should replace the federal rule cited with the applicable state law or rule. But, you should always consult a legal form book for your state if you are not sure that these forms conform to your state's procedure.

A-1. SAMPLE REQUEST FOR PRODUCTION OF DOCUMENTS[86]

[proper case caption][87]

Plaintiff [*your name*] requests defendant [*defendant's name*] to respond within [*number*] days to the following requests, namely that:

Defendant produce and permit plaintiff to inspect and to copy each of the following documents: [You should list the documents either individually (for example, minutes of a prison disciplinary hearing) or by category (for example, personnel files of one of the defendants) and describe each of them.]

[You should also state the time, place, and manner of making the inspection and of making the photocopies. You may wish to request that the defendants send copies of the documents to you at your prison facility. You should also request that the defendants send a list of all of the documents they are sending so that you make sure that none of the documents were lost in transit.]

Defendant produce and permit plaintiff to inspect and to photograph, test, or sample each of the following objects: [list the objects either individually (baton used by guard) or by category (blood and hair samples of the guard or the samples obtained from you during a medical examination).]

[Again, you should ask the defendants to send the evidence to you, unless you are concerned that the objects will be interfered with before they reach you at the prison. You may wish to request specifically that the objects are sent in sealed containers so that you can see if they are tampered with before they reach you. However, if they are tampered with before they reach you, you may have no remedy.]

Defendant permit plaintiff [or name someone that will get the information for you] to enter [describe property to be entered] and to inspect, photograph, test or sample [describe the portion of property and the objects to be inspected. Since you will not be able to leave your facility to visit a property, you should ask someone else to visit the cell block or other area where the incident that you are complaining about occurred.]

[You should also state the time, place, and manner of making the inspection and performance of any related acts.]

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

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86. Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-26 (4th ed. 2004) (Form D-1).

87. Chapter 6 of the *JLM*, "An Introduction to Legal Documents," includes examples of what case captions look like.

A-2. SAMPLE REQUEST FOR ADMISSION[88]

[proper case caption]

Plaintiff [*your name*] requests defendant [*defendant's name*], within [*number*] days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following documents, exhibited with this request, is genuine:

[Here list the documents and describe each document that you have so that the defendant will be able to verify that it is the actual document and not something that has been changed.]

That each of the following statements is true:

[Here list the statements that you would like the defendant to admit. If you believe that the defendant may not want to admit certain things, you may not want to include those things in a request for admission, but in an interrogatory.]

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

A-3. SAMPLE NOTICE OF INTERROGATORY[89]

[proper case caption]

To: [Each party and the attorney for each party]

PLEASE TAKE NOTICE that pursuant to Rule 31, Fed. R. Civ. P., the following interrogatories are to be propounded on behalf of [*party seeking answers*] to [*name and address of deponent*] by [*name and title of deposition officer*] pursuant to notice served herewith.

[Set out interrogatories in numerical order.]

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

88. Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-30 (4th ed. 2004) (Form F-1).
89. Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-23 (4th ed. 2004) (Form B-9).

A-4. SAMPLE NOTICE OF MOTION FOR ORDER COMPELLING DISCOVERY[90]

Note: This motion seeks to compel production of documents. This form may also be used if your opponent has refused to comply with a different discovery request (for example, failing to respond to interrogatories). Simply change the language referring to a request for production of documents to indicate the type of discovery you are seeking.

[proper caption]

[*Plaintiff/defendant*] moves this court for an order pursuant to Rule 37 of Fed. R. Civ. P. [*describe relief sought*]. A copy of a proposed order is attached to this motion. The reasons supporting this motion include [*explain reasons such as the defendant's failure to answer your interrogatories, to produce records, or to allow you to perform discovery in a way that was practical for you*].

[*Plaintiff/defendant*] further moves the court for an order seeking reasonable attorney's fees and costs and expenses incurred in this proceeding. There exists substantial justification for seeking fees, costs and expenses, because [*explain reasons why such as defendant's ignoring your requests or defendant's telling you that your case was worthless because you are a prisoner*].

This motion is based upon the notice, pleadings, records, and files in this action, and the attached supporting affidavits [*or*: declarations] of [*party, witness, attorney—persons who can state that they know that the defendant did not produce the documents or that you did not receive them*] and the attached memorandum of law [*if necessary or appropriate*], and oral and documentary evidence to be presented at the hearing on the motion [*if you think a hearing will be necessary*].

Dated:

[date] [city, state]

Signed,
[your name & address]
Plaintiff, *pro se*.

90. Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-34 (4th ed. 2004) (Form G-1).

A JAILHOUSE LAWYER'S MANUAL

Chapter 9:
Appealing Your Conviction or Sentence

Columbia Human Rights Law Review

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CHAPTER 9

APPEALING YOUR CONVICTION OR SENTENCE*

A. Introduction

This Chapter explains how you can get your conviction undone or your sentence reduced if something was done incorrectly at your trial or hearing. To do so, you "appeal" to an "appellate court" which has the power to overrule a lower court's decision. As the "appellant," you argue that the trial court's judgment[1] against you was wrong because of harmful errors that occurred in your case.

This Chapter deals specifically with the law of New York State. If you have been convicted or sentenced in a federal court or in another state's court, your appeal will be governed by federal law or by the law of that other state and you should use your prison's law library to find information about the law that applies to your appeal. Even if New York law does not apply to your appeal, however, you may find it useful to read this Chapter for background information about appeals in general.

For your appeal, you should quickly get a lawyer to assist you. You should act quickly because there are time limits for starting an appeal. These time limits are strictly enforced. After they have expired, it may be impossible for an appellate court to consider your appeal, even if your appeal would otherwise have been successful. See Part B(1) for information about time limits. The Constitution guarantees that you can have a lawyer for your appeal, even if you can't pay for one.[2] You should make sure you have a lawyer because, among other reasons, many issues that could win your appeal are difficult to recognize by yourself. Because of the time limits, appealing by yourself is risky: you may lose the chance to raise an issue before you learn enough to even notice it. See Part C(1) for information on how you can get a lawyer.

Part A of this Chapter (the part you are reading now) is the introduction. Part B discusses limitations on your right to appeal, including time limits and restrictions that apply if you pleaded guilty. Part C describes what you can do before you appeal or while your appeal is pending, including how to get a lawyer and how to request release on bail. Part D explains what an appellate court can do when it considers your appeal. Part E explains how to actually file papers for your appeal. Part F discusses the possibility of continuing your appeal if the first appellate court decides against you.[3] Part G explains what you can do if your appellate lawyer is not providing "effective assistance of appellate counsel." Part H is a brief conclusion.

At the end of this Chapter, Appendix A helps you figure out where you should file your appeal. Appendix B provides sample papers for appeals, including papers needed to get a lawyer without cost, to get released on bail pending appeal, and to get an extension of time to file your appeal. These forms are samples only: you or your lawyer must write your own versions of these papers. Ideally, you should read the entire Chapter before you file any papers. If you file papers incorrectly or just tear these papers out of the book and send them to a court, the court may ignore them and you may lose your chance to appeal.

You should know that only a small proportion of criminal appeals are eventually granted, but in general, if you think something was done wrong in your case, there's no reason not to try an appeal.

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* This Chapter was revised by Gregory K. Johnson based on previous versions by Douglas Shively, Sydney Bird, Miranda Berge, Peggy Cross, Joy Fuyuno, Deidra D. Dixon, Janet Ellis, and Amy Metzler. Special thanks to Lorca Morello of The Legal Aid Society of New York for her valuable comments.

1. A judgment means your conviction (the entry of a guilty plea or a guilty verdict) and your sentence. *See* N.Y. Crim. Proc. Law § 1.20(13)–(15) (McKinney 2010).

2. *See* Douglas v. California, 372 U.S. 353, 356–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d 811, 814–15 (1963) (establishing that the Constitution requires the state to pay for a lawyer for a defendant who cannot afford one for his first appeal). *See also* Halbert v. Michigan, 545 U.S. 605, 605, 125 S. Ct. 2582, 2583, 162 L. Ed. 2d 552, 556 (2005) (explaining that, assuming state law allows for any criminal appeal at all, the *Douglas* right applies to a first appeal even if the appeal requires permission under state law, but does not apply to second appeals that require permission).

3. *See* Melvin Bressler et al., *Appeals in Criminal Cases*, in New York Criminal Practice Handbook 651, 651 (Lawrence N. Gray ed., 2d ed. 1998 & Supp. 2007). Bressler has been an important resource in the writing of this Chapter of the *JLM*. We strongly recommend it for a detailed, chronological discussion of the criminal appellate process in New York State.

B. Limits on Your Right to Appeal

When deciding whether you should appeal, you should first determine whether there are any limits on your right to do so. This is an important first step because you may have already lost all or part of your right to appeal. You could have waived (given up) or forfeited (lost) your right to appeal in several ways. For example, if you pleaded guilty, you might have agreed to waive your right to appeal as part of a plea bargain. Even if you did not waive your right to appeal, your right to appeal may be limited if you missed certain deadlines or failed to raise certain objections in trial court. Your right to appeal may also be subject to limitations as to which court can hear your appeal, based on which court convicted or sentenced you and what your conviction or sentence was.

This Part will help you to identify if there are any potential limits on your right to appeal. If limits on your right to appeal exist, this Part will also help you determine whether it is possible for you to get your right to appeal reinstated (to get it back).

If you're unsure whether an appeal is possible for you, you should promptly go ahead and file your notice of appeal and get a lawyer anyway. Your appeal may be denied in the end, or you or your appellate lawyer may choose not to continue the appeal, but you'll be no worse off—and if you *are* eligible to appeal, waiting may cause you to lose your chance.

1. Time Limits

The general rule is that you will lose your right to appeal if you wait too long to file a notice of appeal after you have been sentenced. To preserve your right to appeal, you must file two copies of a notice of appeal with the clerk of your trial court within thirty days of the date you were sentenced.[4] You must count thirty days from your original sentencing, even if you were re-sentenced later (except that if you were re-sentenced after the deadline to appeal, you may count from the new sentence if you want to appeal your new sentence).[5] Within the same thirty-day period, you must also serve a copy of the notice of appeal on the District Attorney of the county in which your trial was held.[6] See Part E for information on preparing and filing your papers. This thirty-day period is a critical period, and you have a constitutional right to counsel during this time.[7] **THESE TIME LIMITS ARE EXTREMELY IMPORTANT.**

If you don't file a notice of appeal within thirty days, you usually lose your right to appeal entirely, but you may be able to recover your right to appeal by filing a motion for a time extension.[8] This extension will be granted if you meet two requirements. First, you must make the motion for a time extension within *one year* of the original deadline for filing a notice of appeal.[9] Second, your failure to file on time must have been because of one of the following reasons:[10]

(1) A public servant behaved improperly (for example, if a prosecutor acted to prevent your good-faith efforts to file on time from succeeding[11]);

(2) Your lawyer behaved improperly, died, or became disabled (examples of improper conduct include your lawyer's failure to inform you in writing of your right to appeal,[12] failure to inform you of your

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4. N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 2010).

5. N.Y. Crim. Proc. Law § 450.30(3) (McKinney 2010).

6. N.Y. Crim. Proc. Law § 460.10(1)(b) (McKinney 2010).

7. *See* People v. Montgomery, 24 N.Y.2d 130, 133, 247 N.E.2d 130, 132, 299 N.Y.S.2d 156, 159 (1969) ("It is apparent that the 30-day period in which an appeal must be docketed is a critical time for the defendant. It cannot be successfully argued that an indigent defendant does not have the right to counsel at this stage of his proceedings.").

8. N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2010). The extension may be for no more than 30 days, counting from the date of the decision to grant the extension.

9. N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2010). Although this one-year time limit for making a motion for an extension of time cannot be extended, an appellate court might decide not to enforce the one-year time limit in extremely rare circumstances. *See* People v. Thomas, 47 N.Y.2d 37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979) (holding that, in the interest of justice, the district attorney could not enforce the one-year time limit to file a 460.30 motion when the defendant had made an honest effort to appeal within the appropriate time limit and action by the district attorney had contributed to the failure of the defendant's timely attempt to appeal).

10. N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2010).

11. *See, e.g.,* People v. Johnson, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987) (allowing an appeal after the deadline because defendant's prior, timely attempts to appeal had been prevented by actions of the state).

12. *See* People v. Nunez, 178 A.D.2d 1029, 1029, 578 N.Y.S.2d 780, 781 (4th Dept. 1991) (granting extension of

right to apply for leave to appeal as a poor person,[13] and failure to start your appeal after being informed of your desire to appeal[14]); or

(3) You were unable to communicate with your lawyer about whether to appeal before the filing deadline had passed. To win an extension based on an inability to communicate with your lawyer, the inability to communicate must have been (a) because you were in prison and (b) through no fault of your attorney's or of your own (that is, not because you or your attorney made a mistake).[15]

If you do not satisfy both of these requirements—making your motion for an extension within one year after your original thirty days to appeal has passed and showing you missed your original deadline to appeal due to one or more of the three allowable factors—then you will not be granted a time extension. If more than a year and 30 days have passed and your claim involves your attorney's unreasonable failure to file an appeal, you can file a writ of error *coram nobis* with the Appellate Division to claim ineffective assistance of counsel, as described in Part G(3) of this Chapter.[16]

If you think that you can satisfy these requirements, then you should send your motion for a time extension to the appellate court to which you want to appeal.[17] See Form B-5 in Appendix B of this Chapter for an example of a motion for time extension, and see Appendix A of this Chapter to figure out which court you should send your motion to. The motion must be in writing and must contain a sworn statement of the facts that make you eligible for a time extension, and you must notify the District Attorney of your motion so that the District Attorney can file papers opposing your motion.[18]

If questions exist about the facts underlying your request for an extension—for example, whether you were really unable to communicate with your lawyer or simply didn't do so—the appellate court may order the trial court to hold a hearing on these issues.[19] Once the facts are clarified, or if there are no factual questions to begin with, the appellate court will grant or deny your motion for an extension.

If the appellate court grants you a time extension, it will give you no more than thirty days from the day of its decision to file your appeal.[20] If the appellate court denies your motion for an extension, you may appeal the denial only if both (a) a judge on the Court of Appeals gives you permission to appeal and (b) the intermediate appellate court states that it based its decision solely on the law without finding facts.[21] Additionally, you may not appeal a decision denying an extension if your appeal would always have required permission of the same court that denied the extension (that is, if the appeal was not rightful but rather required permission of the court).[22]

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time to appeal because defense counsel failed to provide defendant with written notice of right to appeal); N.Y. Comp. Codes R. & Regs. tit. 22, § 1022.11 (2010) ("[I]mmediately after the pronouncement of sentence … counsel shall advise the defendant in writing of his right to appeal.").

13. *See* People v. Lord, 181 A.D.2d 1076, 1076, 582 N.Y.S.2d 305, 305 (4th Dept. 1992) (granting extension of time to appeal where defense counsel, among other mistakes, gave defendant "improper advice concerning the manner of applying for leave to appeal as a poor person"); N.Y. Comp. Codes R. & Regs. tit. 22, § 1022.11 (2010) ("[I]mmediately after the pronouncement of sentence … counsel shall advise the defendant in writing of … the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal as a poor person.").

14. *See* People v. Lord, 181 A.D.2d 1076, 1076, 582 N.Y.S.2d 305, 306 (4th Dept. 1992) (granting extension of time to appeal where defense counsel, among other mistakes, had failed to carry out defendant's request to appeal); N.Y. Comp. Codes R. & Regs. tit. 22, § 1022.11 (2010) ("[Trial] counsel shall also ascertain whether defendant wishes to appeal … and, if so, counsel shall serve the necessary notice of appeal or application for permission [on the opposing party] and shall file the necessary notice of appeal or application for permission.").

15. N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2010).

16. *See* Perich v. Mazzuca, 2007 U.S. Dist. LEXIS 62219, at *55 (E.D.N.Y. 2007) (finding that New York courts recognize this procedure where filing time has expired). *See also* People v. Perich, 15 A.D.3d 505, 505, 789 N.Y.S.2d 435, 435 (2d Dept. 2005) (implicitly recognizing this procedure where the filing time has expired); People v. Morales, 2003 N.Y. Misc. LEXIS 142, at *7–8 (Sup. Ct. N.Y. County 2003) (explaining why *coram nobis* is the proper procedure).

17. N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2010). See Form B-5 in Appendix B of this Chapter for a sample notice of a motion for extension of time.

18. N.Y. Crim. Proc. Law § 460.30(2) (McKinney 2010).

19. N.Y. Crim. Proc. Law § 460.30(5) (McKinney 2010).

20. N.Y. Crim. Proc. Law § 460.30(1) (McKinney 2010).

21. N.Y. Crim. Proc. Law § 460.30(6) (McKinney 2010).

22. *See* People v. Nealy, 82 N.Y.2d 773, 773, 624 N.E.2d 175, 176, 603 N.Y.S.2d 991 (1993) (holding defendant may not appeal the appellate division's denial of an extension of time to request permission to appeal to that appellate division).

2. Plea Agreements

If you pleaded guilty, your right to appeal is limited in certain ways. If you pleaded guilty as part of a plea bargain or negotiated sentence, you automatically forfeited (lost) your right to appeal about certain matters. This is true even if your plea agreement does not say so. Moreover, many plea agreements contain terms in which you waive (give up) the right to appeal about even more matters, which would be listed in the agreement. The next two parts explain these limits on your right to appeal.

Be aware that if you successfully appeal from a guilty plea, you will still have to face all the original charges against you. If you then negotiate a new plea agreement, or if you go to trial and are convicted, your new sentence could actually be *worse* than the sentence you received under your earlier plea. Thus, unless you have already received the worst possible sentence, there is some risk involved in appealing a guilty plea.

(a) Rights Automatically Forfeited by Your Guilty Plea

If you pleaded guilty, you automatically forfeited the right to appeal many types of errors, even if your plea agreement does not specify them.[23] In general, by pleading guilty, you give up the right to argue the factual issue of guilt.[24] Additionally, you give up the right to raise problems with discovery or other pretrial matters.[25] You may not appeal the following issues if you pleaded guilty:

(1) The insufficiency of the evidence before the grand jury;[26]
(2) The insufficiency of instructions given to the grand jury;[27]
(3) The refusal of the trial court to try you separately from a co-defendant;[28]
(4) The denial of your right to a jury trial;[29]
(5) The denial of your right of confrontation;[30]
(6) The suppression of evidence, if you pleaded without obtaining an explicit ruling on this;[31]
(7) The limits on your privilege against self-incrimination;[32]
(8) The expiration of a statue of limitation (a time limit for bringing charges);[33]
(9) The lack of a factual basis for a plea to a lesser charge;[34]

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23. *See generally* N.Y. Crim. Proc. Law § 220.10 (McKinney 2010); People v. Hansen, 95 N.Y.2d 227, 231 n.3, 738 N.E.2d 773, 776 n.3, 715 N.Y.S.2d 369, 372 n.3 (2000) (listing claims that are forfeited by guilty plea); People v. Gerber, 182 A.D.2d 252, 259–60, 589 N.Y.S.2d 171, 174 (2d Dept. 1992) (listing claims that are forfeited by guilty plea).

24. *See* People v. Garcia, 216 A.D.2d 36, 36–37, 627 N.Y.S.2d 666, 667 (1st Dept. 1995) ("By pleading guilty, the defendant has waived his right to litigate the issue of his guilt. ").

25. *See* People v. Berezansky, 229 A.D.2d 768, 771, 646 N.Y.S.2d 574, 577 (3d Dept. 1996) (holding that a defendant who waives indictment and pleads guilty "waives all discovery and all other pretrial and trial matters").

26. *See* People v. Caleca, 273 A.D.2d 476, 476, 711 N.Y.S.2d 743, 744 (2d Dept. 2000) ("By pleading guilty, the defendant waived his claim that the evidence submitted to the Grand Jury was not sufficient.").

27. *See* People v. Palo, 299 A.D.2d 871, 871, 749 N.Y.S.2d 452, 452 (4th Dept. 2002) ("The contention of defendant that the prosecutor improperly instructed the grand jury does not survive his plea of guilty.").

28. *See* People v. Sheppard, 177 A.D.2d 668, 668, 576 N.Y.S.2d 368, 369 (2d Dept. 1991) ("The defendant's plea of guilty constituted a waiver of the right to seek appellate review of the denial of his severance motion").

29. *See* People v. Walls, 129 A.D.2d 751, 751, 514 N.Y.S.2d 513, 513 (2d Dept. 1987*)* (holding that a guilty plea waives the right to appeal issues relating to both the right to a jury trial and the right to confront witnesses); *see also* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("[A] guilty plea signals defendant's 'intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including … the right to trial by jury'") (quoting People v. Lynn, 28 N.Y.2d 196, 201–02, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78).

30. *See* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("[A] guilty plea signals defendant's 'intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including the right to confrontation.'") (quoting People v. Lynn, 28 N.Y.2d 196, 201–02, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78).

31. *See* People v. Smith, 304 A.D.2d 677, 677, 757 N.Y.S.2d 491, 491 (2d Dept. 2003) ("By pleading guilty before making a motion to suppress evidence … the defendant waived her claim").

32. *See* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("[A] guilty plea signals defendant's 'intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including … the privilege against self incrimination'") (quoting People v. Lynn, 28 N.Y.2d 196, 201–02, 269 N.E.2d 794, 797, 321 N.Y.S.2d 74, 78).

33. *See* People v. Parilla, 8 N.Y.3d 654, 659, 870 N.E.2d 142, 145, 838 N.Y.S.2d 824, 827 (2007) (holding that a statute of limitations defense is not among the rights that survive a guilty plea).

34. *See* People v. Clairborne, 29 N.Y.2d 950, 951, 280 N.E.2d 366, 367, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed.").

(10) The absence of counsel during certain proceedings; and[35]

(11) Your *statutory* (as opposed to constitutional) right to a speedy trial.[36]

By pleading guilty, however, you did not forfeit your entire right to appeal. Generally, you still have the right to appeal about the following errors (and others[37]):

(1) You were denied your *constitutional* right to a speedy trial;[38]

(2) You were charged in violation of your *constitutional* right against double jeopardy;[39]

(3) You were not competent to stand trial;[40]

(4) The statute under which you were convicted is unconstitutional;[41]

(5) Your sentence was illegal;[42]

(6) Your plea was not voluntary or knowing;[43]

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35. *See* People v. Reiblein, 200 A.D.2d 281, 283, 613 N.Y.S.2d 789, 790 (3d Dept. 1994), *appeal denied*, 84 N.Y.2d 831, 641 N.E.2d 172, 617 N.Y.S.2d 151 (3d Dept. 1994) (holding that, by pleading guilty, defendant waived right to appeal on the grounds that defense counsel was not present at psychiatric interview).

36. *See* People v. Smith, 272 A.D.2d 679, 681, 708 N.Y.S.2d 485, 487 (3d Dept. 2000) ("By pleading guilty, defendant waived appellate review of his statutory right to a speedy trial."); *see generally* N.Y. Crim. Proc. Law § 30.30 (McKinney 2010). A statutory right is a right created by an ordinary law. By contrast, a constitutional right is a right guaranteed by the state or federal constitution. Courts are generally less willing to decide that constitutional rights—which are often more fundamental and important—have been waived.

37. *See* N.Y. Crim. Proc. Law § 220.10 nn.221–83 (McKinney 2010), N.Y. Crim. Proc. Law § 470.15 n.18 (McKinney 2010), N.Y. Crim. Proc. Law § 710.70 n.59 (McKinney 2010). *See also* People v. Hansen, 95 N.Y.2d 227, 230–31, N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000) (describing the issues that survive a guilty plea).

38. *See* People v. Lopez, 6 N.Y.3d 248, 255, 844 N.E.2d 1145, 1148, 811 N.Y.S.2d 623, 626 (2006) (noting that a claim regarding constitutional right to a speedy trial cannot be waived by guilty plea and waiver of appeal); People v. Smith, 272 A.D.2d 679, 681, 708 N.Y.S.2d 485, 487 (3d Dept. 2000) ("[D]efendant's right to raise his constitutional right to a speedy trial survives both his guilty plea and the waiver of his right to appeal"); People v. Hansen, 95 N.Y.2d 227, 230–31 n.2, 738 N.E.2d 773, 776 n.2, 715 N.Y.S.2d 369, 372 n.2 (2000) (listing speedy trial right among constitutional claims that survive a guilty plea).

39. *See* Menna v. New York, 423 U.S. 61, 62–63, 96 S. Ct. 241, 242, 46 L. Ed. 195, 198 (1975) (holding that a guilty plea does not waive a claim that the charges amounted to unconstitutional double jeopardy); People v. Prescott, 66 N.Y.2d 216, 221, 486 N.E.2d 813, 815–16, 495 N.Y.S.2d 955, 958 (1985) (holding that a defendant's constitutional double jeopardy claim survives a guilty plea and may be raised for the first time on appeal). But you may not raise your *statutory* right against double jeopardy under § 40.20 of the New York Criminal Procedure Law if you have plead guilty. *See* People v. Prescott, 66 N.Y.2d 216, 220, 486 N.E.2d 813, 815, 495 N.Y.S.2d 955, 957 (1985) (holding that a guilty plea results in forfeiture of statutory double jeopardy claim, even if presented to the court prior to the plea); *see also* People v. Gray, 300 A.D.2d 696, 697, 752 N.Y.S.2d 731, 733 (2d Dept. 2002) (holding that a constitutional double jeopardy claim survives a guilty plea but that a statutory claim does not).

40. *See* People v. Lopez, 6 N.Y.3d 248, 257, 844 N.E.2d 1145, 1150, 811 N.Y.S.2d 623, 626 (2006) (noting that a "challenge to a defendant's competency" is not waived by pleading guilty and waiving the right to appeal); People v. Callahan, 80 N.Y.2d 273, 280, 590 N.Y.S. 46, 50, 604 N.E.2d 108, 112 (1992) (holding that a guilty plea accompanied by waiver of right to appeal does not waive the right to appeal about competency to stand trial); People v. Armlin, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975) (holding that a plea of guilty does not waive right to a mandated competency hearing); People v. Bennefield, 306 A.D.2d 911, 911, 761 N.Y.S.2d 906, 907 (4th Dept. 2003) (holding that "issues relating to defendant's competency survive" a guilty plea and a waiver of a right to appeal).

41. *See* Gesicki v. Oswald, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971), *aff'd*, 406 U.S. 913, 92 S. Ct. 1773, 32 L. Ed. 2d 113 (1972) (holding that a guilty plea does not waive the right to contest the constitutionality of the statute under which a defendant was convicted); *see also* People v. Lee, 58 N.Y.2d 491, 493, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983) ("A defendant by a plea of guilty does not forfeit the right … to challenge the constitutionality of the statute under which he was convicted.").

42. *See* People v. Lopez, 6 N.Y.3d 248, 255, 844 N.E.2d 1145, 1148, 811 N.Y.S.2d 623, 626 (2006) (finding that a claim challenging the legality of a sentence cannot be waived by a guilty plea but noting that an explicit waiver of the right to appeal *does* waive the right to appeal on the basis of harshness of agreed-upon sentence); People v. Seaberg, 74 N.Y.2d 1, 9, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 972 (1989) (finding that a claim challenging the legality of the sentence cannot be waived by a guilty plea).

43. *See* People v. Catu, 4. N.Y.3d 242, 245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005) (reversing conviction on the basis that guilty plea was not "voluntary and intelligent" since defendant was not told he would be subject to post-release supervision); People v. Gerber, 182 A.D.2d 252, 260–61, 589 N.Y.S.2d 171, 175–76 (2d Dept. 1992) ("[A] defendant who pleads guilty is entitled to raise appellate contentions regarding … the voluntary and knowing nature of his plea").

You can argue involuntariness on direct appeal if the involuntariness is apparent on the record and you moved to withdraw your plea before sentencing. *See* People v. Brown, 2010 N.Y. LEXIS 32, at *7–8 (2010). If you did not move to withdraw, courts may refuse to consider the issue as "unpreserved." See Part B(3) of this Chapter for more on the

(7) Jurisdiction was not proper in the trial court;[44]
(8) Your conviction was based entirely upon evidence the prosecutor knew was false;[45]
(9) You were improperly denied a motion to suppress evidence;[46] or
(10) The trial court based your sentence on an improper determination of your prior-felon status.[47]

Even if you have not automatically forfeited the right to appeal the above issues simply by pleading guilty, you still may have given up the right to appeal these issues by either specifically waiving your right to appeal in your plea agreement or by failing to preserve the issues at trial (that is, failing to object when errors occurred). Waiver and preservation are discussed in Part B(2)(b) and Part B(3) of this Chapter, respectively.

(b) Rights You Waive by Agreement

In addition to pleading guilty, you may also have agreed to waive your right to appeal as part of a plea bargain or negotiated sentence.[48] If your plea included an agreement to waive your right to appeal, you still have several options. First, you may claim your waiver was invalid. A waiver is considered invalid if you did not knowingly, intelligently, and voluntarily agree to waive your right to appeal.[49]

Second, you can appeal certain types of claims that are considered so important to society that they *can never* be waived by plea agreement. This means that even if you waived your right to appeal in a plea agreement or as part of a negotiated sentence, you still have a right to appeal certain types of claims.[50] These claims include:

(1) a challenge to a death sentence;[51]
(2) a claim that you were denied your *constitutional* right to a speedy trial;[52]

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preservation requirement. There is an important exception to this requirement: if something in the plea allocution shows that you did not understand what you were pleading guilty to, and the court did not ask any questions to make sure, you can argue on appeal that the plea was not knowing and voluntary, even though you did not move to withdraw it. People v. McNair, 13 N.Y.3d 821, 822–23, 920 N.E.2d 929, 930, 892 N.Y.S.2d 822, 823 (2009) (holding that trial court must ask further questions where defendant's remarks "cast significant doubt" on guilt). If the involuntariness has to do with matters outside the record, such as ineffectiveness of trial counsel, file a 440.10 motion instead of an appeal. For information on Article 440 appeals, see Chapter 20 of the *JLM*.

44. *See* People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985) ("A guilty plea does not forfeit the right to raise a jurisdictional defect.").

45. *See* People v. Pelchat, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984) (finding that a defendant who pleaded guilty was allowed to challenge a conviction when the prosecutor knowingly based the charges on false evidence).

46. N.Y. Crim. Proc. Law § 710.70(2) (McKinney 2010).

47. *See* People v. Lacend, 140 A.D.2d 243, 244, 528 N.Y.S.2d 832, 833 (1988) (modifying status of defendant, who had pleaded guilty, from predicate violent felon to predicate felon and remanding for re-sentencing).

48. A waiver generally covers any aspect of a case that does not fall within certain exceptions. For example, a waiver means that you give up the right to appeal your conviction on the grounds that your lawyer failed to raise certain defenses. *See* People v. Parilla, 8 N.Y.3d 654, 659, 870 N.E.2d 142, 145, 838 N.Y.S.2d 824 (2007) (holding that a waiver of the right to appeal as part of a plea agreement prevented the defendant from raising the issue of a statute of limitations defense on appeal). For information on how other states address the issue of waivers by agreement, see Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 135–45 (1995).

49. People v. Seaberg, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026–27, 543 N.Y.S.2d 968, 972–73 (1989) ("A waiver, to be enforceable, must not only be voluntary but also knowing and intelligent."). A waiver is not voluntary, knowing, and intelligent (and therefore is not valid) if the trial record does not demonstrate that the trial court made certain that the defendant understood the meaning of the waiver before agreeing to it. *See* People v. Billingslea, 6 N.Y.3d 248, 257, 844 N.E.2d 1145, 1149, 811 N.Y.S.2d 623 (2006) (holding that trial court's statement that "when you plead guilty you waive your right of appeal" was not sufficient for the waiver to be knowing since the court did not explain that the defendant's was agreeing to waive rights beyond those that are automatically forfeited by any guilty plea). However, a waiver that is adequately explained in writing and signed by the defendant may be valid even if the trial court does not fully explain the terms of the waiver to the defendant. *See* People v. Ramos, 7 N.Y.3d 737, 738, 853 N.E.2d 222, 222, 819 N.Y.S.2d 853, 853 (2006) (holding that the trial record established that the "defendant knowingly, intelligently and voluntarily waived his right to appeal" based on a written waiver agreement, even though the trial court's explanation to the defendant was unclear).

50. *See* People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (noting that there are "several categories of appellate claims that may not be waived because of a larger societal interest in their correct resolution"). *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 450.10 (McKinney 2010).

51. N.Y. Crim. Proc. Law § 470.30(2) (McKinney 2010) ("Whenever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals.").

(3) a challenge to the legality of court-imposed sentences;[53]
(4) a challenge to the constitutionality of the statute outlawing the conduct to which you pleaded guilty;[54]
(5) a claim regarding your competency to stand trial;[55] or
(6) a claim that ineffective assistance of counsel affected the voluntariness of your guilty plea.[56]

Keep in mind, though, that there may be other claims that society has a strong interest in, including double jeopardy, that *can* be waived.[57]

Finally, note that while you cannot waive your right to challenge an illegal sentence, you can waive your right to challenge your sentence as too harsh or excessive.[58] This is true even if your plea agreement did not contain the promise of a specific sentence as long as you were informed of the potential maximum sentence.[59]

3. Failure to Protest (the "Preservation Requirement")

Appellate courts generally aren't willing to decide questions that the trial court had no chance to consider. Therefore, an error usually must be "preserved" by pointing it out to the trial court at a time when the court had the opportunity to fix it. This applies whether you pleaded guilty or not. To preserve a legal error for review, you (or more likely your lawyer) generally must have objected to the mistake when it occurred or at a later time when the trial court still had the chance to correct the error.[60] In other words, you

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52. *See* People v. Blakley, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461 (1974) (holding that a constitutional speedy trial claim may not be waived and that, where such a plea is attempted, the plea must be vacated); People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (holding that a waiver of right to appeal does not prevent an appeal based on denial of defendant's constitutional speedy trial right).

53. *See* People v. Francabandera, 33 N.Y.2d 429, 434 n.2, 310 N.E.2d 292, 294 n.2, 354 N.Y.S.2d 609, 612 n.2 (1974) (upholding defendant's plea bargain as valid but noting that the legality of a sentence is always appealable); *see also* People v Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46, 50 (1992) (listing the legality of a sentence as among the issues that remain appealable even where a defendant attempts waiver). The right to appeal the legality of a sentence includes the right to appeal an unreasonable delay in sentencing. People v. Campbell, 97 N.Y.2d 532, 533, 769 N.E.2d 1288, 1288, 743 N.Y.S.2d 396, 396 (2002) (holding that a general waiver of the right to appeal does not waive a claim of "unreasonable delay in sentencing" as the claim challenges the legality of the sentence).

54. *See* People v. Lee, 58 N.Y.2d 491, 493–94, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983) (overturning defendant's conviction on the ground that the statute to which defendant plead guilty of violating was unconstitutional); People v. Beaumont, 299 A.D.2d 657, 659, 749 N.Y.S.2d 612, 614 (3d Dept. 2002) (noting that the defendant's right to appeal the constitutionality of the statute under which he was convicted survived his valid waiver of his right to appeal but finding that the defendant did not preserve the issue by objecting at trial).

55. *See* People v. Armlin, 37 N.Y.2d 167, 168, 332 N.E.2d 870, 871, 371 N.Y.S.2d 691, 693 (1975) (holding that defendant's guilty plea could not prevent the defendant from raising on appeal the issue of competency to stand trial).

56. *See* People v. Johnson, 288 A.D.2d 501, 502, 732 N.Y.S.2d 137, 138 (3d Dept. 2001) (stating that "to the extent that a claim of ineffective assistance of counsel impacts on the voluntariness of a defendant's guilty plea, the claim survives a waiver of the right to appeal" but noting that the "claim must ordinarily be preserved by a motion to withdraw the plea or a motion to vacate the judgment of conviction.").

57. For example, in People v. Allen, the Court of Appeals held that a defendant may expressly waive the right to appeal a constitutional double jeopardy ruling in a plea bargain. The defendant in that case pleaded guilty just before the start of a second trial after a mistrial had been declared during the first trial. When he later attempted to appeal his conviction, the Court of Appeals ruled that he had validly waived the right to a double jeopardy defense in his plea bargain. The court determined that society's interest in the right to a double jeopardy defense was not as strong as, for example, its interest in the right to a speedy trial. Therefore, while you cannot waive the right to a speedy trial, you can waive the right to a double jeopardy defense if you agree to do so in your plea bargain. People v. Allen, 86 N.Y.2d 599, 603, 658 N.E.2d 1012, 1015, 635 N.Y.S.2d 139, 142 (1995); *see also* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 220.10 (McKinney 2010). The Court of Appeals later held that the right to appeal a constitutional double jeopardy ruling may be waived as part of a general waiver of the right to appeal even if the waiver agreement does not specifically state that the right to appeal on the basis of double jeopardy is being waived. People v. Muniz, 91 N.Y.2d 570, 575, 696 N.E.2d 182, 186, 673 N.Y.S.2d 358, 362 (1998) (finding that there is "no principled basis upon which to conclude that a defendant cannot impliedly waive a claim of double jeopardy" when the waiver agreement allows the defendant to appeal from all waivable aspects of the case).

58. *See* People v. Espino, 279 A.D.2d 798, 799, 718 N.Y.S.2d 729, 730 (3d Dept. 2001) (noting a defendant may waive the right to appeal a sentence as harsh and excessive but never the right to appeal the legality of a sentence).

59. *See* People v. Hidalgo, 91 N.Y.2d 733, 737, 698 N.E.2d 46, 48, 675 N.Y.S.2d 327, 329 (1998) (finding that a defendant's general waiver of the right to appeal prevented her from appealing her sentence as harsh and excessive).

60. If you make no protest, the intermediate appellate court cannot review the error as a "question of law." N.Y. Crim. Proc. Law § 470.05(2) (McKinney 2010). But an appellate court nonetheless may decide to review the error "in the interest of justice." N.Y. Crim. Proc. Law. § 470.15(6)(a) (McKinney 2010). The "in the interest of justice" exception to the

usually are not allowed to raise an issue for the first time on appeal. Instead, you must have raised the issue at the trial so that the trial court could have addressed it before it became a problem.

In general, you must have identified the specific legal basis for your objection at trial in order to preserve the error for appellate review.[61] That is, it is not enough to have objected without explaining at the time of the objection why you were objecting. However, an appellate court will also review an error on legal grounds that you did not specify at trial if the trial court expressly decided the particular issue in response to an objection by a party.[62] You may also have preserved errors for review on appeal through a request, rather than an objection.[63] This means that if you asked the judge for a particular ruling or instruction[64] but he refused, you may challenge the trial court's refusal even if you did not formally object. However, if you want to challenge an error in the ruling or instruction that the trial court gave, as opposed to challenging the refusal to use your particular instructions, you must have objected.[65] In any event, the issue must have been brought to the trial court's attention.[66]

(a) Errors Not Subject to the Preservation Requirement

If you did not object to an error at your trial and the court did not consider the specific issue, an appellate court will usually refuse to consider the error on appeal, but you may still be able to appeal if the error deals with a fundamental aspect of the fairness of your trial. Such errors fall into two categories: errors reviewed "in the interest of justice" and errors that disrupt the "mode of proceedings."

Any unpreserved error may be reviewed in the interest of justice by New York's Appellate Division courts (the intermediate appellate courts).[67] Thus, if something happened that was so unfair that it may have affected your conviction, but it was not objected to or otherwise preserved, you can still argue that the Appellate Division should consider it in the interest of justice. That is, even if the error you wish to appeal is generally subject to the preservation requirement, you may *ask* an Appellate Division court to consider your appeal.[68] Note that if you did not preserve an issue, an appellate court is not *required* to review it.[69]

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preservation requirement is discussed in Part (b) of this Subsection.

61. *See* People v. Hawkins, 11 N.Y.3d 484, 492, 900 N.E.2d 946, 950, 872 N.Y.S.2d 395, 399 (2008) (holding that a motion must be "specifically directed" at the error to preserve it); People v. Dien, 77 N.Y.2d 885, 886, 571 N.E.2d 69, 70, 568 N.Y.S.2d 899, 900 (1991) (holding that "defendant made only a general objection, thus failing to preserve his argument" for appellate review); People v. Rivera, 73 N.Y.2d 941, 942, 537 N.E.2d 618, 618, 540 N.Y.S.2d 233, 233 (1989) (holding that defendant's general objection did not preserve his argument for appellate review). *But see* People v. Vidal, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889, 309 N.Y.S.2d 336, 340 (1970) ("if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient").

62. N.Y. Crim. Proc. Law § 470.05(2) (McKinney 2010) (a question is preserved "if in reponse [sic] to a protest by a party, the [trial] court expressly decided the question raised on appeal"); *see* People v. Johnson, 144 A.D.2d 490, 491, 534 N.Y.S.2d 207, 209 (2d Dept. 1988) (holding that an issue was preserved even without objection because the trial court expressly decided the question); *see generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.05 (McKinney 2010) (summarizing New York Criminal Procedure Law Section 470.05, which explains when an appeal will be allowed).

63. N.Y. Crim. Proc. Law § 470.05(2) (McKinney 1994 & Supp. 2010); *see also* People v. Leisner, 73 N.Y.2d 140, 147, 535 N.E.2d 647, 650, 538 N.Y.S.2d 517, 520 (1989) (holding that a trial court's failure to give the jury the requested jury instruction was an error preserved for appellate review since there was no "clear intent" by the defense to abandon the request).

64. "Instruction" refers to what the judge tells the jury it should or should not consider as well as what questions the jury must answer when it is deciding the verdict in your case.

65. *See* People v. Narayan, 54 N.Y.2d 106, 112–13, 429 N.E.2d 123, 125, 444 N.Y.S.2d 604, 606 (1981) (holding that where defense requested to speak to his client on the second day of an order disallowing such conversation, but had not so requested on the first day, the request preserved for appeal only the refusal on the second day, not the order itself or its application to the first day). If the trial court grants the instruction that you (or your lawyer) requested but makes a mistake or otherwise gives an instruction different than the instruction that you requested, this error is not preserved for appeal unless you objected to it. *See* People v. Whalen, 59 N.Y.2d 273, 280, 451 N.E.2d 212, 215, 464 N.Y.S.2d 454, 457 (1983) ("Inasmuch as defendant's request was initially granted and his comments after the charge did not alert the [t]rial [j]udge to the error so as to afford an opportunity to correct himself, defendant must be deemed to have waived any objection to the alibi instruction.").

66. This requirement applies to appeals brought by the prosecution too.

67. N.Y. Crim. Proc. Law § 470.15(3)(c), (6)(a) (McKinney 2010).

68. N.Y. Crim. Proc. Law § 470.15(3)(c), (6)(a) (McKinney 2010).

69. *Compare* People v. Benton, 196 A.D.2d 755, 756, 601 N.Y.S.2d 918, 919 (1st Dept. 1993) (court used its judgment to review an incorrect decision which classified the defendant as a second violent felony offender), *with* People

The Court of Appeals (the highest court), by contrast, is limited by the New York State Constitution to only review "questions of law,"[70] which generally means that an issue must have been preserved by objection.[71] But errors that disrupt the organization of the court or the mode of proceedings are treated as questions of law even without preservation by objection.[72] Thus, if the error you wish to appeal falls into the limited class of errors that affect the organization of the court or the mode of proceedings, you can appeal even if you did not preserve the error or even if you agreed at trial to accept the error.[73] These errors are considered so fundamental that they are not subject to the preservation requirement at all.

In either situation, successful appeals are generally based on a derailing of trial procedure or a violation of your "fundamental constitutional rights."[74] Errors that can be raised for the first time on appeal include:

(1) You were tried twice for the same offense in violation of your rights against double jeopardy guaranteed by the New York State or U.S. Constitutions[75] (this protection does not apply to rights against double jeopardy provided by statute rather than a constitution[76]);

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v. Walton, 309 A.D.2d 956, 957, 766 N.Y.S.2d 93, 94 (2d Dept. 2003) (court declined to review defendant's unpreserved claim that he had been wrongly deemed a second violent felony offender). *See also* People v. Gray, 86 N.Y.2d 10, 19, 652 N.E.2d 919, 921, 629 N.Y.S.2d 173, 175 (1995) (holding that a claim of legal insufficiency of the evidence must be preserved for review as a "question of law," but noting that an intermediate appellate court may decide to review such a claim "in the interest of justice" even if it was not preserved). *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.05 (McKinney 2010).

If a court declines to hear your non-preserved claims, one strategy is to include them in an ineffective assistance claim. For guidance on how to make this type of claim, see *JLM*, Chapter 12, Part B(3).

70. N.Y. Const. art. VI, § 3(a) ("The jurisdiction of the court of appeals shall be limited to the review of questions of law [subject to certain exceptions].").

71. N.Y. Crim. Proc. Law § 470.05(2) (McKinney 2010) ("For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered.").

72. *See* People v. Kelly, 5 N.Y.3d 116, 119–120, 832 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005) (discussing the state constitutional limitation on the Court of Appeals and the "mode of proceedings" exception, as well as contrasting this exception with the Appellate Division's authority to review "in the interest of justice").

73. *See* People v. Mehmedi, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (holding that violation of defendant's right to be present at all material stages of the trial was automatically preserved for appeal, even though defendant did not make an objection at trial and "even though counsel may have consented to the procedure"); People v. Patterson, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 903, 383 N.Y.S.2d 573, 577 (1976), *aff'd*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) ("A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law.").

74. The general rule is that even violations of constitutional rights must be preserved. *See* Ulster County Ct. v. Allen, 442 U.S. 140, 151 n.10, 99 S. Ct. 2213, 2221, n.10, 60 L. Ed. 2d 777, 788 n.10 (1979) ("[T]he New York Court of Appeals has developed an exception to the State's contemporaneous-objection policy that allows review of unobjected-to errors that affect 'a fundamental constitutional right'") (quoting People v. McLucas, 15 N.Y.2d 167, 172, 256 N.Y.S.2d 799, 204 N.E.2d 846, 848 (1965)); People v. Kelly, 5 N.Y.3d 116, 119–20, 832 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005) ("in a very narrow category of cases, we have recognized so-called 'mode of proceedings' errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted"); People v. Gray, 86 N.Y.2d 10, 19–22, 652 N.E.2d 919, 921–23, 629 N.Y.S.2d 173, 175–77 (1995) (holding that an objection is necessary for a constitutional error to be reviewed as a matter of law unless the error is among the very narrow class of "mode of proceedings" errors); People v. Voliton, 83 N.Y.2d 192, 195, 630 N.E.2d 641, 643, 608 N.Y.S.2d 945, 947 (1994) (declining to review on appeal a defendant's constitutional challenge to a seizure by the police because the issue was not preserved and did not "impair the essential validity of the criminal proceedings").

75. U.S. Const. amend. V; N.Y. Const. art. I, § 6; *see* People v. Prescott, 66 N.Y.2d 216, 218, 486 N.E.2d 813, 814, 495 N.Y.S.2d 955, 956 (1985) (holding that a claim of double jeopardy can be raised for the first time on appeal because it is a "fundamental principle of our legal system that a defendant may not be twice placed in jeopardy for the same offense"). However, a claim of double jeopardy cannot be raised on appeal if the circumstances surrounding the defendant's failure to object amounted to a waiver of the right to appeal on double jeopardy grounds, or if the defendant has waived the right to appeal by a waiver agreement. *See* People v. Michallow, 201 A.D.2d 915, 916, 607 N.Y.S.2d 781, 783 (1994) (noting that constitutional double jeopardy protections are "so fundamental that they are preserved despite the failure to raise them" by objecting, but holding that defendant's active participation was implied consent and thus acted as waiver of her constitutional right against double jeopardy); People v. Michael, 48 N.Y.2d 1, 7, 394 N.E.2d 1134, 1137, 420 N.Y.S.2d 371, 374 (1979) (holding that a defendant implicitly waived the right to challenge his retrial on double jeopardy grounds); People v. Muniz, 91 N.Y.2d 570, 574, 696 N.E.2d 182, 185, 673 N.Y.S.2d 358, 361 (1998) (a claim of constitutional double jeopardy may validly be waived). For a discussion on waiver of the right to appeal, including waiver of the right to appeal a claim of double jeopardy, see Part (B)(2) of this Chapter.

(2) You were deprived of your right to a lawyer;[77]
(3) You were deprived of your right to be present at an important stage of the trial[78] or other important court proceedings;[79]
(4) Your lawyer was not told of the contents of a note the judge received from the jury before the judge answered the jury's questions;[80]
(5) You were deprived of your right to have your trial supervised by a judge;[81] or
(6) Your sentence, or the way in which it was determined, was illegal.[82]

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76. *See* People v. Biggs, 1 N.Y.3d 225, 231, 803 N.E.2d 370, 771 N.Y.S.2d 49, 53 (2003) (stating that unlike state and federal constitutional double jeopardy claims, which are reviewable even if not preserved at the trial court level, an unpreserved statutory double jeopardy claim is not reviewable).

77. *See* People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) ("The failure to object to the admissions on right to counsel grounds is not fatal since we are concerned with the deprivation of a fundamental constitutional right"); People v. Kinchen, 60 N.Y.2d 772, 773, 457 N.E.2d 786, 787, 469 N.Y.S.2d 680, 681 (1983) ("[A] claimed deprivation of the State constitutional right to counsel may be raised on appeal, notwithstanding that the issue was not preserved by having been specifically raised.").

78. *See* People v. Mehmedi, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (affirming reversal of defendant's conviction on the basis that instructions were given to the jury in defendant's absence, even though defendant's trial counsel did not object to defendant being absent); *see also* People v. Kelly, 11 A.D.3d 133, 142–43, 781 N.Y.S.2d 75, 84 (1st Dept. 2004), *aff'd*, 5 N.Y.3d 116, 832 N.E.2d 1179, 799 N.Y.S.2d 763 (2005) (acknowledging that a violation of the right of a defendant to be present at the material stages of the trial is preserved for appellate review even without an objection, but finding that defendant's right to be present had not been violated).

79. *See* People v. Antommarchi, 80 N.Y.2d 247, 250, 604 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992) (holding that defendant has a right to be present at sidebar questioning of jurors when questioning explores prospective jurors' backgrounds and relates to their ability to weigh the evidence objectively, but not when questioning relates to physical impairment, family obligations, or work commitment); People v. Dokes, 79 N.Y.2d 656, 659, 595 N.E.2d 836, 838, 584 N.Y.S.2d 761, 763 (1992) (finding that a defendant's statutory right to be present at trial includes the right to be present during the selection of the jury, the introduction of evidence, the closing argument of counsel, and the court's charge to the jury); People v. McAdams, 22 A.D.3d 885, 885–86, 802 N.Y.S.2d 531, 532 (3d Dept. 2005) (finding that denial of right to be present at sidebar conferences with potential jurors, including one conference about possible juror bias, constitutes a denial of defendant's right to be present at a material stage of the proceeding and is reversible error on appeal even though defendant did not object at trial). You may, however, waive your right to be present if you knowingly, voluntarily, and intelligently make the waiver. *See* People v. Williams, 92 N.Y.2d 993, 996, 706 N.E.2d 1187, 1189, 684 N.Y.S.2d 163, 165 (1998) ("The right to be present during sidebar questioning of prospective jurors on matters of bias or prejudice may be waived by a voluntary, knowing, and intelligent choice."); People v. Keen, 94 N.Y.2d 533, 728 N.E.2d 979, 707 N.Y.S.2d 380 (2000) (holding that defendant's waiver of his right to be present for certain court proceedings was effective).

80. *See* People v. Tabb, 13 N.Y.3d 852, 853, 920 N.E.2d 90, 90, 891 N.Y.S.2d 686, 686 (2009) (reversing conviction because the absence of any record that the judge showed a jury note to the defense was a mode of proceedings error); People v. O'Rama, 78 N.Y.2d 270, 276–80, 579 N.E.2d 189, 192–94, 574 N.Y.S.2d 159, 162–64 (1991) (holding that court's failure to read a jury note to defense counsel before giving the jury a charge was reviewable by Court of Appeals "notwithstanding that defense counsel did not object to the court's procedure until after the supplementary charge had been given"); People v. Kisoon, 23 A.D.3d 18, 22–23, 801 N.Y.S.2d 69, 72 (2d Dept. 2005) (holding court's failure to give defendant's attorney a complete reading of jury's question was preserved for appellate review even without an objection at trial). *But see* People v. Williams, 38 A.D.3d 429, 430, 833 N.Y.S.2d 29, 30 (1st Dept. 2007) (holding that where judge talked to jury foreperson to tell her he would address her question when defendant, counsel, and jury were all present, this conversation was not significant and would not have required input from defense attorney, and thus that the error was not preserved since not objected to by the defense).

81. *See* People v. Ahmed, 66 N.Y.2d 307, 311–12, 487 N.E.2d 894, 896–97, 496 N.Y.S.2d 984, 986–87 (1985) (reversing defendant's conviction where trial judge had, with defendant's consent, been absent for part of the jury deliberations, leaving a law clerk to answer two questions from jurors).

82. *See* People v. Callahan, 80 N.Y.2d 273, 280–81, 604 N.E.2d 108, 112, 590 N.Y.S.2d 46 (1992) (noting that among the "appellate claims that may not be waived" are "challenges to the legality of court-imposed sentences"); People v. Samms, 95 N.Y.2d 52, 55–56, 731 N.E.2d 1118, 1120–21, 710 N.Y.S.2d 310, 312–13 (2000) (discussing which illegal sentence claims can be raised for the first time on appeal). Note, however, that this applies to sentences that are illegal (that is, not allowed by law) and not merely harsh or excessive (but within the legal sentence that the trial court was allowed to impose). See Part D(2) of this Chapter for a discussion of the difference between illegal and excessive sentences. Also, note that a claim that the verdict is against the "weight of the evidence" is a question of law that does not need to be preserved in order to be raised on appeal. *See* People v. Bleakley, 69 N.Y.2d 490, 493, 508 N.E.2d 672, 674, 515 N.Y.S.2d 761, 762 (1987) (describing "weight of the evidence" analysis); People v. Roman, 217 A.D.2d 431, 431, 629 N.Y.S.2d 744, 745 (1st Dept. 1995) (finding that an appellate claim that the verdict was against the weight of the evidence need not have been raised before the trial court because a trial court has no authority to make a decision on this type of claim).

4. Which Courts Will Consider Your Appeal

If you decide to appeal, you must submit your appeal to the correct court for it to be considered. There are two types of courts to which appeals can be made: (1) an intermediate appellate court[83] or (2) the Court of Appeals of the State of New York, which is the highest state court.[84] In most cases, you will need to file an appeal with an intermediate appellate court before the Court of Appeals will consider hearing your case. If you have been sentenced to death, however, you have the right to appeal directly to the Court of Appeals without having to go through an intermediate appellate court.[85]

Note that there are many intermediate appellate courts, so unless you are appealing directly to the Court of Appeals, you need to figure out which is the right intermediate appellate court for your case. This will depend on where you were convicted.[86] For example, if you were convicted of a felony in a New York supreme court, you must appeal to the appellate division of the department in which you were convicted.[87] Appendix A at the end of this Chapter can help you figure out where to file your appeal.

You will also need to figure out if you need permission to file your appeal. In general, you do not need permission if you are appealing: (1) the trial court's judgment against you,[88] (2) your sentence,[89] or (3) an order granting the District Attorney's motion under Article 440 to set aside your sentence to impose a longer sentence.[90] That is, New York law grants you the *right* to appeal these decisions to an intermediate appellate court.

For other challenges, however, you may first need to get permission before you file an appeal. For example, if you have already made a motion to vacate your judgment under Section 440.10 of the New York Criminal Penal Law or a motion to set aside your sentence under Section 440.20, and the court has denied your motion, you will need to ask the court for permission to appeal the court's denial.[91] Note that if you need to ask for permission to appeal, this means that a court does not have to consider your appeal, whereas a court *must* consider your appeal if you have the right to appeal on that issue.

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83. *See generally* N.Y. Crim. Proc. Law § 450.60 (McKinney 2010). An intermediate appellate court means any court that hears appeals other than the Court of Appeals. There are two kinds of intermediate appellate court: the appellate division and the appellate term. For a diagram of New York's courts, see the inside back cover of the *JLM*.

84. *See generally* N.Y. Const. art. VI. New York is somewhat unusual in that its highest court is not called the "Supreme Court." (In fact, a "supreme court" is a type of trial court in New York!) For a diagram of New York's courts, see the inside back cover of the *JLM*.

85. N.Y. Crim. Proc. Law § 450.70(1) (McKinney 2010).

86. N.Y. Crim. Proc. Law § 450.60 (McKinney 2010).

87. N.Y. Crim. Proc. Law § 450.60(1) (McKinney 2010).

88. N.Y. Crim. Proc. Law § 450.10(1) (McKinney 2010). Though a trial court makes many orders and rulings during your trial, you generally cannot appeal these rulings until there is a final judgment. *See*, *e.g.*, People v. Boyd, 91 A.D.2d 1045, 1046, 458 N.Y.S.2d 643, 644 (2d Dept. 1983) (holding that any objection to an intermediate order denying a motion to suppress evidence is reviewable only on an appeal from judgment); People v. Pollock, 67 A.D.2d 608, 608, 412 N.Y.S.2d 12, 12 (1st Dept. 1979), *aff'd*, 50 N.Y.2d 547, 407 N.E.2d 472, 429 N.Y.S.2d 628 (1980) (stating no separate appeal is available for an order denying a motion to set aside a verdict).

89. N.Y. Crim. Proc. Law § 450.10(2) (McKinney 2010). Note that the statute says it excludes appeals of allegedly excessive sentences if you agreed to the sentence as part of a plea bargain. But the Court of Appeals decided this part of the statute is unconstitutional because the legislature does not have the power to prevent the appellate division from hearing these appeals. *See* People v. Pollenz, 67 N.Y.2d 264, 270, 493 N.E.2d 541, 543, 502 N.Y.S.2d 417, 419 (1986) (holding that the legislature could not prohibit the appellate division from hearing appeals based on excessive sentences). Section 450.10(2) of the New York Criminal Procedure Law may still be applicable in cases where the intermediate appellate court is an appellate term. *See* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 450.10 (McKinney 2010). Note also, though the statute itself may not prevent an appeal of an allegedly excessive sentence, you may have voluntarily waived your right to appeal your sentence or conviction as part of a plea or negotiated sentence. For more information, see Part B(2) of this Chapter.

90. N.Y. Crim. Proc. Law § 450.10(4) (McKinney 2010). For information on Article 440 appeals, see Chapter 20 of the *JLM*.

91. *See* N.Y. Crim. Proc. Law § 450.15 (McKinney 2010). If you obtain permission, you can appeal a sentence that you could not otherwise appeal under Section 450.10(1) and (2) of the New York Criminal Procedure Law. You can also appeal the denial of your Article 440 motion to vacate a judgment or set aside a sentence. See Form B-2 in Appendix B at the end of this Chapter for a sample application for permission to appeal. You may make only one such application, so do so carefully. The procedure for requesting leave to appeal under Section 460.15 varies depending on which intermediate court you are applying to. N.Y. Crim. Proc. Law § 460.15(2) (McKinney 2010). *See generally* N.Y. Comp. Codes R. & Regs. tit. 22, §§ 600.8(d), 670.12(b), 800.3, 1000.13 (2010) (describing these procedures); Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 460.15 (McKinney 2010).

If an intermediate appellate court reviews your case and makes a decision, and you are unsatisfied with the decision, you may ask for permission to appeal the decision to the Court of Appeals. You do not, though, have a *right* to appeal an appellate court's decision to the Court of Appeals. Note that the Court of Appeals will only consider one application for permission to appeal per case, including applications addressed to a justice of the appellate division.[92] If the Court of Appeals decides to hear your case, it will issue a certificate of leave to appeal.[93] Part F explains this process in more detail.

Finally, keep in mind that filing an appeal is not the only way to challenge your conviction or your sentence. You may be able to file a motion to vacate the judgment against you[94] or a motion to set aside your sentence.[95] Such a motion, called an Article 440 motion, can be filed before, after, or simultaneously with an appeal. A motion differs from an appeal in that an appeal must be based only on matters already on the record—on things that were said in trial court or in papers previously given to the trial court. A motion, by contrast, involves matters not on the record, such as advice your attorney gave you or evidence that was never brought up in court. Thus, when the record from your trial does not contain the necessary facts for a court to decide the issue that you want to raise, you should file an Article 440 motion.[96] For a more detailed description of when you can file an Article 440 motion and which claims you may raise in an Article 440 motion, see Chapter 20 of the *JLM*.

C. What You Can Ask the Courts to Do *Before* Your Appeal is Heard

Before an appellate court hears your appeal, you can ask the court system to help you with several things, including getting a lawyer and a transcript of your trial. You can also ask the appellate court to stay your judgment and release you on bail. This Part discusses each of these things in more detail.

1. Getting a Lawyer

You have a constitutional right to a lawyer on direct appeal.[97] This means if you cannot afford a lawyer, the appellate court will upon request appoint a lawyer to represent you at no cost.[98] Your right to a lawyer applies when you or the government appeals a trial court's final judgment. It also applies when you or the government appeals other decisions the trial court made during the proceedings, including decisions about what evidence is allowed, decisions to set aside the jury's verdict, and denials of motions.[99] When you were sentenced, your lawyer at the trial level was supposed to advise you that you can appeal, explain how to appeal and how to get a new lawyer for your appeal, ask you if you wanted to appeal, and, if you did, to file the initial paperwork for you.[100] To get a lawyer for your appeal, you will need to show proof that you do not

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92. *See* People v. Liner, 70 N.Y.2d 945, 945, 519 N.E.2d 619, 619, 524 N.Y.S.2d 673, 673 (1988) (dismissing appeal made by defendant's lawyer on ground that court could not hear appeal after defendant had already made *pro se* application for appeal to the appellate division); People v. Nelson, 55 N.Y.2d 743, 743, 431 N.E.2d 640, 640-41, 447 N.Y.S.2d 155, 156 (1981) (dismissing appellate division's grant of permission to appeal while prior application was pending in Court of Appeals).

93. *See* N.Y. Crim. Proc. Law § 460.20 (McKinney 2010); *see also* N.Y. Crim. Proc. Law § 450.90 (McKinney 2010) (providing for taking an appeal after a certificate granting leave to appeal has been issued). If you are appealing an appellate division's order, a judge from the same department of the appellate division may grant you a certificate of leave to appeal before the Court of Appeals. N.Y. Crim. Proc. Law § 460.20(2)(a) (McKinney 2010).

94. *See* N.Y. Crim. Proc. Law § 440.10 (McKinney 2010).

95. *See* N.Y. Crim. Proc. Law § 440.20 (McKinney 2010).

96. *See* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 440.10 (McKinney 2010).

97. Anders v. California, 386 U.S. 738, 741, 87 S. Ct. 1396, 1398; 18 L. Ed. 2d 493, 496 (1967) (holding that an indigent person has the right to appellate representation); Douglas v. California, 372 U.S. 353, 356–357, 83 S. Ct. 814, 815–16; 9 L. Ed. 2d 811, 813-14 (1963) (holding that the 14th Amendment requires states to provide indigent persons representation on their appeals as of right); People v. Garcia, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) ("[O]n a People's appeal, a defendant has the right to appellate counsel of defendant's choice and the right to seek appointment of counsel upon proof of indigency.").

98. Usually the court will appoint a new lawyer on appeal. *See* People v. Garcia, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) ("[O]n a People's appeal, a defendant has the right to appellate counsel of defendant's choice and the right to seek appointment of counsel upon proof of indigency.") If you want your assigned trial lawyer to continue to represent you, this may be possible depending on the rules of the court to which you are appealing. For example, the First Department's Appellate Division requires that your lawyer obtain your written consent and be a member of the Assigned Counsel Plan panel. N.Y. Ct. Rules § 600.8(g) (McKinney 2010).

99. *See* N.Y. Ct. Rules § 200.40 (McKinney 2010).

100. N.Y. Comp. Codes R. & Regs. tit. 22, § 606.5(b) (West 2010).

have enough money to hire an attorney and pay the expenses of your appeal.[101] Appendix B provides samples of the papers you should file to make this request.

If you decide that you do not want a lawyer to represent you on appeal, you may be able to prepare your appeal and appear in court on your own, which is called appearing "*pro se*." Note, however, that you do *not* have a constitutional right to represent yourself on appeal—the court may choose to allow it or not.[102]

2. Requesting a Transcript

You can ask the trial court to provide you with a free transcript of your trial. In addition, you may ask for permission to appeal on "the original record," which you should do, assuming your appeal will be based on something that happened at trial or a hearing. If the trial court grants this request, it will give the appellate court and the prosecution copies of the record.[103]

3. Requesting a Stay

After filing and serving notice of your appeal, you can request a judge to "stay" your judgment. A stay delays or interrupts the execution of your sentence until after your appeal. If you are appealing a death sentence, or a judgment including a death sentence, the execution of your sentence is automatically stayed by filing a notice of appeal.[104] Note that you may file only one stay application after filing a notice of appeal, so prepare your application carefully.[105]

If you decide to apply for a stay, you will need to figure out which court you should ask for the stay. This will depend on which court tried and sentenced you and which court will hear your appeal. For example, if you are appealing to an appellate division from a judgment of a supreme court, you may apply for a stay from any appellate division or supreme court judge in the county where the judgment was entered. See Appendix A at the end of this Chapter for help selecting the right court.

4. Requesting Release from Jail

While you are waiting for your appeal to be heard, you can request a judge to release you on bail or on your own "recognizance." To be released on your own recognizance means that a court will permit you to leave jail, on the condition that you will appear at court whenever your attendance is required, and that you will comply with the orders and processes of the court.[106]

You do not have a right to bail or recognizance while waiting for appeal.[107] But, depending on your offense, a judge may be able to grant your request. In many cases, a judge has discretion to determine whether to release you. That is, the law does not require the judge to keep you in custody or release you, and you may not appeal the judge's decision on this matter.[108] But, in other cases, a judge does not have this discretion. This means the law determines whether you must be held in custody.[109] For example, if you were

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101. *See* N.Y. Ct. Rules § 671.5 (McKinney 2010); *see generally* People v. West, 100 N.Y.2d 23, 789 N.E.2d 615, 759 N.Y.S.2d 437 (2003) (holding that "requiring a defendant to apply for legal representation and providing instructions on how to do so" is constitutionally acceptable without providing counsel to assist in that application).

102. *See* Martinez v. Court of Appeal of California, 528 U.S. 152, 163, 120 S. Ct. 684, 692, 145 L. Ed. 2d 597, 607, (2000) ("Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*.").

103. See Appendix B-3 of this Chapter for sample papers to request free trial transcripts and copies of the record.

104. N.Y. Crim. Proc. Law § 460.40(1) (McKinney 2010).

105. N.Y. Crim. Proc. Law § 460.50(3) (McKinney 2010).

106. N.Y. Crim. Proc. Law §§ 460.50(1), (2)(a) (McKinney 2010). To determine which court can grant your application for a stay, see N.Y. Crim. Proc. Law § 460.50(2) (McKinney 2010).

107. *See*, *e.g.*, Gold v. Shapiro, 62 A.D.2d 62, 65, 403 N.Y.S.2d 906, 907 (2d Dept. 1978), *aff'd*, 45 N.Y.2d 849, 382 N.E.2d 767, 410 N.Y.S.2d 68 (1978) ("[T]here is no constitutional right to bail after conviction."). You do have the constitutional right that the court's discretion not be exercised unreasonably or arbitrarily, and that bail not be excessive. U.S. Const. amend. VIII; N.Y. Const. art. 1, § 5; *see also* Finetti v. Harris, 609 F.2d 594, 599–602 (2d Cir. 1979) ("Only if there is no rational basis in the record to support the denial of bail [pending appeal] may there be a violation of a state prisoner's constitutional rights.").

108. *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 460.50 (McKinney 2010); *see also* United States *ex rel.* Siegal v. Follette, 290 F. Supp. 636, 638 (S.D.N.Y. 1968) (stating that New York law "permits [a judge] to grant or deny bail in his discretion after weighing the facts he considers significant"). Although an order denying bail is not appealable, it may be reviewed on habeas corpus grounds. For more information, see *JLM*, Chapter 21, "State Habeas Corpus."

109. N.Y. Crim. Proc. Law §§ 510.30(1), 530.10 (McKinney 2010) (explaining when a court is required to order bail or recognizance and when it may do so at its discretion). Bail must not violate the 8th Amendment restrictions on

convicted of a Class A felony, a judge may not release you because the law requires you to be held in custody.[110]

If your offense does not automatically require you to be held in custody, a judge will consider the following factors to decide whether to grant your request for release:[111]

(1) Your character, reputation, habits, and mental condition;
(2) Your employment and financial resources;
(3) Your family ties and length of residence in the community;
(4) Your criminal record, if any;
(5) Your previous record as a juvenile delinquent or youth offender, if any;
(6) Your previous record of responding to court appearances when required; and, above all,
(7) The likelihood that the judgment against you will be reversed on appeal.

A judge may refuse to release you on bail if he or she thinks an appellate court is unlikely to reverse your judgment.[112] Therefore, when you submit a request for bail, you should include a brief statement that explains your appellate claims and demonstrates that there is a reasonable possibility of reversal.

In general, you should petition for bail if there is any chance it will be granted. If you are released on bail, you will avoid the difficulty of preparing an appeal while in jail. Keep in mind, though, that the amount of bail may be more than you can afford, and that you will not receive credit for time served during the time that you are out on bail.

Note also that if you are released on bail while your appeal is pending, the order releasing you will expire if your appeal is not "perfected" within 120 days after the order is given.[113] Generally, to perfect an appeal you must deliver a specified number of copies of the trial record and your brief to the appellate court and the opposing party.[114] If your appeal is not perfected within 120 days, you should request a time extension to file an appeal, explicitly asking the court to extend the 120-day period.[115]

D. What You Can Ask the Court to Do in Your Appeal

In an appeal, you ask the appellate court to correct the trial court's judgment. The appellate court will make one of three decisions. First, it might "reverse" the trial court's judgment, which means it declares the entire judgment invalid. Second, it might "affirm" the trial court's judgment, which means it upholds the entire judgment. Finally, it might "modify" the trial court's judgment, which means it reverses part of the judgment and affirms another part of the judgment.[116] If the appellate court reverses or modifies the judgment, it will also take some action to correct the judgment, such as reducing your sentence or dismissing your indictment.[117]

Sometimes the appellate court might determine that it does not have enough information to decide your appeal right away. If this happens, the appellate court may suspend your appeal and send the matter to a lower court for additional proceedings.[118] This means that the appellate court will not decide whether to affirm, modify, or reverse the judgment until the lower court has held another hearing.

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excessive bail. *See* People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 33, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 184 (1973) ("Our State Constitution does not decree a right to bail, but merely proscribes 'excessive bail.'") (citing N.Y. Const., art. I, § 5; People ex rel. Shapiro v. Keeper of City Prison, 290 N.Y. 393, 398, 49 N.E.2d 498, 500).

110. N.Y. Crim. Proc. Law § 530.50 (McKinney 2010).

111. N.Y. Crim. Proc. Law § 510.30(2) (McKinney 2010).

112. N.Y. Crim. Proc. Law § 510.30(2)(b) (McKinney 2010).

113. N.Y. Crim. Proc. Law § 460.50(4) (McKinney 2010). Under this statute, an order granting release will expire if your appeal has "not been brought to argument in or submitted to the intermediate appellate court" within 120 days. Courts have interpreted this statute to mean that such an order will expire if your appeal is not perfected within 120 days. *See, e.g.*, People v. Higgins, 177 A.D.2d 1052, 578 N.Y.S.2d 70 (4th Dept. 1991) (stating that defendant "bore the burden of surrendering himself after the 120-day stay expired before his appeal was perfected").

114. See Part E(3) of this Chapter for information on perfecting your appeal.

115. N.Y. Crim. Proc. Law § 460.50(4) (McKinney 2010). The intermediate appellate court itself must grant the extension, regardless of who issued the order. *See* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 460.50 (McKinney 2010).

116. *See* N.Y. Crim. Proc. Law § 470.15(2) (McKinney 2010).

117. *See* N.Y. Crim. Proc. Law § 470.20 (McKinney 2010).

118. This process is called "remitting." *See, e.g.*, People v. Hasenflue, 24 A.D.3d 1017, 1018, 806 N.Y.S.2d 766, 768 (3d Dept. 2005) (withholding decision and sending matter back to trial court to look at the defendant's competency to stand trial); People v. Britt, 231 A.D.2d 581, 583, 647 N.Y.S.2d 527, 529 (2d Dept. 1996) (sending matter back for trial

An intermediate appellate court must base its decision to reverse or modify the trial court's judgment on one of three things (or some combination of them): the law, the facts, or the "interest of justice."[119]

1. Appealing Your Conviction

If you appeal your conviction "on the law," you will argue that legal errors in the trial deprived you of a fair trial or that the evidence used to convict you was legally insufficient. If you appeal your conviction "on the facts," you will argue that your conviction was against the weight of the evidence.

(a) "On the Law"

You can ask an appellate court to reverse the judgment "on the law" on the basis of: (1) legal errors that deprived you of a fair trial, or (2) legally insufficient evidence to support your conviction.[120]

You may seek reversal "on the law" on grounds of legal errors that deprived you of a fair trial. In order to seek a reversal "on the law" due to legal errors, you must have properly preserved these errors for review, unless the error you are appealing is one that is not subject to the preservation requirement, as explained above in Section B(3). Some examples of categories of legal errors that may support reversal include: (1) erroneous evidentiary rulings,[121] (2) prosecutor's misconduct,[122] (3) improper jury instructions,[123] or (4) improper influence on the jury.[124] Note that there are many other potential legal errors, and spotting them requires thorough familiarity with relevant bodies of law, including evidence law, criminal procedure, and state and federal constitutional law. It is not possible for this Chapter or the *JLM* to discuss every conceivable error. This is a big reason that you should get a lawyer for your appeal: even if you do legal research beyond the *JLM*, you will likely not be able to learn enough law in time to notice errors and present them to the court as well as an appellate lawyer could. See Section C(1) above for how to get a lawyer.

If the appellate court does reverse your judgment because of legal errors, the court must order a new trial on the counts of the original indictment.[125] You cannot be retried, however, on (1) counts dismissed on appeal or in a post-judgment order, or (2) counts or offenses of which you were effectively acquitted. For example, if you were charged with first-degree murder, but convicted only of second-degree murder, you will be considered acquitted of first-degree murder and can be retried only for second-degree murder.[126]

You may also seek reversal "on the law" on grounds of legal insufficiency. Legal insufficiency means that the evidence presented by the prosecution was not sufficient to prove all the necessary elements of the crime of which you were convicted. For example, in order to convict a defendant of driving while intoxicated, the prosecution must prove both that the defendant was drunk and that he was driving a car. If the prosecution

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court to make clear whether it followed the proper three-step procedure to find out if peremptory strikes, which are used to keep certain people off of a jury, were used to keep people off the jury because of their race).

119. *See* N.Y. Crim. Proc. Law § 470.15(3) (McKinney 2010).

120. Note, however, that "on the law" reversals need not be limited to these two instances. *See* N.Y. Crim. Proc. Law § 470.15(4) (McKinney 2010) (noting "on the law" determinations "include, but are not limited to," these bases).

121. *See*, *e.g.*, People v. Boughton, 70 N.Y.2d 854, 854–55, 517 N.E.2d 1340, 1341, 523 N.Y.S.2d 454, 455 (1987) (reversing conviction because trial judge wrongly allowed prosecutor to introduce confession without giving sufficient notice); People v. Reilly, 19 A.D.3d 736, 737–38, 796 N.Y.S.2d 726, 727–28 (3d Dept. 2005) (ordering new trial because judge allowed evidence that was very prejudicial but not very probative, that is, not useful for deciding fairly).

122. *See*, *e.g.*, People v. Collins, 12 A.D.3d 33, 784 N.Y.S.2d 489 (1st Dept. 2004) (ordering new trial because prosecutor's concluding remarks deprived defendant of a fair trial).

123. *See*, *e.g.*, Griffin v. California, 380 U.S. 609, 612–13, 85 S. Ct. 1229, 1231–32, 14 L. Ed. 2d 106 (1965) (reversing conviction because judge improperly commented during jury instructions on defendant's decision not to testify); People v. Colon, 143 A.D.2d 105, 105, 531 N.Y.S.2d 355, 356 (2d Dept. 1988) (ordering reversal because court's instructions were excessively lengthy and improperly drew attention to defendant's decision not to testify).

124. *See* Parker v. Gladden, 385 U.S. 363, 364–65, 87 S. Ct. 468, 470, 17 L. Ed. 2d 420, 422–23 (1966) (reversing conviction where bailiff made statements to jurors including that defendant was a wicked and guilty person); People v. Stanley, 87 N.Y.2d 1000, 1001–02, 665 N.E.2d 190, 191, 642 N.Y.S.2d 620, 621 (1996) (reversing conviction because jurors visited crime scene to evaluate a witness' credibility and so became "unsworn witnesses" themselves); People v. Brown, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979) (reversing because juror conducted experiment to evaluate testimony and told jury she "could see that it was plausible").

125. N.Y. Crim. Proc. Law § 470.20(1) (McKinney 2010).

126. *See*, *e.g.*, People v. Graham, 36 N.Y.2d 633, 639, 331 N.E.2d 673, 677, 370 N.Y.S.2d 888, 894 (1975) (holding that defendant could not be retried for murder in the second degree after the appellate division reduced the conviction to manslaughter in the first degree).

did not introduce any evidence that the defendant was driving a car, the evidence would be insufficient.[127] In determining whether the evidence presented is legally sufficient, the appellate court will weigh whether any valid reasoning or inferences could lead a rational person to the conclusion that the jury reached, viewing the evidence in the light most favorable to the prosecution.[128] Note that showing that evidence is legally insufficient is different from showing a verdict to be against the weight of the evidence, which is discussed in Subsection (b) below.

Like any legal error, a claim of legal insufficiency must be preserved for it to be reviewed on appeal[129] or else it may only be reviewed "in the interest of justice" by the Appellate Division.[130] (See Part B(3) of this Chapter for more on the preservation requirement.) If a court grants your appeal by finding legal insufficiency, the court must dismiss those counts of your indictment that the court determines to be supported by legally insufficient evidence.[131] The Double Jeopardy Clause of the Fifth Amendment[132] prohibits the prosecution from retrying any count that has been dismissed on the grounds of legal insufficiency.[133] Thus, if the appellate court reverses every count in your indictment for legal insufficiency, you will be set free. By contrast, if the reversal is due to an error in the trial, and not because of legal insufficiency, there is no issue of double jeopardy, and you may be retried for the same crime.[134]

An appellate court may modify a judgment by dismissing one or more counts based on legal insufficiency, but affirming other counts for which there was legally sufficient evidence. In this situation, the appellate court has two alternatives. It can either affirm the sentence that the trial court imposed for the counts that were not dismissed[135] or it can "remand" (send the case back to the trial court) for re-sentencing.[136]

An appellate court may also modify the judgment to change your conviction to a "lesser included offense."[137] A lesser included offense exists when no one could possibly commit the greater crime without, by the same conduct, committing the lesser offense.[138] Petit larceny, for example, is a lesser included offense of third-degree robbery because petit larceny is stealing property[139] and third-degree robbery is stealing property through the use of force[140] or threat of force.[141] Since both offenses require you to steal property,

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127. *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.15 (McKinney 2010).

128. *See* People v. Taylor, 94 N.Y.2d 910, 911–12, 729 N.E.2d 337, 337–38, 707 N.Y.S.2d 618, 618–19 (2000) (stating that "whether inferences of guilt could be rationally drawn" from the evidence is the standard for evaluating sufficiency of the evidence).

129. When the prosecution rested, the defense should have moved for a dismissal and stated exactly why the prosecution's case was legally insufficient. *See* People v. Hawkins, 11 N.Y.3d 484, 493, 900 N.E.2d 946, 951, 872 N.Y.S.2d 395, 400 (2008) (holding that a general objection that prosecution failed to prove its case does not preserve the issue of whether evidence was legally sufficient to support a particular element).

130. In fact, some courts have said that evaluating legal insufficiency is "necessarily" part of weighing evidence, which Appellate Division courts routinely do. Thus, a claim of legal insufficiency may succeed, even if the issue was not preserved, if the claim is presented as the verdict being against the weight of the evidence. *See, e.g.,* People v. Scott, 67 A.D.3d 1052, 1054, 889 N.Y.S.2d 279, 281 (3d Dept. 2009) ("we will necessarily consider [legal insufficiency] in reviewing the weight of the evidence"); People v. Loomis, 56 A.D.3d 1046, 1046–47, 867 N.Y.S.2d 772, 773 (3d Dept. 2008) (considering sufficiency of evidence, although not preserved, while considering weight of evidence).

131. N.Y. Crim. Proc. Law §§ 470.20(2), (3) (McKinney 2010).

132. U.S. Const. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

133. *See* Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150–51, 57 L. Ed. 2d 1, 14 (1978) (holding that the Double Jeopardy Clause requires a judgment of acquittal if a court finds the evidence is legally insufficient).

134. *See* Lockhart v. Nelson, 488 U.S. 33, 40–42, 109 S. Ct. 285, 291, 10 L. Ed. 2d 265, 273–74 (1988) (holding that the Double Jeopardy Clause does not prohibit retrying a case overturned for improper sentencing unless the sum of the evidence was insufficient to sustain a guilty verdict); *see generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.20 (McKinney 1994).

135. N.Y. Crim. Proc. Law § 470.20(3) (McKinney 2010).

136. N.Y. Crim. Proc. Law § 470.20(3) (McKinney 2010).

137. N.Y. Crim. Proc. Law § 470.15(2)(a) (McKinney 2010).

138. N.Y. Crim. Proc. Law § 1.20(37) (McKinney 2010).

139. N.Y. Penal Law § 155.25 (McKinney 2010).

140. N.Y. Penal Law § 160.05 (McKinney 2010).

141. *See* People v. Rychel, 284 A.D.2d 662, 663, 728 N.Y.S.2d 211, 213 (3d Dept. 2001) (holding evidence legally sufficient for third-degree robbery where evidence established that force was threatened); People v. Smith, 278 A.D. 2d 75, 75, 718 N.Y.S.2d 305, 305 (1st Dept. 2000) (holding evidence legally sufficient for third-degree robbery where evidence established that force was threatened through "relatively polite behavior").

you cannot commit third-degree robbery without also committing petit larceny. Thus, if an appellate court concludes that the prosecutor failed to prove that you used force (making your robbery conviction legally insufficient), the appellate court may change your conviction to petit larceny without holding a new trial, provided the prosecutor did prove that you stole property. If the appellate court determines that the evidence proved a lesser included offense, the court will send you back to the trial court for re-sentencing,[142] unless you have already served the maximum sentence possible for the lesser crime.[143]

(b) "On the Facts"

You can ask an appellate court for reversal "on the facts" by arguing your guilty verdict was against the weight of the evidence.[144] In evaluating the weight of the evidence, an intermediate appellate court must determine whether, based on the evidence, a jury could reasonably have acquitted you. If the appellate court concludes a jury could reasonably have acquitted you, the court must weigh the evidence submitted at trial to be sure the jury gave the evidence the weight it deserved. If the court decides the jury did not give the evidence proper weight, the court may set aside the jury's guilty verdict.[145] For instance, as you recall from the example above, evidence of drunk driving is legally insufficient if the prosecution did not introduce any evidence that the defendant was driving a car. If a prosecution witness had said she saw the defendant driving a car, but this was the only evidence and there were strong reasons for not believing the witness, then the verdict would likely be against the weight of the evidence—there is some evidence, but the jury weighed it wrong.

Only the Appellate Division can review a weight of the evidence claim. In doing so, it sits as "a thirteenth juror."[146] In contrast, neither the trial court nor the Court of Appeals can review weight of the evidence or make its own decision about whether a witness was credible.[147] A "weight of the evidence" claim does not need to have been preserved at trial,[148] but you should raise it clearly on appeal to be sure that the Appellate Division will consider it.

If the appellate court sets aside your verdict as "against the weight of the trial evidence," the appellate court must dismiss the charge against you.[149] According to New York law, you cannot be prosecuted again on the same charge.[150] Thus, if the court sets aside all of the charges against you as "against the weight of the evidence," the court will order you released from custody. If one or more, but not all, of the charges against you are dismissed as against the weight of the evidence, the court may modify the judgment as described above in Part D(1)(a).

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142. N.Y. Crim. Proc. Law § 470.20(4) (McKinney 2010).

143. *See* People v. McBride, 248 A.D.2d 641, 642, 669 N.Y.S.2d 952, 952 (2d Dept. 1998) (holding that there is no need to remand for re-sentencing since defendant had already served the maximum sentence for the reduced offense).

144. N.Y. Crim. Proc. Law § 470.15(5) (McKinney 2010).

145. *See* People v. Bleakley, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 674–75, 515 N.Y.S.2d 761, 763 (1987) (holding that the appellate division cannot find that a jury verdict is supported by sufficient evidence without first conducting a factual analysis of whether the jury determination was against the weight of the evidence).

146. People v. Danielson, 9 N.Y.3d 342, 348–49, 880 N.E.2d 1, 5, 849 N.Y.S.2d 480, 484 (2007).

147. There is a rare exception where a witness is "incredible as a matter of law." *See, e.g.*, People v. Quinones, 61 A.D.2d 765, 765, 402 N.Y.S.2d 196, 197 (1st Dept. 1978) (rejecting as a matter of law police officer testimony that strongly appeared to have been fabricated to conceal constitutional violations).

148. *See* People v. Danielson, 9 N.Y.3d 342, 349–50, 880 N.E.2d 1, 5–6, 849 N.Y.S.2d 480, 484–85 (2007) (noting that a court must consider whether there is evidence that the elements of a crime have been satisfied when weighing the sufficiency of the evidence, even without the issue having been preserved at trial).

149. N.Y. Crim. Proc. Law § 470.20(5) (McKinney 2010).

150. The prosecution cannot retry any count that was reversed because it was against the weight of the evidence. N.Y. Crim. Proc. Law. § 470.20(5) (McKinney 2010). This is based solely upon New York statute and *not* on constitutional protection from double jeopardy. *See* Tibbs v. Florida, 457 U.S. 31, 32, 102 S. Ct. 2211, 2213, 72 L. Ed. 2d 652, 655 (1982) (holding that the Double Jeopardy Clause of the Constitution does not bar the retrial of an accused when an earlier conviction was reversed based on the weight, as opposed to the sufficiency, of the evidence); People v. Romero, 7 N.Y.3d 633, 644 n.2, 859 N.E.2d 902, 909 n.2, 826 N.Y.S.2d 163, 170 (2006) (explaining that, in New York, "our Legislature has erected a statutory bar preventing a defendant from being retried after a conviction is reversed based on the weight of the evidence").

2. Appealing Your Sentence

You can appeal your sentence on the ground that the sentence is either: (1) unlawful or (2) unduly harsh or excessive.[151]

(a) Unlawful Sentence

A sentence is invalid as a matter of law when its terms are not authorized by statute or when the sentencing court considers inappropriate factors, like whether you decided to exercise certain rights. For example, a sentence of thirty years for first-degree assault, a class B violent felony, is unlawful, since the maximum penalty allowed for a class B violent felony is twenty-five years.[152] A sentence may also be unlawful if it is based on an erroneous determination that you had a prior conviction,[153] or if your sentences were improperly ordered to run consecutively (one after the other), instead of concurrently (at the same time).[154] A sentence is also illegal if it constitutes "cruel and unusual" punishment.[155]

(b) Unduly Harsh or Excessive Sentence

A sentence is excessive if the sentence is allowed by the law, but is unfair based on the facts of your case.[156] An appellate court may take into account, for example, the circumstances of your crime, the probability of your rehabilitation, your background, and your criminal record.[157] You may appeal your sentence as unduly harsh if anything over the minimum legal sentence was imposed. A court may also consider whether the sentences you received are to run consecutively (one after the other) or concurrently (at the same time). Even if the appellate court rejects all of your arguments regarding errors that occurred during your trial, it may use its "in the interest of justice" discretion to order your sentences to run concurrently instead of consecutively.[158]

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151. N.Y. Crim. Proc. Law § 450.30(1) (McKinney 2010). You may be able to appeal your sentence on the ground that the sentence is unduly harsh or excessive even if you negotiated your sentence in exchange for a guilty plea. *See* People v. Pollenz, 67 N.Y.2d 264, 268, 493 N.E.2d 541, 542, 502 N.Y.S.2d 417, 418 (1986) (holding that Art. Six, § 4(k) of the New York Constitution prohibits the legislature from limiting the appellate division's jurisidicion by prohibiting appeals on the issue of excessive sentences); *see also* N.Y. Crim. Proc. Law § 470.15(6)(b) (McKinney 2010) (providing that an appellate court may use its discretion to reverse or modify a sentence as unduly harsh or severe). See Part B(2) of this Chapter for a discussion of possible waiver of your right to appeal the issue of whether your sentence was unduly harsh or excessive.

152. N.Y. Penal Law § 70.02(3)(a) (McKinney 2010).

153. *See* People *ex rel.* Furia v. Zelker, 70 Misc. 2d 167, 169, 332 N.Y.S.2d 310, 311 (Sup. Ct. Dutchess County 1971) (finding that where defendant's 1959 conviction had been set aside before he was convicted on this offense in 1966, the fact that he was convicted again in 1970 for the 1959 crime did not make him a "multiple felony offender" in 1966); People v. Foster, 57 N.Y.S.2d 737, 738 (Sup. Ct. Cayuga County 1945) (finding a sentence unlawful because it had been increased to reflect a prior felony, although no prior felony had been included in the indictment).

154. *See*, *e.g.*, N.Y. Penal Law § 70.25(2)(g) (McKinney 2010) (requiring that certain sentences run concurrently). The Constitution does not prevent a trial judge (instead of a jury) from deciding whether facts exist that require a consecutive sentence. Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 714–15, 172 L. Ed. 2d 517, 522 (2009) (holding that Oregon's system—which, like New York's, generally requires concurrent sentences for multiple convictions at the same time unless certain factors exists—is constitutional although judges rather than juries decide whether those factors exist).

155. *See* U.S. Const. amend. VIII; People v. Diaz, 179 Misc. 2d 946, 956–57, 686 N.Y.S.2d 595, 601–02 (Sup. Ct. N.Y. County 1999) (holding that defendant's sentence of 15 years to life was "grossly disproportionate" as applied to him and therefore constituted "cruel and unusual punishment," and re-sentencing defendant to 10 years to life).

156. When an appellate court decides whether a sentence is excessive or unduly harsh, it is said to be exercising its "in the interest of justice" jurisdiction. N.Y. Crim. Proc. Law § 470.15(6)(b) (McKinney 2010). See Part B(3)(a) of this Chapter for a discussion of "in the interest of justice" jurisdiction.

157. *See*, *e.g.*, People v. Bankowski, 204 A.D.2d 802, 803, 611 N.Y.S.2d 712, 713B14 (3d Dept. 1994) (holding that the harshest available sentence for manslaughter and drunk driving was not excessive where the defendant had a prior conviction for drunk driving); People v. Pugh, 194 A.D.2d 863, 865, 599 N.Y.S.2d 317, 318 (3d Dept. 1993) (holding that the defendant's full and intentional participation in brutally violent crimes made the sentence appropriate, even though the defendant was young and did not have any previous criminal record).

158. *See*, *e.g.*, People v. Evans, 212 A.D.2d 626, 627, 623 N.Y.S.2d 4, 6 (2d Dept. 1995) (modifying a sentence in which the defendant would serve four terms of "25 years to life" consecutively to a sentence in which the defendant could serve the four terms concurrently); People v. Quinitchett, 210 A.D.2d 438, 439, 620 N.Y.S.2d 430, 431 (2d Dept. 1994) (modifying a sentence in which the defendant would serve three terms of "25 years to life" consecutively to a sentence in which the defendant could serve the three terms concurrently).

An intermediate appellate court may substitute its own discretion for that of the trial court in reviewing and modifying your sentence.[159] If an intermediate appellate court decides to change your sentence because it is unduly harsh or excessive, then the court itself must impose some lawful lesser sentence.[160] If this happens, the court changes only your sentence and the rest of the judgment (your conviction) is otherwise affirmed.[161]

In a death sentence appeal, the Court of Appeals must focus upon the individual circumstances of your case in determining whether your sentence is unjust.[162] Under New York law, the Court of Appeals is required to consider the potential influence of passion or prejudice (including race-based prejudice) upon your sentence, the penalty imposed in similar cases, and the weight of the evidence in support of your sentence.[163] An appellate court has three options when it reviews a death penalty sentence: (1) it can affirm the death sentence, (2) it can remand the case for re-sentencing with the possibility of the death sentence, or (3) it can remand the case for re-sentencing without the possibility of a death sentence.[164]

Although these appellate procedures for death penalty cases are still valid, there is currently no constitutionally valid death penalty statute on the books in New York.[165] This means that there will not be any death penalty appeals in New York in the near future.

3. Types of Errors

When appealing your conviction (see Part D(1)) or your sentence (see Part D(2)), you argue that the trial court allowed errors to take place. Some errors are considered so serious that they are always enough to justify the reversal of your judgment without needing to prove how it was that they harmed you. Other errors have the potential to be serious enough to warrant reversal, but they do not necessarily justify reversal. The court analyzes such errors under the "harmless error test." The court decides an error is harmless if it believes you would have received the same conviction and/or sentence even if the error had not occurred. The court will not reverse or modify a judgment based on a harmless error.

Note that to appeal on the basis of most of these errors, even those that are always considered harmful when your appeal is evaluated, you must have preserved the error by objecting at trial. Some errors are not subject to this requirement, however. For information about the preservation requirement, see Part B(3).

(a) Errors That Are Always "Harmful"

Some errors are considered so harmful that their occurrence means you were denied a fair trial and are entitled to a new one. These errors have such a significant effect that they are themselves enough to justify reversal of your conviction.[166] For example, errors in which the court misstates the prosecution's burden of proof on an issue should result in reversal.[167] Other examples of errors justifying reversal include:

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159. *See* People v. Delgado, 80 N.Y.2d 780, 783, 599 N.E.2d 675, 676, 587 N.Y.S.2d 271, 272 (1992) (noting that "[a]n intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe" and that the court could exercise this power "if the interest of justice warrants, without deference to the sentencing court"); People v. Wiggins, 24 A.D.3d 263, 263, 806 N.Y.S.2d 496, 297 (1st Dept. 2005) (reducing sentence on appeal as a matter of discretion in the interest of justice); *see also* N.Y. Crim. Proc. Law § 470.15(6)(b) (McKinney 2010). *But see* People v. Hoyle, 211 A.D.2d 973, 975, 621 N.Y.S.2d 756, 759 (3d Dept. 1995) (refusing to modify the sentence because the lower court did not abuse its discretion in sentencing defendant).

160. N.Y. Crim. Proc. Law § 470.20(6) (McKinney 2010).

161. N.Y. Crim. Proc. Law § 470.15(2)(c) (McKinney 2010).

162. *See* Gregg v. Georgia, 428 U.S. 153, 195, 96 S. Ct. 2909, 2936, 49 L. Ed. 859, 887 (1976) (observing that concerns that a court might impose the death penalty in an "arbitrary and capricious manner" are "best met by a system [in] which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information").

163. N.Y. Crim. Proc. Law § 470.30(3) (McKinney 2010).

164. N.Y. Crim. Proc. Law § 470.30(5) (McKinney 2010).

165. *See* People v. LaValle, 3 N.Y.3d 88, 99, 817 N.E.2d 341, 344, 783 N.Y.S.2d, 485, 488 (2004) (holding that the current New York death penalty statute is unconstitutional); *see also* People v. Taylor, 9 N.Y.3d 129, 155–56, 878 N.E.2d 969, 984, 848 N.Y.S.2d 554 (2007) (vacating the sentence of the last prisoner on death row in New York).

166. *See generally* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 470.05 (McKinney 2010).

167. *See* People v. McLaughlin, 80 N.Y.2d 466, 472, 606 N.E.2d 1357, 1360, 591 N.Y.S.2d 966, 969 (1992) (reversing convictions on counts for which the judge gave an erroneous charge to the jury).

(1) You were deprived of your right to counsel,[168] including if you were denied your right to a lawyer of your choosing,[169] or if you were represented only by a person pretending to be a lawyer;[170]
(2) You represented yourself at trial but the court failed to inform you of the dangers of proceeding without a lawyer;[171]
(3) You were denied your right to represent yourself;[172]
(4) Your judge was biased;[173]
(5) The judge gave an incorrect instruction about reasonable doubt to the jury, in violation of your Fifth and Sixth Amendment rights;[174]
(6) The judge gave an instruction to the jury that defined two alternative reasons for conviction, one which was legally erroneous, and the appellate court now cannot say with absolute certainty that the jury based its verdict on legally correct reason;[175]
(7) You were denied your right to be present at certain stages of the trial;[176]
(8) The prosecutor wrongly excluded potential jurors on the basis of their race or sex;[177]

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168. *See* Gideon v. Wainwright, 372 U.S. 335, 339–43, 83 S. Ct. 792, 794–96, 9 L. Ed. 2d 799, 802–04, (1963) (reversing conviction because defendant was not appointed counsel); People v. Hilliard, 73 N.Y.2d 584, 586–87, 540 N.E.2d 702, 542 N.Y.S.2d 507, 507–08 (1989) (reversing conviction because trial court did not allow defendant to contact his attorney for thirty days prior to arraignment, and stating that it doesn't matter whether this affected the outcome). In contrast to denial of effective assistance of counsel at trial, harmless error analysis *is* applicable to denial of effective counsel at a pre-indictment preliminary hearing. *See* People v. Wicks, 76 N.Y.2d 128, 133–34, 556 N.E.2d 409, 411–12, 556 N.Y.S.2d 970, 972–73 (1990) (holding that the deprivation of a defendant's right to counsel at a hearing to determine whether the defendant could be held over for action by the grand jury is subject to harmless error analysis); People v. Wardlaw, 18 A.D.3d 106, 112, 794 N.Y.S.2d 524, 529 (4th Dept. 2005) (holding that the deprivation of a defendant's right to counsel at a pretrial suppression hearing is subject to constitutional harmless error analysis).

169. *See* Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 58, 77 L. Ed. 158, 162 (1932) (reversing conviction because, among other reasons, defendants were appointed lawyers before being given an opportunity to hire their own); People v. Knowles, 88 N.Y.2d 763, 767, 673 N.E.2d 902, 905, 650 N.Y.S.2d 617, 620 (1996) (overturning conviction because second appointed lawyer was not permitted to take part in defense trial); People v. Arroyave, 49 N.Y.2d 264, 270–71, 401 N.E.2d 393, 396–97, 425 N.Y.S.2d 282, 285–86 (1980) (modifying judgment because, among other reasons, a letter from a potential lawyer for the defendant was not delivered to the defendant for five months).

170. *See* People v. Felder, 47 N.Y.2d 287, 294–96, 391 N.E.2d 1274, 1277–78, 418 N.Y.S.2d 295, 298–99 (1979) (reversing because defendant had been represented by a non-lawyer pretending to be a lawyer because such conviction "must be set aside without regard to whether [defendant] was individually prejudiced by such representation"). However, not every instance in which a person who is not licensed to practice law participates as a lawyer for the defendant will require automatic reversal. *See* People v. Jacobs, 6 N.Y.3d 188, 190, 844 N.E.2d 1126, 1127, 811 N.Y.S.2d 604, 605 (2005) (holding that where one of defendant's two-person defense team was a non-lawyer pretending to be a lawyer, reversal was not appropriate unless defendant was actually harmed); People v. Kieser, 79 N.Y.2d 936, 937, 591 N.E.2d 1174, 582 N.Y.S.2d 988, 988 (1992) (holding that where defendant is represented by a lawyer who is temporarily not entitled to practice law for some "technical" reason, such as failure to pay bar dues, reversal is not appropriate unless defendant was harmed).

171. *See* People v. Arroyo, 98 N.Y.2d 101, 103–04, 772 N.E.2d 1154, 1156, 745 N.Y.S.2d 796, 798 (2002) (reversing a conviction because the trial court allowed defendant to represent himself without adequate inquiry into defendant's understanding of the choice).

172. *See* Faretta v. California, 422 U.S. 806, 833–34, 95 S. Ct. 2525, 2540–41, 45 L. Ed. 2d 562, 580–81 (1975) (holding that refusal to let a "literate, competent, and understanding" defendant represent himself violated the 6th and 14th Amendments). However, the U.S. Supreme Court has held that a court has the discretion to deny the request if the defendant is found to lack competence to represent himself, and it can force an incompetent defendant to accept the aid of a lawyer. Indiana v. Edwards, 128 S. Ct. 2379, 2388, 171 L. Ed. 2d 345, 357 (2008) ("the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial … but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves").

173. *See* Tumey v. Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749, 754 (1927) (holding that trial under a judge with a personal interest in conviction violated defendant's 14th Amendment rights).

174. *See* Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182, 188 (1993) (holding that constitutionally-deficient reasonable doubt instruction required reversal).

175. *See* United States v. Joseph, 542 F.3d 13, 18 (2d Cir. 2008) (reversing because erroneous jury instruction presented the possibility that jury had convicted on an improper basis); People v. Martinez, 83 N.Y.2d 26, 32, 628 N.E.2d 1320, 1323, 607 N.Y.S.2d 610, 613 (1993) (reversing because judge told the jury it could return a guilty verdict based on either of two theories, one of which was illegal, and the jury did not say which theory it used to reach the guilty verdict).

176. *See*, *e.g.*, People v. Antommarchi, 80 N.Y.2d 247, 250, 604 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992) (reversing because defendant was not present at bench conferences with jury candidates); People v. Dokes, 79 N.Y.2d 656, 661, 595 N.E.2d 836, 839–40, 584 N.Y.S.2d 761, 764–65 (1992) (reversing because defendant was not present at hearing about impeaching him with prior acts).

(9) A juror was improperly removed from the jury;[178]
(10) Your judge was absent during part of your trial;[179]
(11) During the selection of jurors, your judge improperly denied your claim that a juror should not be included in the jury, and this refusal was based on the judge's incorrect conclusion that you or your lawyer were discriminating on the basis of race or gender;[180] or
(12) During the selection of jurors, your judge improperly denied your claim that a juror should not be included because the juror expressed doubt about his or her ability to decide the case fairly, and you or your lawyer eventually used up all of your challenges to the jury composition.[181]

Note that the question of whether the harmless error test applies (as opposed to automatic reversal), and what standard to apply, are issues evolving on both the state and federal levels.[182]

(b) Errors That May be "Harmless"

If the error that occurred in your proceedings was not necessarily enough to warrant reversal of your judgment, the court will subject the error to the harmless error test. Once the court decides that the error occurred, it must decide if the error harmed you. In general, if the court finds your conviction (or plea) and your sentence would have been the same even if the error had not occurred, then it will find the error was harmless. The specific test that New York appellate courts apply to determine whether an error is harmless depends on whether the error is a constitutional or non-constitutional error.

A non-constitutional legal error does not violate rights guaranteed by the U.S. Constitution or the New York State Constitution. Rather, these types of errors generally violate rights guaranteed by state statutes or common law. A non-constitutional legal error is harmful if (1) there was not overwhelming proof of your guilt at trial (apart from any wrongly admitted evidence) *and* (2) there is a "significant probability" that the jury would have acquitted you had it not been for the error.[183]

For example, the trial judge may not improperly examine a witness (for instance, by asking a witness questions in a way that conveys to the jury an impression that the judge does not find the witness to be credible).[184] If the appellate court holds that the trial judge did indeed improperly examine a witness, it will use the harmless error test to determine if your judgment should be modified or reversed. In general, the

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177. *See* Batson v. Kentucky, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d. 69 (1986) (holding that challenging potential jurors on the basis of race violates the defendant's equal protection rights). The 14th Amendment prohibits discrimination in jury selection on the basis of gender as well as race. *See* J.E.B. v. Alabama, 511 U.S. 127, 129, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89, 97 (1994) (stating that gender discrimination by the state violates Equal Protection Clause); *see also* Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (granting a new trial because the prosecutor had improperly excluded black jurors in a case where the defendant was black, and noting that a close examination of why the prosecutor excluded jurors was necessary where racial motives were not acknowledged). The law no longer requires that you be a member of the same group as the wrongfully excluded jurors for the error to be considered fundamental. Powers v. Ohio, 499 U.S. 400, 416, 111 S. Ct. 1364, 1374, 113 L. Ed. 2d 411, 429 (1991) (reversing conviction of white defendant because black jurors were improperly not selected for the jury).

178. *See*, *e.g.*, People v. Jones, 210 A.D.2d 430, 431, 620 N.Y.S.2d 124, 125 (2d Dept. 1994) (reversing conviction because trial court did not conduct proper inquiry before discharging a juror, and noting that such an error is not subject to harmless error analysis).

179. *See* People v. Ahmed, 66 N.Y.2d 307, 311, 487 N.E. 2d 894, 896, 496 N.Y.S.2d 984, 986 (1985) (reversing conviction because absence of judge during jury deliberations violated defendant's right to jury trial).

180. *See* People v. Richie, 217 A.D.2d 84, 89, 635 N.Y.S.2d 263, 267 (2d Dept. 1995) (reversing conviction because trial court had used wrong standard to evaluate whether defendant's challenges to juror selection were based on race or gender).

181. *See* People v. Johnson, 94 N.Y.2d 600, 614–15, 730 N.E.2d 932, 940, 709 N.Y.S.2d 134, 142 (2000) (reversing conviction because trial court failed to either excuse or demand unconditional assurances from jurors who openly admitted that they doubted whether they could be fair in the case).

182. For example, in 1991, the U.S. Supreme Court ruled that the harmless error test applies to the admission of coerced confessions. Arizona v. Fulminante, 499 U.S. 279, 312, 111 S. Ct. 1246, 1266, 113 L. Ed. 2d 302, 333 (1991). This was a change in the previous standard, in which admission of a coerced confession was always considered harmful. Payne v. Arkansas, 356 U.S. 560, 568, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975, 981 (1958).

183. *See* People v. Ayala, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) ("[T]he standard for nonconstitutional error, which is governed solely by State law, requires reversal if the properly admitted evidence was not 'overwhelming' and there is a 'significant probability that the jury would have acquitted the defendant had it not been for the error or errors which occurred.'") (citation omitted).

184. *See* People v. Mendez, 225 A.D.2d 1051, 1051–52, 639 N.Y.S.2d 219, 219–20 (4th Dept. 1996) (granting defendant a new trial because the trial judge skeptically questioned a defense witness).

stronger the evidence against you, the more likely a court will find a non-constitutional error harmless (and therefore affirm the judgment against you).

A constitutional error is a legal error that violates rights guaranteed by the U.S. Constitution or the New York State Constitution. Appellate courts apply a standard that is more favorable to the defendant when reviewing constitutional errors than they do when reviewing statutory errors. In general, a constitutional error is harmful unless there is no reasonable possibility that the error might have contributed to your conviction (as in the error is harmless beyond a reasonable doubt).[185]

E. Preparing Your Papers for Your Appeal

1. What and Where to File

This Part will help you determine what papers you need to file and how to file them.

If you have a right to appeal and are appealing "as a matter of right,"[186] you must file two copies of a written notice of appeal with the clerk of the court in which you were sentenced.[187] You must also serve a copy of your notice of appeal upon the District Attorney of the county where your trial court is located.[188] The notice of appeal should state the following information: (1) your name; (2) your desire to appeal; (3) the court to which you plan to appeal; (4) a description of the judgment, sentence, or order you wish to appeal; and (5) your indictment number or your docket number if your proceedings occurred in the criminal court.[189] If your notice of appeal contains mistakes in the description of the judgment, sentence, or order to be appealed, the appellate court may, in the interest of justice, excuse your mistakes and treat your notice as valid.[190] However, you should try to make your legal papers as correct as possible.

If you are challenging a decision for which there is no right to appeal without permission—for example a trial court's denial of your Article 440.10 or Article 440.20 motion—you must first seek permission to appeal. To do this, you must file an application for a certificate granting leave (permission) to appeal in the intermediate appellate court.[191] If you do not file the application and simply appeal without permission, the court will not consider your appeal, and by the time the problem comes to light it might be too late to get permission. If your application is granted, the court will issue you a certificate granting leave (permission) to appeal. You must file both this certificate and a notice of appeal with your trial court within fifteen days.[192] If the appeal is from a local criminal court and a court stenographer did not record your proceedings, you may submit an affidavit of errors in place of the notice of appeal. See Part F for more information on how to appeal to the Court of Appeals.

In either case, once you have filed a notice of appeal, you should order copies of the trial transcript from the court reporter. You will need copies of the transcript to "perfect your appeal."[193] If you cannot afford the transcripts, you may request that the appellate court give you a free transcript, or request to appeal on the

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185. *See* Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710–11 (1967) (noting that on appeal the prosecution must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" for a conviction to be sustained despite a constitutional error); *see also* People v. Ayala, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) ("Constitutional error … must lead to reversal unless there is no reasonable possibility that the error might have contributed to the conviction."). The harmless error test for constitutional errors in habeas corpus proceedings is different than the standard in direct appeals. See *JLM*, Chapter 13 on federal habeas corpus proceedings and *JLM*, Chapter 21 on New York State habeas corpus proceedings.

186. See Part B(4) of this Chapter, which explains when you have a right to appeal without asking permission.

187. N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 2010). This section applies to appeals as a matter of right to an intermediate appellate court or directly to the Court of Appeals. If there is no clerk of the trial court, you must file one copy of your notice of appeal with the judge of the trial court and a second copy with the clerk of the appellate court to which you plan to appeal. N.Y. Crim. Proc. Law § 460.10(2) (McKinney 2010). If a transcript of your trial was not made because there was no court reporter at your trial, you may file an affidavit of errors with the trial court instead of a notice of appeal. If you file a notice of appeal, you must also file an affidavit of errors within thirty days of filing your notice of appeal. N.Y. Crim. Proc. Law § 460.10(3) (McKinney 2010). See Part E(2) of this Chapter for deadlines for filing.

188. N.Y. Crim. Proc. Law § 460.10(1)(b), (3)(b) (McKinney 2010).

189. See Forms B-1, B-2, and B-3 in Appendix B of this Chapter.

190. N.Y. Crim. Proc. Law § 460.10(6) (McKinney 2010).

191. N.Y. Crim. Proc. Law § 460.10(4)(a) (McKinney 2005 & Supp. 2008) (describing procedure for seeking leave to appeal). Also see Appendix B, Form B-2, for a sample application for a certificate granting leave to appeal. Note, each appellate division has its own rules for applying for a certificate. See *JLM*, Chapter 20 for information on 440 motions.

192. N.Y. Crim. Proc. Law § 460.10(4)(b) (McKinney 2010).

193. See Part E(3) of this Chapter on how to perfect an appeal.

original record. To do either, you must send the appellate court: (1) a letter stating your request, and (2) an affidavit (a sworn statement witnessed by a notary public) setting forth your request, the amount and sources of your income, and facts showing that you are unable to pay the relevant expenses.[194] This affidavit to proceed as a poor person on appeal, or for partial poor person relief, is called an *in forma pauperis* affidavit. You should also send copies of the letter and affidavit to the district attorney of the county where your trial court is located. Appendix B of this Chapter explains exactly how to fill out poor person's papers. The same procedure can be used to ask the court to appoint a lawyer for you if you cannot afford one.

2. When to File

If your appeal is a matter of right, you must file and serve your notice of appeal within thirty days of your sentencing date.[195] If you want to appeal, you should file even if you are unsure of the details of your appeal. Filing does not force you to complete your appeal, but if you do not file you will probably lose your right to appeal when the deadline passes. You can get a lawyer to help you with the rest of your appeal. See Part C(1) above for how to get a lawyer.

If your appeal is a matter of right and you are appealing directly to the Court of Appeals, the deadline for filing your notice of appeal is the same as for an appeal as of right to an intermediate appellate court. Also, you must file and serve your jurisdictional statement within ten days of filing your notice of appeal.

If you must seek permission to appeal, an application for a certificate granting leave to appeal to an intermediate appellate court must be filed within thirty days after you or your lawyer at trial received a copy of the order or judgment you wish to appeal.[196] If the court gives you a certificate granting permission to appeal, you must file the certificate and notice of appeal within fifteen days from the time the court created the certificate.[197]

3. How to Perfect Your Appeal

In addition to filing a notice of appeal, you must "perfect" your appeal.[198] Generally, to perfect an appeal you must deliver a specified number of copies of the trial record and your brief to the appellate court and to the opposing party. The exact steps necessary to perfect an appeal vary in each appellate court. For details, you should consult the rules of the appellate division or appellate term to which you are appealing.[199]

4. How to Prepare for Your Appeal

Once you have properly taken your appeal, you or your lawyer will need to review the record and begin to prepare a brief. The brief is a memorandum of law, which is a paper that informs the appellate court of the facts of your case, identifies the trial court's errors, and explains why these errors require the appellate court to reverse or modify your conviction or sentence.[200] The brief is "served upon" or officially given to the

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194. Under the rules of the four appellate divisions, the procedure for seeking relief as a poor person in criminal appeals is the same as that in civil cases. For an explanation of this procedure, *see* N.Y. Civ. Proc. Law §1101 (McKinney 2010). *See also* Anders v. California, 386 U.S. 738, 741, 87 S. Ct. 1396, 1398, 18 L. Ed. 2d 493, 496 (1967) (holding that an indigent person has the right to appellate representation equal to that of a nonindigent person); Douglas v California, 372 U.S. 353, 356–57, 83 S. Ct. 814. 815–16, 9 L. Ed. 2d 811, 813-814 (1963) (holding that the 14th Amendment requires states to provide indigent persons representation on their appeals as of right); People v. Garcia, 93 N.Y.2d 42, 46, 710 N.E.2d 247, 249, 687 N.Y.S.2d 601, 603 (1999) ("On a People's appeal, a defendant has the right to appellate counsel of defendant's choice and the right to seek appointment of counsel upon proof of indigency.").

195. *See* N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 2010). If you file the notice, but fail to serve a copy on the district attorney within the 30-day period, the appellate court may allow you to serve the notice after the deadline, provided you have a good reason. N.Y. Crim. Proc. Law § 460.10(6) (McKinney 2010).

196. *See* N.Y. Crim. Proc. Law § 460.10(4)(a) (McKinney 2010).

197. *See* N.Y. Crim. Proc. Law § 460.10(4)(b) (McKinney 2010).

198. *See generally* N.Y. Crim. Proc. Law § 460.70 (McKinney 2010).

199. See Appendix A of this Chapter to determine where you should direct your appeal. *See generally* N.Y. Comp. Codes R. & Regs. tit. 22, §§ 600.8, 600.11 (1st Dept. App. Div.) (2010); N.Y. Comp. Codes R. & Regs. tit. 22, §§ 640.3, 640.5, 640.6 (1st Dept. App. Term) (2010); N.Y. Comp. Codes R. & Regs. tit. 22, §§ 670.8, 670.10-a, 670.10-b, 670.10-c, 670.12 (2d Dept. App. Div.) (2010); N.Y. Comp. Codes R. & Regs. tit. 22, §§ 731.1, 731.2, 731.4 (2d Dept. App. Term) (2010); N.Y. Comp. Codes R. & Regs. tit. 22, § 800.14 (3d Dept. App. Div.) (2010); N.Y. Comp. Codes R. & Regs. tit. 22, § 1000.4 (4th Dept. App. Div.) (2010).

200. Part C of Chapter 6 of the *JLM* describes briefs and other legal papers in more detail.

court and your opponent (the respondent). If your lawyer prepares the brief, you should read a copy to be sure it contains all the arguments that you believe the appeals court should consider in deciding your case.

If you have been assigned a lawyer, you do not have the right to insist the lawyer include arguments in the brief that your lawyer believes should not be presented to the appellate court.[201] You may, however, request permission to file a *pro se* supplemental brief (an additional brief of your own) to raise issues your lawyer left out of the original brief. The appellate court will likely (but not necessarily) accept your *pro se* brief, provided you request to file it in a timely fashion, usually by writing for permission to the appellate court where your appeal will be heard, and provided you specifically identify in your request the issues that you intend to raise in the *pro se* brief. You must request this permission in writing within thirty days of the date your attorney files the brief. You should make sure your request is not too late or too general.[202] The rules for when you must file your request can be found in the rules of the court to which you are appealing.[203]

In response to your brief, your opponent (the prosecution) will almost certainly file a brief that argues that the trial court's judgment should stand. After the appellate court receives your opponent's brief, it will set a calendar date for oral argument.[204] After your opponent files his brief, you also have the right to file a reply brief within a few days. A reply brief gives you the opportunity to point out factual errors in the respondent's brief, or to mention relevant court decisions that have been issued since you submitted your initial brief. You are not allowed to raise new issues in your reply.[205]

In an oral argument, your lawyer has about fifteen minutes to discuss the merits of your appeal directly with the appellate court.[206] The purpose of the oral argument is to focus the judges' attention on important points of your case and answer any questions or doubts they have about your claims. You should discuss with your lawyer any particular points you would like emphasized in oral argument, since it is your lawyer's final chance to persuade the appellate court to rule in your favor. In some cases, you and your lawyer may decide it is best not to argue your case orally. For example, your lawyer may believe an oral argument will add little to the arguments presented in your written brief. Keep in mind there are risks involved in such a decision. In some cases, the court may consider waiving the oral argument as an admission that your case is weak. An oral argument also provides an important chance to clarify and expand on issues raised in your brief. You and your lawyer should consider the matter carefully before making a decision on how to proceed.

Appellate court judges will decide your case after they read the briefs and hear the oral argument. The court may or may not explain in writing the reasons for its decision.[207] Keep in mind that the whole process—from the time you file a notice of your appeal to the date the judges hand down their decision—is very time consuming and may be subject to delays. Despite the strict time limits for starting an appeal, the entire process can takes several years to conclude. Each step may take several months—including gathering the necessary documents, preparing the brief, obtaining the respondent's brief, getting a calendar date, and, finally, waiting for a decision.

Throughout your appeal, you should take an active role even if you have a lawyer. This includes communicating frequently with your lawyer, suggesting issues for your lawyer to include in your briefs, and requesting copies of documents relating to your appeal.

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201. *See* Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993 (1983) (holding that a defendant does not have the right to insist that his lawyer raise every possible argument that has some merit); People v. White, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (same).

202. *See* People v. White, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (holding that while it would be "better practice" for appellate courts to accept timely supplemental *pro se* briefs, the denial of an application to accept a *pro se* brief is within the court's discretion).

203. In the second department of the appellate division, for example, if you want to file a *pro se* brief, you must do so within 30 days from the date your attorney filed her brief. For more information about the rules of the court to which you are applying, see *JLM*, Chapter 5.

204. Some appeals may take place without oral argument. Check the rules of the appellate court to which your appeal is directed. *See* N.Y. Crim. Proc. Law § 460.80 (McKinney 2010).

205. *See* Jonathan M. Purver & Lawrence E. Taylor, Handling Criminal Appeals § 128.12 506 (Supp. 2004).

206. The rules of the individual appellate courts set the amount of time allowed for oral argument. N.Y. Crim. Proc. Law § 460.80 (McKinney 2010).

207. The practice of affirming a decision without a written explanation (known as "summary affirmance") has been criticized by lawyers, but appellate courts sometimes do it nonetheless.

F. Continuing Your Appeal

If your first appeal is not successful, you may be able to pursue your claim in a higher court or by an alternative procedure. This Part discusses how you can take an appeal that has been denied by an intermediate appellate court to the Court of Appeals. It also discusses alternatives that you may consider if the Court of Appeals denies your appeal.

If the intermediate appellate court denies your appeal, you may continue pursuing your claim by appealing the intermediate appellate court's order to New York's highest court, the Court of Appeals. You can appeal an intermediate appellate court decision affirming or modifying a trial court decision against you only if: (1) the decision is based on the law alone or (2) the remedy ordered is illegal. Unlike the intermediate appellate courts, the Court of Appeals cannot vacate a conviction solely on the basis that the evidence does not sufficiently support the facts. In addition, the Court of Appeals cannot review a determination made by an intermediate appellate court based upon its "in the interest of justice" discretion.[208]

Keep in mind that you do not have a right to appeal an intermediate appellate court decision to the Court of Appeals; you may do so only if you obtain a certificate granting leave (permission) to appeal.[209] You must apply for this certificate within thirty days after you are served with the appellate court order that you wish to appeal.[210] **THIS TIME LIMIT IS EXTREMELY IMPORTANT.** You may seek permission to continue your appeal if the appellate court affirms the trial court judgment, sentence, or order against you, or if you are dissatisfied with the appellate court's modification of the judgment, sentence, or order.[211]

When you are appealing from an unrecorded proceeding, you must file either a notice of appeal or an affidavit of errors within thirty days after the judgment, sentence, or order was entered or imposed.[212] If you first file a notice of appeal, you have thirty days from the date of such filing to file an affidavit of errors.[213] You must serve a copy of the affidavit of errors to the District Attorney within three days of filing the affidavit with the court.[214]

The specific procedure for obtaining permission to appeal depends upon the particular intermediate appellate court from which you are appealing. If you are appealing from any court other than the appellate division, you must seek permission from a judge of the Court of Appeals. However, if you are appealing from a decision of the appellate division, you may request a certificate of leave to appeal from either a judge of the Court of Appeals or a justice of the appellate division in the same department that handed down the decision that you are appealing.[215] Many appellate division judges are hesitant to grant leave to appeal, however, because they know that the Court of Appeals likes to decide for itself what cases it will hear. You can file only one application, so you may wish to seek a certificate directly from the Court of Appeals. However, if an appellate division judge dissented from the majority in your case, you may decide to apply to that judge for a certificate of leave to appeal instead of going directly to a judge of the Court of Appeals.

To request a certificate from a judge of the Court of Appeals, you must send an application to the clerk of the Court of Appeals. The application should be addressed to the chief judge, who will appoint one judge of the Court of Appeals to consider your application.[216] Your application must include copies of the briefs and the appellate division decision along with a letter explaining why your case needs further review. You must also include relevant transcripts that demonstrate that your appeal is based on a question of law (which usually requires that you preserved the right to appeal when the error was made).[217] Further review might be considered appropriate if your case presents a novel issue of law (that is, an issue that the court has never decided before), if the lower court did not follow established precedent, or if the appellate divisions differ in

208. N.Y. Crim. Proc. Law § 450.90 (McKinney 2010).

209. N.Y. Crim. Proc. Law § 450.90 (McKinney 2010). Form B-2 in Appendix B is a sample application for a certificate granting leave to appeal.

210. N.Y. Crim. Proc. Law § 460.10(5)(a) (McKinney 2010).

211. N.Y. Crim. Proc. Law § 450.90(1) (McKinney 2010).

212. N.Y. Crim. Proc. Law § 460.10(3)(a) (McKinney 2010).

213. N.Y. Crim. Proc. Law § 460.10(3)(a) (McKinney 2010).

214. N.Y. Crim. Proc. Law § 460.10(3)(b) (McKinney 2010).

215. N.Y. Crim. Proc. Law § 460.20(2) (McKinney 2010). If you are appealing from the decision of an intermediate appellate court other than the appellate division (i.e. the appellate term), you must request the certificate from a judge of the Court of Appeals. N.Y. Crim. Proc. Law § 460.20(2)(b) (McKinney 2010).

216. N.Y. Crim. Proc. Law § 460.20(3)(b) (McKinney 2010).

217. *See generally* N.Y. Comp. Codes R. & Regs. tit. 22, § 500.20 (2010).

their approaches to the issue involved. For an example of an application to the Court of Appeals, see Form B-2 in Appendix B at the end of this Chapter. If the judge grants your application and issues a certificate, your appeal is taken. You may proceed to prepare your brief and oral argument.

A jurisdictional statement explains the issues to be raised and gives legal authority to assert that the Court of Appeals has the power to hear your claim. You will need to file two copies of the jurisdictional statement with the clerk of the Court of Appeals, and serve one copy on the District Attorney of the county where your trial court is located.[218]

If the Court of Appeals denies permission to appeal, you may request reconsideration of your application by filing an application for reconsideration with the clerk of the court within thirty days of the issuance of the certificate denying permission. Your application will be reassigned to the same judge who originally ruled on it.[219] Be aware that very few of cases heard at the intermediate level reach the Court of Appeals.[220]

If the Court of Appeals hears your appeal, it will affirm, reverse, or modify the intermediate appellate court order[221] and take or direct some appropriate corrective action.[222]

If the Court of Appeals does not hear your appeal, or if it hears your appeal but rules against you, you may still have other opportunities for relief. First, if your case involves issues of federal law,[223] you can apply for a writ of certiorari. This would allow you a final appeal on those federal issues to the United States Supreme Court, but the Supreme Court very rarely grants such permission. Second, in certain circumstances, you may seek to challenge your conviction or sentence through a different post-conviction proceeding, such as an Article 440 motion, a petition for state habeas corpus, or a petition for federal habeas corpus. See *JLM*, Chapters 20, 21, and 13, respectively, for explanations of these remedies.

G. Three Options for Dealing with Ineffective Assistance of Appellate Counsel

When you appeal your conviction, you have the right to effective assistance from your appellate lawyer.[224] This Part addresses what to do if you believe that your appointed attorney is not raising all the issues that should be pursued on appeal or is otherwise failing to represent you appropriately. Note that you also have a right to receive effective assistance from your trial lawyer, and if you did not receive effective assistance at your trial this could itself be grounds for appeal. For information about effective assistance from your trial lawyer, see *JLM*, Chapter 12.

This Part will discuss three particular strategies that may be valuable for you: (1) responding to an *Anders* brief submitted by your attorney, (2) filing supplemental briefs along with those of your attorney, and (3) applying for a writ of error *coram nobis* for relief from ineffective counsel.

1. *Anders* Briefs

You may encounter a situation in which the attorney appointed for your criminal appeal asks the court for permission to withdraw from your case by filing a motion known as an "*Anders* brief." An attorney files an *Anders* brief if she concludes, after reviewing your case, that there are no non-frivolous claims you could make on appeal. But, in the brief, your attorney must also identify, by references to the trial record, any issues with at least arguable merit, supported by legal authority.[225] After reviewing the *Anders* brief, a court

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218. N.Y. Comp. Codes R. & Regs. tit. 22, §§ 500.20, 500.21 (2010). Proof of service on the district attorney must also be filed with the clerk of the Court of Appeals.

219. N.Y. Comp. Codes R. & Regs. tit. 22, § 500.20(2)(iii)(d) (2010).

220. In 2008, the Court of Appeals decided 53 criminal appeals. *See* Chief Administrator of the Courts, State of N.Y., The 31st Annual Report of the Chief Administrator of the Courts (2008), *available at* http://www.courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2008.pdf; *see also* Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 450.90 (McKinney 2010) (discussing appellant's hurdles to reaching appeals court).

221. N.Y. Crim. Proc. Law § 470.35(3) (McKinney 2010).

222. N.Y. Crim. Proc. Law § 470.40 (McKinney 2010).

223. Violations of the U.S. Constitution present issues of federal law. *See* 28 U.S.C. § 1331 (2006).

224. Evitts v. Lucey, 469 U.S. 387, 395–96, 105 S. Ct. 830, 835–36, 83 L. Ed. 2d 821, 829 (1985) (holding that fairness of the appellate process requires that a defendant receive more than nominal representation from counsel); Douglas v. California, 372 U.S. 353, 357, 83 S. Ct. 814, 816, 9 L. Ed. 2d 811, 815–16 (1963) (holding state requirement that defendants make preliminary showing of merit prior to assignment of appellate counsel was unconstitutional).

225. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967). *But see* Smith v. Robbins, 528 U.S. 259, 272, 120 S. Ct 746, 756–57, 145 L. Ed. 2d 756, 771–72 (2000) (holding that states may adopt procedures that differ from that described in *Anders*, so long as the underlying goal of adequate appellate review required by the 14th Amendment is met). However, the "procedures adopted by New York courts closely parallel and are

will grant your attorney's request to withdraw from handling your appeal if it determines your attorney has fulfilled the obligation to thoroughly examine the trial record for arguably appealable issues. If the court agrees there are no non-frivolous claims you could make on appeal, it will affirm the judgment from which you seek to appeal and dismiss your appeal. But, if the court concludes there *are* non-frivolous claims on which you could base an appeal (whether or not it thinks you will actually prevail), the court will appoint you a new attorney to help with your appeal.[226]

The fact that your attorney files an *Anders* brief does not in itself constitute ineffective assistance of counsel.[227] However, your attorney's duty in the matter of your appeal is to be an "active advocate," and her *Anders* brief must be more than a simple assertion that there are no non-frivolous claims that you could make on appeal. It must show that your attorney made an independent and conscientious examination of the record for the purposes of your appeal.[228] You may disagree with your attorney over whether certain issues of your case should be appealed. Your attorney must raise all issues that, in his or her professional judgment, have arguable merit, but he or she is not obliged to raise every non-frivolous issue you request.[229]

If you believe that there are non-frivolous issues that should be pursued on appeal, but your attorney refuses to do so and instead files an *Anders* brief, you will generally have the opportunity to file a *pro se* supplemental brief on any issues you believe to be meritorious (deserving consideration by the court).[230] You should refer to the rules of the court to which you are appealing to determine whether you must first apply for permission to submit your brief and whether there are any criteria the court may have set out for the format of your brief. Your attorney is required to inform you of the fact that he has filed an *Anders* brief that will likely result in an affirmation of your conviction, and he must also inform you of your right to file a *pro se* supplemental brief.[231] Your attorney must also provide you with a copy of the brief.[232]

You should file a supplemental brief or else you may waive other rights unrelated to your direct appeal. If you don't file your own brief in response to your attorney's *Anders* brief, you could be prevented from successfully pursuing habeas relief on issues that could have been raised on appeal, including ineffective assistance of counsel. For example, to obtain federal habeas relief, a petitioner must exhaust state remedies and show his constitutional rights were violated.[233] If you do not raise issues in a *pro se* brief, a court may find you did not exhaust state remedies and bar you from bringing a federal habeas petition.[234] Further,

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clearly modeled upon the procedure set forth by the Supreme Court in *Anders*." People v. Stokes, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.2d 217, 219 (2001) (describing the procedures for *Anders* briefs that New York courts have adopted and holding that the *Anders* brief filed by assigned counsel was insufficient because it did not adequately advocate available non-frivolous arguments on defendant's behalf).

226. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (describing appointed attorneys' duties to handle appeals); *see also* People v. Stokes, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.2d 217, 219 (2001) (describing procedures New York courts have adopted for *Anders* briefs and holding *Anders* brief filed by assigned counsel was insufficient because it did not adequately present available non-frivolous arguments).

227. McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 444, 108 S. Ct. 1895, 1905, 100 L. Ed. 2d 440, 456–57 (1988) (upholding constitutionality of a state requirement that when counsel filed a no-merit brief, he must include an explanation of why an issue lacked merit); *see also* Jorge v. United States, 818 F. Supp. 55, 57 (S.D.N.Y. 1993) (holding the "filing of an *Anders* brief does not in itself constitute ineffective assistance of counsel" and defendant must show that "appellate counsel's performance was unreasonably deficient" in order to prove ineffective assistance of counsel).

228. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1386, 1400, 18 L. Ed. 2d. 493, 498 (1967).

229. Jones v. Barnes, 463 U.S. 745, 751–54, 103 S. Ct. 3308, 3312–14, 77 L. Ed. 2d 987, 993–95 (1983) (holding appellate counsel fulfilled duty of representing client to the best of his ability even though counsel did not raise every non-frivolous issue).

230. United States v. Gomez-Perez, 215 F.3d 315, 320 (2d Cir. 2000) (stating that "[i]f counsel subsequently determines that an *Anders* brief is appropriate and thereafter files such a brief, this Court must … afford the defendant an opportunity to raise pro se any issues he feels merit discussion.") (citing Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967)).

231. United States v. Gomez-Perez, 215 F.3d 315, 321 n.2 (2d Cir. 2000) (stating that an attorney should "adhere to standard practice by including with his *Anders* brief an affidavit certifying" that he has informed his client of the filing of the brief, which will likely result in the affirmance of the client's conviction).

232. Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967) (stating that "[a] copy of counsel's brief should be furnished" to the defendant).

233. See *JLM*, Chapter 13, "Federal Habeas Corpus," for more information on federal habeas and exhaustion.

234. *See* Jorge v. United States, 818 F. Supp. 55, 56 (S.D.N.Y. 1993) (stating that where "a defendant has failed to raise a claim on direct appeal, the claim is barred … unless the petitioner can demonstrate 'cause' for the default of normal appellate procedure and actual 'prejudice' from the alleged violation on which the claim is based.") (citing Campino v. United States, 968 F.2d 187 (2d Cir. 1992)); *see also* Jones v. Vacco, 126 F.3d 408, 413 (2d Cir. 1997) ("It is

where your attorney has submitted an *Anders* brief rejecting issues in your supplemental brief as frivolous, New York courts may assign new counsel for your appeal.[235]

Finally, note that *Anders* is only binding law in federal court.[236] That being said, citing *Anders* in state appeals is persuasive since state courts must follow an *Anders*-like analysis to ensure that your Fourteenth Amendment rights are upheld and since New York's procedures "closely parallel" *Anders*.[237]

2. Filing Supplemental Briefs

Though you do not have an absolute right to file briefs to supplement the arguments made by your appeals attorney in his or her brief, many appellate courts allow you to do so.[238] You should first apply to the court to which you are appealing for permission to file. Permission will usually be granted if you request permission within thirty days of the date your appeals attorney has filed his or her brief AND you specifically identify the issues you intend to raise in the *pro se* brief. You should consult the specific Department's rules and regulations for what your request should include.[239] It is important to follow the timeliness and specificity requirements, because if you do not, the court will likely deny permission to file.

3. Applying for Writ of Error *Coram Nobis*

If you want to challenge an appellate court's affirmation of your conviction on the grounds that you received ineffective assistance of appellate counsel, you may do so by filing a writ of error *coram nobis*.[240] A writ of error *coram nobis* is a way to challenge a conviction as infirm (faulty) and to petition the court to correct errors of a fundamental nature. For example, you can use a writ of error *coram nobis* if your appellate lawyer failed to prosecute an appeal or raise all issues effectively.[241]

You should direct the petition to the appellate division "where the allegedly deficient representation occurred."[242] Note, if you wish to challenge your conviction's affirmance because of ineffective assistance of appellate counsel in New York state, the only way to do so is a writ of error *coram nobis*; you may not challenge it with a motion to vacate judgment under New York Criminal Procedure Law Section 440.10.[243] If your petition is granted, the appellate court may allow you (most likely with a new lawyer) to re-argue your original appeal.[244] If your petition is denied, you may appeal that decision to the Court of Appeals.[245]

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well settled that all state remedies must be exhausted before a federal court may consider a state prisoner's petition for a writ of habeas corpus."); Basnight v. Keane, No. 99-CV-4826 (FB), 2000 U.S. Dist. LEXIS 10940, at *9 (E.D.N.Y. Aug. 1, 2000) (*unpublished*) (stating that "a petitioner must exhaust all state remedies and show that his federal constitutional rights have been violated" to get federal habeas relief).

235. *See*, *e.g.*, People v. Pertillar, 15 A.D.3d 679, 679–80, 789 N.Y.S.2d 921, 922 (2d Dept. 2005) (relieving attorney who had filed *Anders* brief and assigning new counsel to represent defendant on appeal).

236. Smith v. Robbins, 528 U.S. 259, 265, 120 S. Ct 746, 753, 145 L. Ed. 2d 756, 767 (2000) (holding that states may adopt procedures that differ from those described in *Anders*, so long as the underlying goal of adequate appellate review required by the 14th Amendment is met).

237. *See* People v. Stokes, 95 N.Y.2d 633, 637, 744 N.E.2d 1153, 1155, 722 N.Y.S.2d 217, 219 (2001) (noting that the "procedures adopted by New York courts closely parallel and are clearly modeled upon the procedure set forth by the Supreme Court in *Anders*").

238. *See* People v. White, 73 N.Y.2d 468, 479, 539 N.E.2d 577, 583, 541 N.Y.S.2d 749, 755 (1989) (finding while it would be "better practice" for appellate courts to accept timely supplemental *pro se* briefs, courts can decline to accept them).

239. For more information about the rules of the court to which you are applying, see *JLM*, Chapter 5.

240. People v. Bachert, 69 N.Y.2d 593, 594, 509 N.E.2d 318, 319, 516 N.Y.S.2d 623, 624 (1987) (holding claims of ineffective assistance of counsel in the intermediate appellate court will be determined through the writ of error *coram nobis*).

241. People v. Bachert, 69 N.Y.2d 593, 598, 509 N.E.2d 318, 321, 516 N.Y.S.2d 623, 626 (1987) ("a motion for a writ of error *coram nobis* lies where it was asserted that a court-appointed lawyer failed to prosecute an appeal.") (citing People v. De Renzzio, 14 N.Y.2d 732, 199 N.E.2d 172, 250 N.Y.S.2d 76 (1964)); People v. Adams, 12 N.Y.2d 417, 420, 190 N.E.2d 529, 531, 240 N.Y.S.2d 155, 157–58 (1963).

242. People v. Bachert, 69 N.Y.2d 593, 595–96, 509 N.E.2d 318, 322, 516 N.Y.S.2d 623, 627 (1987) ("the natural venue for *coram nobis* review of ineffective assistance of appellate counsel claims is in the appellate tribunal where the allegedly deficient representation occurred.").

243. People v. Bachert, 69 N.Y.2d 593, 595–96, 509 N.E.2d 318, 319, 516 N.Y.S.2d 623, 624 (1987) ("a common-law *coram nobis* proceeding brought in the proper appellate court is the only available and appropriate procedure and forum to review a claim of ineffective assistance of appellate counsel.").

244. People v. Walton, 40 A.D.3d 1258, 1259, 836 N.Y.S.2d 442, 443 (3d Dept. 2007) (granting *coram nobis* relief in part and reinstating defendant's appeal as to certain issues).

A form for writs of error *coram nobis* can be found in Appendix B-7. In the *coram nobis* brief, you must explain the particular actions your appellate counsel took and the actions you believe your attorney should have taken. Your statements—both of the facts and arguments—should be as clear and specific as possible. Also, be sure to consult the rules of the particular jurisdiction for additional deadlines and requirements that you must follow. Note that you also have the right to effective assistance from your trial lawyer. For information about how to challenge your trial lawyer's assistance, see *JLM*, Chapter 12.

H. Conclusion

If you believe a harmful error occurred at your hearing or trial, you may be able to appeal and have the error corrected. The first step in this process is determining whether your appeal is prevented by time, plea agreements, failure to protest, or various other reasons. If your appeal is not prevented and you are eligible to appeal, you should begin the process and get a lawyer. You have the right to a lawyer, and without one you risk making a mistake that will waste your limited opportunity to appeal. Next, your lawyer or you will need to decide the specific legal basis for your appeal and file the correct appeals papers at the proper times to the right court. The appeals process can feel overwhelming and complicated, but, by following the steps in this Chapter, you should be able to appeal your conviction.

245. People v. Stultz, 2 N.Y.3d 277, 281, 810 N.E.2d 883, 885–86, 778 N.Y.S.2d 431, 433–34 (2004) (explaining that an intermediate appellate court's decision regarding a petition for a writ of error *coram nobis* may be appealed to the Court of Appeals and defining the Court of Appeal's standard of review for such an appeal).

APPENDIX A

THE COURT TO WHICH YOU SHOULD APPEAL

Please also refer to the inside back cover of the *JLM*, which shows the structure of the New York court system.

Crime	Court Where You Were Convicted[246]	Court Where Appeal May be Heard
Misdemeanor	Local criminal court outside New York City	County court of the county where you were convicted; or the Appellate Term of the New York State Supreme Court in the Second, Third, or Fourth Departments, if the appellate division of that department so directs.[247]
Misdemeanor	New York City Criminal Court in New York or Bronx Counties	Appellate Term for the New York State Supreme Court of the First Department.
Misdemeanor	New York City Criminal Court in Kings, Queens, or Richmond Counties	Appellate Term for the New York State Supreme Court of the Second Judicial Department.
Misdemeanor	County court	Appellate division of the department where you were convicted; or the Appellate Term of the New York State Supreme Court in the Second, Third, or Fourth Departments, if the appellate division of the department so directs.
Felony	County court	Appellate division of the department where you were convicted.
Any Offense	New York State Supreme Court	Appellate division of the department where you were convicted.

246. This is also the court where you file your notice of appeal.

247. The Appellate Division of the Second Department does direct certain classes of cases to the appellate term. Rules of the Second Department that discuss this matter may be found in McKinney's New York Rules of Court. N.Y. Comp. Codes R. & Regs. tit. 22, § 730.1 (2010).

APPENDIX B

SAMPLE PAPERS FOR A CRIMINAL APPEAL[248]

This Appendix contains the following materials:

B-1. Notice of Appeal as of Right to an Intermediate Appellate Court[249] from a Superior Court[250] Judgment, Sentence, Judgment and Sentence, or Order.
B-2. Notice of Application for a Certificate Granting Leave to Appeal to an Intermediate Appellate Court or to the Court of Appeals
B-3. Papers Needed to Obtain the Services of a Lawyer Without Cost on Appeal, or Other Poor Person Relief
  a. Notice of Motion to Proceed as a Poor Person
  b. Affidavit in Support of Motion to Proceed as a Poor Person on Appeal
B-4. Papers Needed to Get Release on Bail Pending Appeal
  a. Notice of Motion for Recognizance or Bail Pending Appeal
  b. Affidavit in Support of Motion for Recognizance or Bail Pending Appeal
B-5. Notice of Motion for Extension of Time in Which to Take an Appeal Pursuant to New York Criminal Procedure Law Section 460.30
B-6. Affidavit in Support of Motion for Extension of Time to Take Appeal
B-7 Petition for Writ of Error *Coram Nobis*

DO NOT TEAR THESE FORMS OUT OF THE *JLM*. If you simply tear these papers out of the *JLM* and send them to the court, the court will ignore the papers. Write your own versions of these forms, and fill them out according to the facts of your particular case. The endnotes following the sample documents tell you how to fill in the necessary information. Consult Parts A through F of this Chapter and Chapter 6 of the *JLM*, "An Introduction to Legal Documents," for assistance in preparing your case. The name and address of the court to which you should send these papers are contained in Appendices I and II of the *JLM*.

248. These forms are based in part upon McKinney's Forms, a useful resource providing sample forms for almost any action you may wish to bring. The samples we have provided are broad and general, while the McKinney's Forms are specific and correspond to the statute underlying your action. *See generally* 18B West's McKinney's Forms Criminal Procedure Law §§ 450–70 (2010).

249. New York law uses the term "intermediate appellate court" to refer to the appellate courts in each county that decide the defendant's first appeal. These courts are the appellate division and the appellate term.

250. New York law uses the general term "superior court" to include both the supreme court and certain county courts in different counties that have jurisdiction over both felonies and misdemeanors.

B-1. NOTICE OF APPEAL AS OF RIGHT TO AN INTERMEDIATE APPELLATE COURT FROM A SUPERIOR COURT JUDGMENT, SENTENCE, JUDGMENT AND SENTENCE, OR ORDER[1]

Supreme Court of the State of New York[2]
County of _____[3]
----------x

The People of the State of New York,	:	
Plaintiffs,	:	Notice of Appeal
	:	
- against -	:	Indictment No. _____[4]
	:	
_____,[5]	:	
Defendant.	:	

----------x

PLEASE TAKE NOTICE, that defendant, _____, hereby appeals pursuant to section 450.10, subdivision (1), of the Criminal Procedure Law of the State of New York[6] to the Appellate Division of the Supreme Court, _____[7] Judicial Department, from the _____, _____[8] judgment made and entered by Hon. _____,[9] convicting [him/her] of the class ____[10] felony of _____[11] and that this appeal is taken from said judgment and from each and every part thereof and every intermediate order made therein.

Dated: _____,[12] New York
_____[13]

_____
Attorney for Defendant[14]

_____ Street
_____ New York
Telephone Number: _____

To: Hon. _____[15]
District Attorney |

_____ County
_____ Street
_____, New York
Clerk

Supreme Court of the State of New York

_____ County
_____ Street
_____ , New York

B-2. NOTICE OF APPLICATION FOR A CERTIFICATE GRANTING LEAVE TO APPEAL TO AN INTERMEDIATE APPELLATE COURT OR TO THE COURT OF APPEALS[16]

Court of Appeals of the State of New York

The People of the State of New York, Plaintiffs-Respondents,	:	Notice of Application
- against -	:	Indictment No. _____[17]
_____,[18] Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that upon the annexed affidavit, the above named defendant-appellant makes application to _____[19] to determine the application hereby made for a certificate,[20] pursuant to section 460.20 of the Criminal Procedure Law of the State of New York, certifying that this case involves a question of law that ought to be reviewed by the Court of Appeals and granting leave to appeal to the Court of Appeals from __[date]_____, _[year]_ order of the Appellate Division _____[21] Judicial Department which affirmed the ___[date]__, _[year]_, Supreme Court, _____ County, judgment convicting defendant of the class _____ felony of _____ and sentencing defendant to an indeterminate term of imprisonment at _____.[22]

Dated: _____

_____[23]

_____

Attorney for Defendant-Appellant
[Address and phone number][24]

To: Clerk
Court of Appeals of the State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York[25]

B-3. PAPERS NEEDED TO OBTAIN THE SERVICES OF A LAWYER WITHOUT COST ON APPEAL, OR OTHER POOR PERSON RELIEF

These papers will allow you to obtain a free copy of the trial transcript, as well as a lawyer. Remember that these papers (like all in this Chapter) are for an appeal under the law of New York State: they are not the correct papers to file if you are filing a poor person's action in federal court or in another state's court.

a. Notice of Motion to Proceed as a Poor Person

Supreme Court of the State of New York,
Appellate Division,[26]

_____[27] Judicial Department

The People of the State of New York, Plaintiffs-Respondents,	:	Notice of Motion to Proceed As a Poor Person Upon Appeal
- against -	:	
	:	Indictment No. _____[28]
_____,[29] Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that upon the affidavit of _____, sworn to on the _____ day of _____, _____,[30] a motion will be made at a term of this court, for an order permitting defendant-appellant to prosecute this appeal from the judgment entered in this action on the _____ day of _____, _____[31] as a poor person, directing that [he/she] be furnished a copy of the stenographic transcript of the trial of this action without fee, and granting permission to appeal on the original record, upon the ground that said defendant-appellant has insufficient income and property to enable [him/her] to pay the costs, fees, and expenses to prosecute said appeal, and for such other and further relief as this Court may deem just and proper.

Dated: _____
_____[32] _____

_____[33]
Defendant-Appellant

To: _____
District Attorney
Address[34]

- or -

Clerk
Appellate Division, ____ Judicial Department
Address[35]

b. Affidavit in Support of Motion to Proceed as a Poor Person on Appeal

Supreme Court of the State of New York
Appellate Division,

_____ Judicial Department[36]

_____[37]	:	
Defendant-Appellant,	:	Affidavit in Support of
	:	Motion to Proceed as a
- against -	:	Poor Person Upon Appeal
	:	
The People of the State of New York	:	Indictment No. _____[38]
Plaintiffs-Respondent.	:	

State of New York
County of _____[39]

_____,[40] being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned case, and I make this affidavit in support of the attached motion to proceed *in forma pauperis*.

2. I am presently in the custody of the Superintendent of _____ at _____ pursuant to a judgment of the Supreme Court of the State of New York, _____ County, rendered on _____, _____, convicting me of _____, in the _____ degree, and sentencing me to _____ years imprisonment.[41]

3. I am unable because of my indigence to pay the costs, fees, and expenses necessary to prosecute this appeal. I am currently incarcerated and am earning $_____ per week in income and I own $_____ worth of property. No other person has a beneficial interest in the outcome of this appeal.

4. During the trial I was represented by _____.[42]

5. I believe in good faith that I am entitled to the relief that I am seeking in this case.

WHEREFORE, I respectfully ask for an order permitting me to prosecute this appeal as a poor person and that I be furnished with the stenographic transcript of this action without fee and that I be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

_____[43]
Defendant-Appellant

Sworn to before me
this _____ day of _____, _____

_____
Notary Public[44]

B-4. PAPERS NEEDED TO GET RELEASE ON BAIL PENDING APPEAL[45]

a. Notice of Motion for Recognizance or Bail Pending Appeal

Supreme Court of the State of New York

_____ Judicial Department[46]

The People of the State of New York	:	
Plaintiffs-Respondents,	:	Motion for
	:	Recognizance or Bail
- against -	:	
	:	Indictment No. _____[47]
_____[48]	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____ sworn to on the _____ day of _____, ____[49] and upon all proceedings in this case, a motion pursuant to section 510.20 of the Criminal Procedure Law of the State of New York is made to this Court for an order revoking the order committing _____[50] to the custody of the _____[51] and releasing me in my own recognizance or on bail, on the grounds set forth in the affidavit, and for such other and further relief as to the court may seem just and proper.

Dated:_____

_____ [52]

_____ [53]

Defendant-Appellant

To: _____

District Attorney

Address[54]

- or -

Clerk

Appellate Division, ____ Judicial Department

Address[55]

b. Affidavit in Support of Motion for Recognizance or Bail Pending Appeal

Supreme Court of the State of New York
_____ Judicial Department[56]

The People of the State of New York Plaintiffs-Respondents, - against - _____[57] Defendant-Appellant.	: : : : : : :	Affidavit in Support of Motion for Recognizance or Bail Pending Appeal Indictment No. _____[58]

State of New York
County of _____[59]

_____[60] being duly sworn, deposes and says:

1. I am the defendant-appellant above named and I make this affidavit in support of the annexed notice of motion.

2. On the _____ day of _____, _____, I was convicted of _____ in the _____ degree (Judge _____) and I am presently in the custody of the Superintendent of _____ at _____ pursuant to the judgment and sentence in the case.[61]

3. I am now appealing my conviction of _____, and I filed a Notice of Appeal on _____, _____.[62]

4. I believe that the facts of my case warrant the issuance of an order securing my release on bail in my own recognizance:
_____
_____.[63]

5. Deponent believes that the appeal herein has great merit and that there is a reasonable possibility of ultimate reversal of the judgment of conviction appealed from. The reasons why said judgment of conviction should be reversed are:
_____
_____.[64]

6. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully pray that an order be entered revoking the order committing me to the custody of _____[65] and releasing me in my own recognizance or on bail, together with such other and further relief as this court may deem proper and just.

_____[66]

Sworn to before me
this _____ day of _____, _____

_____
Notary Public[67]

B-5. NOTICE OF MOTION FOR EXTENSION OF TIME IN WHICH TO TAKE AN APPEAL PURSUANT TO NEW YORK CRIMINAL PROCEDURE LAW § 460.30[68]

Supreme Court of the State of New York
Appellate Division _____ Department[69]

The People of the State of New York	:	
Plaintiffs-Respondents,	:	Notice of Motion For
	:	Extension of Time to
	:	Appeal Pursuant to
- against -	:	CPL § 460.30
	:	
_____[70]	:	Indictment No. _____[71]
Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____[72] sworn to on the _____ day of _____, _____,[73] and upon all the proceedings in this case, a motion pursuant to section 460.30 of the Criminal Procedure Law of the State of New York is made to this Court for an order reinstating the time for taking an appeal from the [judgment/sentence/order] imposed by the Supreme Court of the County of _____[74] rendered on the _____ day of _____, _____[75] upon conviction of the above named defendant of the crime of _____, in the _____ degree[76] upon the ground that said defendant's failure to file a notice of appeal in timely fashion resulted from _____ _____,[77] and for such other and further relief as the Court may deem just and proper.

Dated:_____
_____ [78]

_____[79]
Defendant-Appellant

To: Hon. _____
District Attorney
Address[80]

Clerk
_____ Appellate Division
_____ Judicial Department
Address[81]

B-6. AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO TAKE APPEAL

Supreme Court of the State of New York
Appellate Division _____ Department[82]

The People of the State of New York Plaintiffs-Respondents, - against - _____[83] Defendant-Appellant.	: : : : : : : :	Affidavit in Support of Motion for Extension of Time to Appeal Pursuant to CPL § 460.30 Indictment No. _____[84]

_____,[85] being duly sworn, deposes and says:

That I am the defendant herein and submit this affidavit in support of my application for leave to serve a notice of appeal within thirty days after the granting of an order permitting me to file pursuant to Section 460.30 of the Criminal Procedure Law of the State of New York.

On _____, _____, I was convicted of _____ in the _____ degree. (Trial Judge _____.) I received a sentence of _____ years on _____, _____. (Judge _____.)[86]

I failed to file my Notice of Appeal within thirty days because:

_____
_____.[87]

WHEREFORE, I respectfully urge this Court to extend the time within which a notice of appeal may be served and filed pursuant to section 460.30 of the Criminal Procedure Law of the State of New York and issue an order granting this application permitting me to serve and file a notice of appeal within thirty days from the date of said order and for such other relief as this Court may deem just and proper.

_____
Defendant-Appellant

Sworn to before me
this _____ day of _____, _____.
_____[88]
Notary Public

B-7. PETITION FOR WRIT OF ERROR *CORAM NOBIS*

Supreme Court of the State of New York
Appellate Division _____ Department[89]

----------x

The People of the State of New York, Plaintiffs-Respondents,	:	Petition for Writ of Error Coram Nobis
- against -	:	Indictment No. _____[90]
_____,[91] Defendant-Petitioner:	:	

----------x

PLEASE TAKE NOTICE that above-named defendant-petitioner hereby moves the court for an issuance of a writ of error *coram nobis* on the ground that defendant-petitioner was convicted of _____[92] in _____[93] on _____[94], and appealed to this court which affirmed his conviction and that the representation of _____[95], defendant-petitioner's attorney on appeal, was ineffective according to the standards of representation set out in the Sixth Amendment of the United States Constitution.

The representation afforded to defendant-petitioner was defective in the following ways: _____.[96]

This motion is made and based on this petition and the affidavit of defendant-petitioner, and on the appellate briefs and the Appellate Division decision,[97] copies of which are attached and served, and on the pleadings, papers, records, and files of this action.

Defendant-petitioner requests assignment of new appellate counsel for assistance in presentation of the writ moved for herein.[98]

Dated: _____ [99]

_____
Defendant-Appellant
[Address and phone number][100]

To:
Clerk
Supreme Court of the State of New York
Appellate Division, ___ Department[101]

Fill in the forms shown in Appendix B as follows:

---

1. *See generally* N.Y. Crim. Proc. Law § 450.10 (McKinney's 2010); 18B West's McKinney's Forms Criminal Procedure Law § 460 (2010).

2. Your Notice of Appeal is addressed to the court you were tried in, not the appeals court. This sample presumes you were tried in a supreme court. If you were tried in a county court, be sure to substitute this court for the supreme court at the top of the form.

3. Fill in the name of the county in which the trial court is located.

4. Your indictment number if you know it. Also, fill in the year in which you were indicted or arraigned.

5. Write your name in all the blanks referring to defendant.

6. You should cite "section 450.10, subdivision (1), of the Criminal Procedure Law of the State of New York" if you are either appealing *only the judgment* or if you are appealing *both the judgment and sentence*. If you wish to appeal *only the sentence*, you should replace the above citation with "section 450.10, subdivision (2), of the Criminal Procedure Law of the State of New York."

7. Insert the number of the department (First, Second, Third, or Fourth) in which you were tried. This is also the department in which your appeal will take place.

8. Fill in the date of the judgment against you.

9. Fill in the name of the trial judge.

10. Fill in the letter of the class of the felony you were convicted of (for example, class B felony).

11. Fill in the name of the felony (for example, robbery in the first degree).

12. Fill in the town from which you are sending the Notice.

13. Fill in the date on which you are signing the Notice.

14. If you are representing yourself, or if you have an attorney but wrote this Notice of Appeal yourself, sign your name, print or type your name below your signature, and fill in your address. If your attorney wrote the Notice, then he or she will sign his or her name and provide an address and phone number.

15. Fill in the name and address of the District Attorney of the county in which you were tried. Include this information on both the copy you are sending to the District Attorney and on the two copies you are sending to the trial court, so that the clerk of the trial court will know that you have notified the District Attorney See Appendix III of the *JLM* for a list of addresses of New York district attorneys.

16. *See generally* N.Y. Crim. Proc. Law § 460.20 18B West's McKinney's Forms Criminal Procedure Law § 460 (2010). This form can be used in any one of three situations: (i) if you need to obtain permission to appeal to the appellate division or appellate term; (ii) if your appeal to the appellate division or appellate term was unsuccessful, and you wish to apply to the court of appeals for permission to appeal it; or (iii) if your appeal to the appellate division was unsuccessful and you wish to apply to the appellate division for permission to appeal to the court of appeals. The first situation is explained in Part E of this Chapter; the last two situations are explained in Part F. If you are applying to the appellate division for permission to appeal to the Court of Appeals, you should replace the reference to the Court of Appeals at the top and bottom of the form with the full name of the appellate division from which you are seeking permission to appeal (for example, the Supreme Court of New York, Appellate Division, Third Department).

17. Your indictment number and the year in which you were indicted.

18. Your name.

19. If you are sending this Notice to a judge in the appellate division, fill in his or her name. If you are sending it to the court of appeals, write "the Chief Judge of the Court of Appeals to designate an Associate Judge of the Court." If your first appeal was denied by a court other than the appellate division, such as a county court or an appellate term, then you may send this application only to the court of appeals. See Part F of this Chapter.

20. If you want to apply for permission to appeal a denial of your Article 440 motion by the trial court, send your application to the proper appellate court and replace the material in the form after "for a certificate ..." with:

> pursuant to section 460.15 of the Criminal Procedure Law of the State of New York, certifying that this case involves a question of law or fact which ought to be reviewed by the Appellate Division [or Appellate Term or County Court] from the _____, ____order by the Supreme Court [or County court or Criminal Court] of _____ County which denied defendant's motion to vacate judgment pursuant to section 440.10 [or motion to set aside sentence pursuant to section 440.20] and affirmed the judgment convicting defendant of the class _____ felony of _____ and sentencing [him/her] to an indeterminate term of imprisonment at _____.

To determine to which appellate court you should apply, see Appendix A of this Chapter. Remember, you must submit an application along with this notice of application. In the application, you must explain why your Article 440 motion should be granted. Your application has a better chance of success if it is notarized as an affidavit. Most jails and prisons have several staff members who will notarize your documents.

21. Fill in the date of the appellate court's denial of your appeal, and the number of the judicial department.

22. Fill in the date of your conviction in the trial court, the county, the offense, as well as the prison to which you were sent.

23. Your address and the date.

24. If you are representing yourself, fill in your own name and address. If your lawyer is writing this notice, he or she will sign his or her own name and address.

25. If you are sending this to the court of appeals, address this Notice to the Clerk of the Court, and the clerk will give notice to the District Attorney in the county in which your *first* appeal was denied. If you are sending this to the appellate division, send two copies to the clerk of the appellate division and fill in the address. Also send a copy to the District Attorney of the county in which you were first convicted and fill in his or her name and address on the copy you send to the District Attorney. See Appendix III of the *JLM* for a list of addresses for New York district attorneys.

26. The different judicial departments have different rules as to whether to send this Notice to the clerk of the trial court or to the clerk of the appellate court. You will need to refer to these rules if they are available in the prison's library or ask your lawyer.

27. Fill in the county and the number of the judicial department of the appellate division. Appendix II of the *JLM* provides this information.

28. Your indictment or docket number and the year in which the proceedings against you began.

29. Your name.

30. Your name again, and the date of the affidavit.

31. The date of the conviction.

32. The date and your present location.

33. Your name.

34. Fill in the name and address of the District Attorney of the county in which you were tried. Include this information on both the copy that you are sending to the District Attorney and on the two copies that you are sending to the trial court, so that the clerk of the trial court will know that you have notified the District Attorney. See Appendix III of the *JLM* for a list of addresses for New York district attorneys.

35. If this is the copy to the appellate division, fill in the address of the court.

36. Fill in the number of the judicial department. *See* Appendix II of the *JLM.*

37. Your name.

38. Your indictment or docket number and the year it was handed down.

39. The county in which you are presently living.

40. Your name.

41. The name of the prison you are currently in, where it is located, the county you were convicted in, the date you were convicted, the crime and degree you were convicted of, and the number of years to which you were sentenced.

42. Your lawyer's name, address, and telephone number. If your lawyer was assigned, indicate this fact here.

43. Your signature. If your attorney is making the application on these papers, then an affirmation (a statement that the papers are true) by him or her may be substituted for the signature and seal of the notary. If you are signing the affidavit, you should do so in the presence of a notary public.

44. If your attorney does not make an affirmation, the notary public's date and seal are placed here.

45. *See generally* N.Y. Crim. Proc. Law § 510.20 (McKinney 2010); 18B West's McKinney's Forms Criminal Procedure Law § 510 (2010).

46. Fill in the county and the number of the judicial department of the trial court. *See* Appendix II of the *JLM.*

47. Your indictment or docket number and the year proceedings against you began.

48. Your name.

49. Your name and the date of the affidavit that you send along with this Notice (the affidavit is Form B-4(b)).

50. Your name.

51. If you are in a county jail, you are in the custody of a sheriff. If you are in a state prison, you are in the custody of the Department of Correctional Services. Therefore, write either "sheriff" or "Commissioner of the Department of Correctional Services," depending on your particular situation.

52. Your address and the date.

53. Your name.

54. Fill in the name and address of the District Attorney of the county in which you were tried. Include this information on both the copy that you are sending to the District Attorney and on the two copies that you are sending to the trial court, so that the clerk of the trial court will know that you have notified the District Attorney. See Appendix III of the *JLM* for a list of addresses for New York district attorneys.

55. If this is the copy to the appellate division, fill in the address of the court.

56. Number of the judicial department of the trial court.

57. Your name.

58. Indictment/docket number; year in which proceedings began.

59. City and county where affidavit was taken.

60. Your name.

61. The date of your conviction, the crime and degree, the trial judge, the name of your prison and its location.

62. State exactly what you are appealing. If you are appealing your sentence, add "and sentence." If you are appealing an order, add "and order." Also fill in the date on which you filed the Notice of Appeal.

63. Set forth the facts and reasons why you should be released on bail pending your appeal (for instance, the lack of seriousness of the charges, why you are not a threat to the community if you are out on bail, your previous good record in making court appearances, and why you are likely to successfully overturn your conviction or sentence on appeal).

64. Explain why the judgment should be reversed, supporting your argument with facts from the record.

65. Fill in the name of the prison in which you are incarcerated.

66. Your signature and typed or printed name below. Do not sign until the notary is present.

67. Notary's signature, the date and seal. If your attorney is making an application on papers submitted by him or her personally, then an affirmation as to the truth of the papers may be substituted for the notary's signature and seal.

68. *See generally* N.Y. Crim. Proc. Law § 460.30 (McKinney 2010); 18B West's McKinney's Forms Criminal Procedure Law § 460 (2010). If you did not file a Notice of Appeal within the thirty-day deadline, and you believe that you missed the deadline for a valid reason, such as the inaction of your lawyer or a prison official, then you should file a motion for an extension pursuant to New York Criminal Procedure Law Section 460.30. If granted, the court will extend the time in which you must file a Notice of Appeal.

69. The county and the number of the department of the appellate division.

70. Your name.

71. Indictment or docket number and the year in which the indictment was handed down against you.

72. Your name.

73. The date of the affidavit.

74. The county in which the trial court was located.

75. The date of the judgment and/or sentence or order that you are appealing.

76. The crime and the degree of the felony or misdemeanor.

77. Explain here why you missed the deadline for filing a Notice of Appeal. For example, "the conduct of defendant's counsel in failing to file a notice of appeal as defendant had timely requested" (but of course do not claim that you missed the filing deadline due to your attorney's misconduct unless this is actually the case). Be as specific as possible. For example, if your claim is that your lawyer promised to file the appeal but didn't, say when you had this conversation and what was said. The more specific you are about the facts, the more convincing your claim. See Part B(1) of this Chapter for a discussion of acceptable reasons for missing the deadline.

78. Fill in your location and the date.

79. Your name.

80. District Attorney's name and address in the county in which you were tried. Include this on all copies. See Appendix III of the *JLM* for a list of addresses for New York district attorneys.

81. If this is the copy you are sending to the appellate court, fill in the address.

82. Number of the judicial department of the appellate division.

83. Your name.

84. Indictment number and year of the indictment.

85. Your name.

86. Fill in the date of conviction, the crime, the degree of the crime, the name of the trial judge, the length of the sentence, the date of the sentence, and the name of the sentencing judge.

87. In the remaining part of the affidavit, state the reasons why you failed to file the notice of appeal within the 30-day period—for example, because your attorney forgot that you wanted to appeal. Do not claim that you missed the filing deadline due to your attorney's mistake unless this is actually the case. See Part B(1) of this Chapter for a discussion of acceptable reasons for missing the deadline.

88. This is the place for the notary public's signature and the date. The notary has to watch you sign, so don't sign beforehand. If your attorney is making the application with these papers in person, then an affirmation as to the truth of the papers may be substituted for the signature and seal of the notary.

89. Fill in the information for the intermediate appellate court to which you are addressing this petition. You should address the petition to the court in which the ineffective assistance of appellate counsel that you are alleging took place.

90. Your indictment number and the year in which you were indicted.

91. Your name.

92. Charge for which you were convicted.

93. Trial court in which you were convicted.

94. Date on which you were convicted.

95. Name of your attorney on appeal. This is the attorney that you are alleging provided ineffective assistance.

96. In this section you need to list the particular actions your appellate counsel took and the actions you believe your attorney should have taken. Your statements—both of the facts and arguments—should be as clear and specific as possible. For example, you must state the specific appellate issues that you believe your lawyer failed to raise. Also, in your prison library, consult the rules of the court for additional deadlines or requirements that you must follow.

97. Include copies of the appellate briefs and the appellate division decision when you mail your petition.

98. You should request that a new lawyer be assigned to you if you do not currently have a lawyer to assist you.

99. Date.

100. If you are representing yourself, fill in your own name and address. If your lawyer is writing this petition, he or she will sign his or her own name and address.

101. Fill in the information for the intermediate appellate court to which you are addressing this petition. You should address the petition to the court in which you believe you had ineffective assistance of counsel. Make sure to include the court's street address.

A JAILHOUSE LAWYER'S MANUAL

Chapter 10:
Applying for Re-Sentencing for Drug Offenses

Columbia Human Rights Law Review

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CHAPTER 10

APPLYING FOR RE-SENTENCING FOR DRUG OFFENSES*

A. Introduction

Recent changes in both federal and New York law have made some prisoners who were convicted of drug crimes eligible to apply for re-sentencing. If you were convicted of a federal drug crime, you should read Part B of this Chapter to find out about federal re-sentencing for drug crimes. If you were convicted of a state drug crime in New York, you should refer to Part C of this Chapter for information on re-sentencing in New York. Appendix A contains sample forms that you may need to apply for re-sentencing for federal drug crimes. Appendix B contains forms that you may need to apply for re-sentencing in New York State.

B. Re-Sentencing for Federal Drug Crimes

1. Introduction

The Federal Sentencing Commission has recently made changes to the United States Sentencing Guidelines (hereinafter "the Guidelines") for various drug offenses. In particular, the Commission has issued amendments that lower the sentencing recommendations for offenses involving crack cocaine (also called cocaine base). The new crack sentencing Guidelines took effect on November 1, 2007,[1] and on December 11, 2007, the Commission voted to apply the new sentencing Guidelines retroactively. This means that some prisoners who were sentenced for certain federal drug offenses under the old, harsher Guidelines can apply for re-sentencing under the new Guidelines. So, if you were sentenced for a federal offense involving crack cocaine or one of a few other drug offenses (such as those involving Percocet or live marihuana plants), you might be eligible to apply for re-sentencing.

This Chapter describes who is allowed to apply for re-sentencing and explains the re-sentencing process. Section 2 explains which prisoners are eligible for re-sentencing and Section 3 explores the process of applying for re-sentencing and possible outcomes of your re-sentencing application. Appendix A at the end of the Chapter provides sample forms you can use if you decide to apply for re-sentencing.

2. Eligibility: Who is Allowed to Apply?

If you are currently serving time for a federal drug offense and wish to apply for re-sentencing, you must first determine whether you are eligible to do so. Not all prisoners serving time for federal drug offenses are eligible to apply for re-sentencing.

In general, changes in the law do not apply to people who were sentenced under the old version of the law. In order for changes in the Guidelines to apply to prisoners who were sentenced under the old Guidelines, the changes must be enacted *retroactively*. Section 1B1.10 of the Guidelines explains which changes in the law are retroactive.[2] Under Section 1B1.10, a federal prisoner is eligible for re-sentencing if the Guideline range applicable to that prisoner's offense has been lowered by one of the amendments listed in part c of the regulations.[3] The only amendments listed in Section 1B1.10(c) that apply to drug offenses are Amendments 126, 130, 484, 488, 499, 505, 516, 591, 657, and 706 as modified by 711 and 715.[4] In order to determine whether you are eligible for re-sentencing, you must first determine whether any of these amendments apply to the sentencing Guidelines for the offense for which you were convicted.

This chapter will focus on Amendment 706 as modified by Amendments 711 and 715. This Amendment changes the Guidelines for crack cocaine offenses. It also changes the procedure for calculating the base offense level for crimes involving possession of both crack cocaine and one or more other drugs. You should remember, however, that if any of the other Amendments listed above applies to your case and would lower the Guidelines for your offense, then you may also be eligible for re-sentencing. For example, Amendment 516 revises the Guidelines for cases involving more than fifty marihuana plants by reducing the amount of marihuana each plant is assumed to produce from one kilogram (KG) to 100 grams (G).[5] So, if you were

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* This Chapter was revised by Susan Reid, based on a previous version written by Sydney Bird and revised by Nathan Piper. Special thanks to William Gibney of the New York Legal Aid Society for his valuable comments.

1. U.S. Sentencing Guidelines Manual § 2D1.1(c) (2008).
2. U.S. Sentencing Guidelines Manual § 1B1.10, policy statement (2008).
3. U.S. Sentencing Guidelines Manual § 1B1.10(a)(1), policy statement (2008).
4. U.S. Sentencing Guidelines Manual app. C. (2008).
5. U.S. Sentencing Guidelines Manual app. C, Amendment 516 (2008).

sentenced for an offense involving more than fifty marihuana plants before the enactment of Amendment 516, you might be eligible for re-sentencing. Similarly, Amendment 657 alters the way that the weight of the drug Oxycodone is calculated for sentencing purposes, usually resulting in shorter sentences for offenses involving Percocet and OxyContin pills.[6] So, if you were sentenced for an offense involving possession of Percocet or OxyContin, you should check to see if the new standards would lower your Guidelines range, making you eligible for re-sentencing.

(a) Determining Eligibility for Re-Sentencing for an Offense Involving Crack Cocaine

If you are currently serving time for an offense committed prior to November 1, 2007 involving only crack cocaine, it is likely that you will be eligible to apply for re-sentencing. Prior to 2007, the sentencing Guidelines stated that 150KG of powder cocaine was equivalent to 1.5KG of crack cocaine (cocaine base) for sentencing purposes.[7] This meant that if you were convicted of possessing a certain amount of crack cocaine, your sentence would be the same as if you were convicted of possessing 100 times as much powder cocaine. This was known as the "100:1 cocaine sentencing disparity." It is important to distinguish between changes to mandatory minimum laws, which are created by Congress, and changes to the Guidelines, which are created by the United States Sentencing Commission. The Guidelines provide recommended sentencing ranges for offenses based on drug quantity. At one time, the 100:1 disparity was embodied in both the Guidelines and the statutes establishing mandatory minimum sentences. This Chapter primarily focuses on the Guidelines because their amendments have been made retroactive, which means that even though you were sentenced under the old Guidelines, you may be able to apply for re-sentencing under the new ones.

The 100:1 disparity in the Guidelines and the mandatory minimum sentencing laws has received a lot of criticism. Many people in the legal community thought that it was unfair to impose such harsh sentences for crack cocaine while imposing much more lenient sentences for powder cocaine. Some judges even began taking the disparity into account when sentencing defendants for crack cocaine offenses, citing the unfair disparity as a reason for giving the defendants shorter sentences than the sentencing Guidelines called for.[8] In 2007, the United States Sentencing Commission issued a report to Congress calling for reform of the federal cocaine sentencing disparity.[9] The report declared that "[f]ederal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission."[10]

The Guidelines were amended in 2007, and these amendments were made retroactive. Amendment 706, which came into effect on November 1, 2007, reduces the disparity between sentences for crack and powder cocaine. The old version of Section 2D1.1(c)(1) stated that 150KG of powder cocaine was equivalent to 1.5KG of crack cocaine. Amendment 706 revised this equivalency calculation by changing Section 2D1.1(c)(1) so that 150KG of powder cocaine is equivalent to 4.5KG of crack cocaine. Although there is still a significant

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6. U.S. Sentencing Guidelines Manual app. C, Amendment 657 (2008).

7. U.S. Sentencing Guidelines Manual app. C, Amendment 706 (2008).

8. *See* Kimbrough v. United States, 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007) (holding that sentencing judges may properly take into account the disparity between sentences for powder and crack cocaine when deciding to depart from the sentence recommended by the Guidelines and impose a more lenient sentence); *see also* Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007) (holding that appellate courts cannot require "extraordinary circumstances" in order to justify a downward departure from the Guidelines); United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d. 621 (2005) (holding that the Guidelines are advisory rather than mandatory, that judges may use their discretion when deciding to depart from the Guidelines, and that sentencing decisions are subject only to a review for "abuse of discretion by appellate courts, regardless of whether or not the sentencing judge adhered to the Guidelines").

9. United States Sentencing Commission, 2007 Report to Congress: Cocaine and Federal Sentencing Policy 2 (May 2007).

10. The Commission has repeatedly recommended that Congress correct the disparity between mandatory minimum sentences for crack and powder cocaine. United States Sentencing Commission, 2007 Report to Congress: Cocaine and Federal Sentencing Policy 8–9 (May 2007). In 2010, Congress finally passed the Fair Drug Sentencing Act, which adjusted mandatory minimum sentences for crack cocaine, increasing the threshold quantity triggering a five-year mandatory minimum from 5G to 28G. This adjustment reduced the mandatory minimum sentencing disparity from 100:1 to approximately 18:1. However, the change has not been made retroactive, which means that as of now, this new legislation likely does not provide a basis for you to apply for re-sentencing. Fair Sentencing Act, Pub. L. No. 111– 20 (2010) (reducing the quantity thresholds triggering mandatory minimum sentences for crack cocaine and eliminating mandatory minimums for possession-only offenses).

disparity between sentences for crack and powder cocaine, this amendment has generally resulted in lower sentences for crack cocaine than under the old version of the Guidelines.

The following table illustrates the changes in Section 2D1.1(c) for calculating the base offense level for crack cocaine offenses. Level 38 is the most severe base level sentence that can be imposed for a drug offense (not taking into account sentencing enhancements).[11]

Base Offense Level	Amount of drug (pre-Amendment 706) [Old Guideline][12]	Amount of drug (post-Amendment 706) [New Guideline][13]
38	150KG or more of cocaine or 1.5 KG or more of cocaine base	150KG or more of cocaine or 4.5KG or more of cocaine base
36	50KG–150KG cocaine or 500G–1.5KG cocaine base	50KG–150KG cocaine or 1.5KG–4.5KG cocaine base
34	15KG–50KG cocaine or 150G–500G cocaine base	15KG–50KG cocaine or 500G–1.5KG cocaine base
32	5KG–15KG cocaine or 50G–150G cocaine base	5KG–15KG cocaine or 150G–500G cocaine base
30	3.5KG–5KG cocaine or 35G–50G cocaine base	3.5KG–5KG cocaine or 50G–150G cocaine base
28	2KG–3.5KG cocaine or 20G–35G cocaine base	2KG–3.5KG cocaine or 35G–50G cocaine base
26	500G–2KG cocaine or 5G–20G cocaine base	500G–2KG cocaine or 20G–35G cocaine base
24	400G–500G cocaine or 4G–5G cocaine base	400G–500G cocaine or 5G–20G cocaine base
22	300G–400G cocaine or 3G–4G cocaine base	300G–400G cocaine or 4G–5G cocaine base
20	200G–300G cocaine or 2G–3G cocaine base	200G–300G cocaine or 3G–4G cocaine base
18	100G–200G cocaine or 1G–2G cocaine base	100G–200G cocaine or 2G–3G cocaine base
16	50G–100G cocaine or 500MG–1G cocaine base	50G–100G cocaine or 1G–2G cocaine base
14	25G–50G cocaine or 250 miligrams (MG)–500MG cocaine base	25G–50G cocaine or 500MG–1G cocaine base
12	Less than 25G cocaine or less than 250MG cocaine base	Less than 25G cocaine or less than 500MG cocaine base

In general, sentences for crack cocaine under the new Guidelines are approximately two levels lower than sentences under the old Guidelines. This can mean that you might be eligible for a reduction in your sentence if you were convicted of a crack cocaine offense committed before the new Guidelines came into effect on November 1, 2007.

(b) Determining Eligibility for Re-Sentencing for an Offense Involving Crack Cocaine and At Least One Other Drug

Amendment 706, as modified by Amendments 711 and 715, changed the way that the base offense level is calculated for crimes involving crack cocaine and at least one other drug.[14] Under the old Guidelines, the base offense level for offenses involving more than one drug was calculated by converting all the drugs

11. U.S. Sentencing Guidelines Manual app. C, Amendment 505 (2008).
12. U.S. Sentencing Guidelines § 2D1.1(c) (2003).
13. U.S. Sentencing Guidelines § 2D1.1(c) (2008).
14. U.S. Sentencing Guidelines Manual app. C, Amendment 715 (2008).

involved to their equivalent amounts of marihuana using the "Drug Equivalency Tables,"[15] adding them together, and then finding the correct base offense level using the "Drug Quantity Table."[16]

This calculation can be a little confusing, so an example may be helpful: Imagine you were convicted of selling 80G of cocaine, 30G of cocaine base, and 1KG of marihuana. In order to calculate the base offense level, you would look at the Drug Equivalency Tables to determine that 1G of cocaine is equal to 200G of marihuana, and 1G of cocaine base is equal to 20KG of marihuana. So, the cocaine sold is equivalent to 16,000G (or 16KG) of marihuana (80G x 200G/1G = 16,000G). The cocaine base is equivalent to 600KG of marihuana (30G x 20KG/1G = 600KG). The total offense, therefore, involves the equivalent of 617KG of marihuana (16KG + 600KG + 1KG). Looking now at the Drug Quantity Table, we can see the 617KG of marihuana corresponds to a Level 28 base offense level.

Amendment 715 leaves unchanged the old method of calculating the base offense level for multiple-drug offenses, but states that whenever the offense involves *crack cocaine and at least one other drug*, the base offense level obtained using the method above should be reduced by two levels.[17] So, under the new Guidelines, your base offense level would be calculated exactly as it was under the old Guidelines (as demonstrated in the example above), BUT the base offense level would then be reduced by two levels. So, in the example above, the base offense level would actually be Level 26 (Level 28 – 2 levels = Level 26).

This means that if you were convicted of an offense involving crack cocaine and at least one other drug, it is likely that you are eligible to apply for re-sentencing because the new Guideline applicable to your offense is probably two levels lower than it was under the old Guidelines.[18] You should be aware, however, that Amendment 715 provides three exceptions to the two-level reduction in cases involving crack cocaine. First, the two-level reduction will not apply if your offense involved 4.5KG or more of crack cocaine. Second, the reduction will not apply if your offense involved less than 250MG of crack cocaine. And third, the two-level reduction will not apply if the base offense level after the two-level reduction would be less than the base offense level for the same offense involving only the other drugs and not the cocaine base.[19] If one of these three exceptions applies to your case, you probably will not be eligible for re-sentencing.

An example may be helpful to illustrate the third exception: Suppose a case involves 5G of cocaine base and 6KG of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5G of cocaine base converts to 100KG of marihuana (5G x 20KG/1G = 100KG), and 6KG of heroin converts to 6,000KG of marihuana (6KG x 1000KG/1G = 6,000KG), which, when added together results in a combined equivalent quantity of 6,100KG of marihuana. Under the Drug Quantity Table, 6,100KG of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000KG of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the combined offense level for the two drug types after the two-level reduction is less than the offense level for the heroin, the reduction will not apply and the combined offense level for the two drugs is still Level 34.[20]

(c) What if Your Original Sentencing Judge Already Gave You a Shorter Sentence than the Old Guidelines Recommended?

Even if you were originally sentenced to shorter time in prison than the Guidelines recommended, you may still be eligible for re-sentencing. Although there is very little case law yet in this area, it is possible that you can receive a further reduction on your sentence if the Sentencing Commission has subsequently lowered the Guidelines for your offense. Section 1B1.10(b)(2)(B) governs this situation, but its precise interpretation is still unclear.[21] For example, one circuit has held that when re-sentencing a defendant

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15. The Drug Equivalency Tables can be found at the end of Note 10(D) of § 2D1.1 in both the 2003 and 2008 versions of the Sentencing Guidelines.

16. U.S. Sentencing Guidelines §2D1.1 cmt. n.10 (2003).

17. U.S. Sentencing Guidelines app. C, Amendment 715 (2008).

18. If you were convicted of a crime committed between Nov. 1, 2007, and May 1, 2008, your sentence may have been calculated using the method established by Amendment 711. If this is the case, you should calculate your base offense level using the criteria set out in Amendment 711 and compare this result to your base offense level using the current Guideline method explained in Part B(2)(a) of this Chapter.

18. U.S. Sentencing Guidelines app. C, Amendment 715 (2008).

20. U.S. Sentencing Guidelines Manual § 2D1.1, cmt. n.10(D)(iii)(II) (2008).

21. § 1B1.10(b)(2)(B) reads as follows: "Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate." U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(B), policy statement (2008).

pursuant to Section 3582(c)(2), a district court must treat the Guidelines, including Section 1B1.10, as advisory only.[22] You should conduct your own research to see whether courts in your area have re-sentenced prisoners who received downward departures on their original sentences.[23]

(d) Are You Eligible for Re-Sentencing Even if Your Current Sentence is the Result of a Binding Plea Agreement?

You may not be eligible for re-sentencing if your current sentence is the result of a binding plea agreement.[24] Many courts have held that if you were sentenced pursuant to a binding plea agreement, then you are automatically ineligible for re-sentencing.[25] However, not all courts agree.[26] Even in jurisdictions where sentences imposed pursuant to binding plea agreements may be eligible for re-sentencing, you may have to demonstrate that your plea agreement was based on the existing guideline recommendations.[27] Thus, if your sentence is the result of a binding plea agreement, you can file for re-sentencing, but you should be prepared to argue that your sentence was in fact based on the Guidelines. You should also be aware that a judge might find you ineligible for re-sentencing because you entered into a binding plea agreement.

(e) Are You Eligible for Re-Sentencing if You Were Originally Sentenced as a "Career Offender"?

If you were originally sentenced as a career offender under Section 4B1.1 of the Guidelines, you are probably not eligible to receive a sentence reduction under the amended Guidelines. This is because your sentence may not have been based upon any of the Guidelines affected by the amendments and thus would probably not be lower under the amended Guidelines. Recent decisions in a variety of circuits have rejected applications for re-sentencing made by career offenders.[28] However, if you were designated a career offender,

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22. United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007) (holding that a prisoner could be re-sentenced to a term lower than the new Guidelines recommendation based on the finding, in United States v. Booker, that the U.S. Sentencing Guidelines are always advisory); *but see* United States v. Fanfan, 558 F.3d 105 (1st Cir. 2009) (specifically rejecting the Ninth Circuit's interpretation of Booker in United States v. Hicks and holding that prisoners could not be re-sentenced below the current Guidelines).

23. See *JLM*, Chapter 2 for information on how to conduct legal research.

24. Federal Public & Community Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines, at 7 (Feb. 18, 2008), *available at* http://www.fd.org/pdf_lib/Defender.Authority.Combined.FINAL.2.18.0819.pdf.

25. *See*, *e.g.*, United States v. Rivera-Martinez, 607 F.3d 283, 287 (1st Cir. 2010); United States v. Green, 595 F.3d 432, 436 (2d Cir. 2010); United States v. Sanchez, 562 F.3d 275, 277–79 (3d Cir. 2009); United States v. Scurlark, 560 F.3d 839, 841 (8th Cir.); United States v. Peveler, 359 F.3d 369, 377–79 (6th Cir. 2004); United States v. Trujeque, 100 F.3d 869, 870–71 (10th Cir. 1996) (all holding that sentences obtained by binding plea agreements cannot be reduced under the revised crack cocaine sentencing Guidelines).

26. *See* United States v. Cobb, 584 F.3d 979, 985 (10th Cir. 2009) (holding that the court has broad discretion to re-sentence offenders under § 3582(c)(2) even where the original sentence was based on a binding plea agreement); United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010) (*per curiam*) (holding that binding plea agreements could be eligible for re-sentencing if they could be fairly said to have been based on the Guidelines); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010) (holding that some binding plea agreements may be eligible for re-sentencing); United States v. Bride, 581 F.3d 888, 891 (9th Cir. 2009) (holding that where a binding plea agreement is based on the Guidelines, it does not render the offender ineligible for re-sentencing); United States v. Coleman, 594 F. Supp. 2d 164, 167 (D. Mass. 2009) (both holding that sentences obtained by binding plea agreements may be reduced under the revised sentencing Guidelines). Offenders sentenced pursuant to binding plea agreements may also be eligible for re-sentencing in the Fourth Circuit, although the state of the law is not entirely clear because the decision was vacated and is no longer the law. *See* United States v. Dews, 551 F. 3d 204, 209 (4th Cir. 2008), *reh'n en banc granted* (Feb 20, 2009), *reh'n dismissed as moot* (May 04, 2009), (holding that nothing in the federal rule regarding binding plea agreements "precludes a defendant pleading guilty under that rule from receiving the benefit of a later favorable retroactive amendment to the Guidelines, provided, of course, that the requirements of § 3582(c)(2) are met.").

27. *See* United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010) (*per curiam*) (holding that "[t]he jurisdictional question is whether the sentence was "based on" the subsequently amended crack-offense Guidelines, and answering that question requires that we examine the nuances of both the plea agreement and the sentencing transcript in each particular case."); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010) (holding that some binding plea agreements may be eligible for re-sentencing if original sentence was based on the Guidelines); United States v. Bride, 581 F.3d 888, 891 (9th Cir. 2009) (holding that where a binding plea agreement is based on the Guidelines, it does not render the offender ineligible for re-sentencing).

28. *See* United States v. Sharkey, 543 F.3d 1236 (10th Cir. 2008) (holding that because Amendment 706 of the Sentencing Guidelines has no effect on the Guidelines for career offenders, prisoners sentenced as career offenders are not eligible for re-sentencing); United States v. Ayala-Pizarro, 551 F.3d 84, 85 (1st Cir. 2008) (holding that prisoners sentenced as career offenders are ineligible for re-sentencing); United States v. Caraballo, 552 F.3d 6, 10 (1st Cir. 2008)

but you were granted a departure so that you were ultimately sentenced based on the crack cocaine amount Guidelines, not the career offender Guidelines, you could be eligible.[29] Thus, it is still unclear whether prisoners sentenced as career offenders might be able to receive sentence reductions. If you were sentenced as a career offender, you may still want to apply for re-sentencing, but you should be aware that your request might be denied because you were sentenced as a career offender.

(f) Are You Eligible for Re-Sentencing if You Were Originally Sentenced to a Statutory Minimum Sentence?

If you were sentenced a statutory minimum sentence, for example sixty months for 5G or more of crack or 120 months for 50G or more of crack, it is likely that you are not eligible for re-sentencing. This is because the statutory minimum sentence overrides any reduction in the guideline range to a sentence below the minimum.[30]

3. Applying for Re-Sentencing

(a) How Do You Apply?

In order to apply for re-sentencing where the Sentencing Commission has lowered the Guidelines for your offense, you must file a motion under 18 U.S.C. § 3582(c)(2)[31] in the district court where the original sentencing occurred. Section 3582(c)(2) permits courts to re-sentence defendants who were originally sentenced on the basis of a guideline that has subsequently been lowered and made retroactive by the Sentencing Commission.[32] You can find sample motions at the end of this Chapter.

Because it is still unclear whether you have a right to counsel if you wish to apply for re-sentencing,[33] you may need to create and file your application for re-sentencing on your own. This is called filing a motion *pro se*.

(i) How to File a Section 3582(c)(2) Motion *Pro Se*

In order to file a Section 3582(c)(2) motion *pro se*, you will need to prepare an application and submit it to the district court that handled your original sentencing. Before you begin your application, you should make sure you know some key facts about your own case: [34]

(1) Your criminal case number.
(2) Your base offense level—you can find this in the "Criminal Computation" section of your pre-sentence report or you can calculate it yourself.
(3) Your criminal history.
(4) The Sentencing Guideline range that was originally used in your sentencing.
(5) Your actual sentence.
(6) The new Sentencing Guideline range that would be applicable to your crime under the amended Guidelines.
(7) Whether you were sentenced pursuant to a binding plea agreement or as a career offender.
(8) Your disciplinary record and program participation during your incarceration.

Your application is a chance for you to argue that you are an ideal candidate for re-sentencing, but you should remember that the court will probably receive many of these kinds of motions from prisoners, so you

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(holding that career offenders are not eligible for re-sentencing unless their sentence as a career offender would be lower under the amended Guidelines, which is highly unlikely).

29. United States v. McGee, 553 F.3d 225 (2d Cir. 2009) (holding that a prisoner who, despite his designation as a career offender, was actually sentenced based on the amount of crack cocaine in his possession, rather than the Guidelines for career offenders, was eligible for re-sentencing).

30. U.S. Sentencing Guidelines Manual § 1B1.10, cmt. n.1(A), § 5G1.1(b) (2008), a*vailable at* http://www.ussc.gov/2008guid/TABCON08.htm. The changes made to the mandatory minimum sentencing scheme in 2010 by the Fair Sentencing Act have not been made retroactive, which means the old mandatory minimums still apply to you if you were sentenced under them. See Part B(2)(a) of this Chapter for more on the Fair Sentencing Act.

31. 18 U.S.C. § 3582(c)(2) (2006).

32. Office of Defender Services, Retroactivity of Crack Cocaine Amendments: Guidance to CJA Panel Attorneys, *available at* http://www.fd.org/odstb_CrackRetroactivity.htm (last visited September 25, 2009).

33. For more information on the right to counsel issue, see Part C(3) of this Chapter.

34. *See* Crack Amendment Guidelines, Pro Se Consultants, http://proseconsult.com/Prosemailnewsletteremailprint.aspx (last visited September 25, 2009); Office of Defender Services, Retroactivity of Crack Cocaine Amendments: Sample Motions and Orders, *available at* http://www.fd.org/odstb_CrackSampleMotions.htm. (last visited September 25, 2009).

may not want to make your application overly lengthy. Using the sample motions at the end of this chapter and filling in your own information is probably the simplest way to file an effective *pro se* motion.[35]

After you file your motion under Section 3582(c)(2), the judge may hold a re-sentencing hearing. At this hearing, the judge may consider factors set forth in 18 U.S.C. § 3553(a).[36] If you think that some of these factors might have an influence on your re-sentencing, you may want to try to explain them in your application. For example, you should mention any vocational or educational programs you have participated in while in prison, or other ways in which you can demonstrate your own rehabilitation. Better yet, if you have reason to think these factors will play an important role in your re-sentencing, you should apply to have an attorney appointed using the form in Appendix A of this Chapter.

(b) Are You Entitled to a Hearing?

Under the Sentencing Guidelines, you are entitled to a hearing whenever any important factor in the sentencing determination is "reasonably in dispute" or whenever a judge plans to consider facts not found at the original sentencing proceeding.[37] Typically, courts find that a hearing is appropriate whenever there is a legitimate question of fact. Some appellate courts have found abuse of discretion where the lower court refused to hold a Section 3582(c)(2) hearing and denied the prisoner's Section 3582(c)(2) motion for a sentence reduction.[38]

(c) Are You Entitled to be Represented by Counsel at a Section 3582(c)(2) Proceeding?

Because Section 1B1.10 of the Guidelines was recently amended, it is still unclear whether you are entitled to counsel at a Section 3582(c)(2) proceeding.[39] Section 1B1.10 was revised in May 2008 and now states that proceedings under Section 3582(c)(2) "do not constitute a full resentencing of the defendant."[40] Because of this, many courts have held that you do not have a right to counsel at a Section 3582(c)(2) proceeding.[41]

However, Section 1B1.10 calls for judges to reconsider factual circumstances surrounding the offense because it instructs them to consider the factors set forth in 18 U.S.C. § 3553(a).[42] Judges may also consider your post-sentencing conduct (such as your disciplinary record while incarcerated).[43] These kinds of factual determinations are characteristic of the kinds of proceedings where the Sixth Amendment[44] requires that defense counsel be available to defendants.[45] There are some cases suggesting that a prisoner might be

35. The Sample Document in Appendix B of this Chapter can serve as a template for your application.

36. These factors include the nature of the offense committed, the prior history and character of the prisoner, the need for the punishment to reflect the seriousness of the offense, the need to provide just punishment and protect the public, the need to avoid arbitrary sentencing differences among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims.

37. U.S. Sentencing Guidelines Manual § 6A1.3 (2008) ("[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor"); *see also* Federal Public & Community Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (Feb. 18, 2008), *available at* http://www.fd.org/pdf_lib/Defender.Authority.Combined.FINAL.2.18.0819.pdf (last visited September 25, 2009).

38. *See* United States v. Byfield, 391 F.3d 277, 280–81 (D.C. Cir. 2004) (finding that the lower court had abused its discretion by failing to hold an evidentiary hearing where prisoner's factual assertions in his § 3582(c)(2) motion raised "enough of a smidgeon to put the matter 'reasonably in dispute'") (citing U.S.S.G. § 6A1.3); United States v. Mueller, 168 F.3d 186, 189–90 (5th Cir. 1999) (holding that where a judge, in deciding a §3582(c)(2) motion, intends to consider evidence not presented in the defendant's pre-sentencing report, the judge must give notice to the prisoner and allow prisoner an opportunity to respond).

39. Memorandum from the Training Branch of the Office of Defender Services to Participants, National Sentencing Policy Institute on Appointment of Counsel in Crack Retroactivity Cases (Jun. 25, 2008), *available at* http://www.fd.org/pdf_lib/crack_appointment_of_counsel.pdf (last visited September 25, 2009).

40. U.S. Sentencing Guidelines Manual § 1B1.10(a)(3), p.s. (2008).

41. *See, e.g.*, United States v. Webb, 565 F.3d 789, 794–95 (11th Cir. 2009) (holding that prisoners have no constitutional or statutory right to representation at § 3582(c)(2) proceedings); United States v. Harris, 568 F.3d 666, 668–69 (8th Cir. 2009) (same); United States v. Forman, 553 F.3d 585, 590 (7th Cir. 2009) (same); United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) (same); United States v. Townsend, 98 F.3d 510, 512–13 (9th Cir.1996) (same); United States v. Reddick, 53 F.3d 462, 463–65 (2d Cir.1995) (same); United States v. Brown, 556 F.3d 1108, 1113 (10th Cir. 2009) (same).

42. U.S. Sentencing Guidelines Manual § 1B1.10, p.s., cmt. n.1(B)(i) (2008).

43. U.S. Sentencing Guidelines Manual § 1B1.10, p.s., cmt. n.1(B)(iii) (2008).

44. U.S. Const. amend. VI.

45. Federal Public & Community Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument

entitled to counsel at particular Section 3582(c)(2) hearings, but no court has found a general right to counsel during re-sentencing.[46]

If you wish to have an attorney represent you during the re-sentencing process and cannot afford to hire one, you can apply to have counsel appointed. The form at Appendix A-1 of this Chapter provides a template for your application to have an attorney appointed on your behalf.

(d) Are You Entitled to be Present at a Section 3582(c)(2) Hearing?

You are not generally entitled to be present at a Section 3582(c)(2) hearing. Under the Federal Rules of Evidence, proceedings under Section 3582(c) are exempt from the rule that a prisoner must be present at his sentencing.[47] You may also choose not to be present if your absence from prison would interfere with your housing, your work, or other obligations. However, if you have reason to believe that important facts relating to your case will be considered at the hearing, you can argue that you have a constitutional right to be present.[48]

(e) What Sentence Might You Receive if a Judge Grants Your Motion for Re-Sentencing?

Most likely, you will receive a sentence within the amended Guidelines. You may receive a sentence that is lower than the recommended sentence from the amended Guidelines if your original sentence was a downward departure from the sentence recommended by the old Guidelines.[49]

(f) May a Court Deny Your Motion for Re-Sentencing Even When the New Guidelines for Your Offense Have Been Lowered?

A court may deny your Section 3582(c)(2) motion even if it is clear that the Sentencing Commission has lowered the sentencing Guidelines for the offense for which you are serving time. A judge may choose not to re-sentence you if he finds that the factors listed in Section 3553(a), your post-conviction history, or concerns about public safety suggest that a reduction in your sentence would be inappropriate.[50]

Outlines (Feb. 18, 2008), *available at* http://www.fd.org/pdf_lib/Defender.Authority.Combined.FINAL.2.18.0819.pdf (last visited September 25, 2009).

46. *See* United States v. Robinson, 542 F.3d 1045, 1052 (5th Cir. 2008) (holding that where a prisoner convicted of selling crack cocaine moved for a sentence reduction by filing a §3582(c)(2) motion and requesting counsel, the interest of justice warranted appointment of counsel; the court refrained from definitively stating that all prisoners have a right to counsel at § 3582(c)(2) hearings); United States v. Reddick, 53 F.3d 462, 465 (2d Cir. 1995) (holding that appointment of counsel for § 3582(c)(2) application rests in the discretion of the district court); Mempa v. Rhay, 389 U.S. 128, 135, 88 S. Ct. 254, 257, 19 L. Ed. 2d. 336, 341 (1967) (holding that the 6th Amendment guarantees a right to counsel in a proceeding where a judge has to recommend a revised sentence to the parole board because "to the extent such recommendations are influential in determining the resulting sentence, the mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."); Halbert v. Michigan, 545 U.S. 605, 610, 125 S. Ct. 2582, 2587, 162 L. Ed. 2d 552, 560 (2005) (finding that the Due Process and Equal Protection clauses of the Federal Constitution require that if an avenue for relief is provided by statute, the government may not "bolt the door to equal justice to indigent defendants."); Turnbow v. Estelle, 510 F.2d 127, 129 (5th Cir. 1975) (holding that there is a right to counsel whenever the judge can exercise some discretion and influence over the sentence imposed). *See also* Federal Public & Community Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (Feb. 18, 2008), *available at* http://www.fd.org/pdf_lib/Defender.Authority.Combined.FINAL.2.18.0819.pdf (last visited September 27, 2009) (arguing that prior case law finding no right to counsel under United States Sentencing Guidelines § 1B1.10 for § 3582(c)(2) proceedings is now obsolete because of the significant revisions of § 1B1.10 in 2008).

47. *See* Fed.R.Crim.P. 43(b)(4) (2009); United States v. Parrish, 427 F.3d 1345, 1347–48 (11th Cir. 2005) (holding a prisoner has no right to be present at a § 3582(c)(2) re-sentencing hearing and that Federal Rule of Procedure 43(b)(4) exempts proceedings under § 3582(c)(2) from the rule that a prisoner must be present at sentencing); United States v. Gainer, No. 08-12895, 2008 U.S. App. LEXIS (11th Cir. Dec. 17, 2008) (*unpublished*) (holding that a prisoner has no right to be present for a § 3582(c)(2) re-sentencing hearing); United States v. Jones, No. 08-1223-cr, 2008 U.S. App. LEXIS 26029 (2d Dept. Oct. 29, 2008) (*unpublished*) (distinguishing United States v. DeMott and holding that prisoners who file § 3582(c)(2) motions for re-sentencing have no right to be present at a hearing). *But see* United States v. DeMott, 513 F.3d. 55 (2d Cir. 2008) (holding that defendant has a constitutional right to be present during re-sentencing, insofar as the proceeding is technically imposing a new sentence in place of the vacated sentence).

48. Federal Public & Community Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (Feb. 18, 2008), *available at* http://www.fd.org/pdf_lib/Defender.Authority.Combined.FINAL.2.18.0819.pdf (last visited September, 2009) (finding a possible constitutional right to be present at a re-sentencing hearing where important facts are in dispute).

49. Review Part B(2)(c) above.

50. U.S. Sentencing Guidelines Manual § 1B1.10, p.s., cmt. n.1(B) (2008).

4. Conclusion

In conclusion, the recent retroactive changes in the Federal Sentencing Guidelines for some drug offenses, especially those involving crack cocaine, make some prisoners currently serving sentences for federal drug convictions eligible to apply for sentence reductions under the new Guidelines. If the sentencing range for your offense has been lowered by the amendments, you may be eligible for re-sentencing. You should try to have an attorney appointed to your case or, if you are unable to get an attorney, you should file a re-sentencing application *pro se*.

C. Re-Sentencing For Drug Crimes in New York State

1. Introduction

In 2004, New York reformed the state's old Rockefeller drug laws by adopting the Drug Law Reform Act ("DLRA").[51] The DLRA took effect on January 13, 2005,[52] and changed sentencing ranges for drug offenses, generally by making sentences shorter. The new shorter sentence ranges automatically apply to anyone sentenced for a drug offense committed after January 13, 2005.[53] The DLRA also allows people currently serving sentences for A-I felony drug offenses under the old law to apply for re-sentencing under the new law.[54] A second law, which took effect on October 29, 2005, also allows some people serving sentences for A-II felony drug convictions to apply for re-sentencing under the new law.[55] The New York state legislature also adopted new re-sentencing policies in a public protection budget bill in April, 2009.[56] The bill created a new provision of the criminal procedure law that allows certain people currently serving sentences for Class B felony drug offenses to apply for re-sentencing.[57] This means that if you are serving a sentence for an A-I, A-II, or Class B felony drug offense, and you were sentenced under the old laws, you may be able to have your sentence reduced under the new laws. This Chapter describes who is allowed to apply for re-sentencing, which new sentences you could receive if you apply, and how to apply for re-sentencing. Section 2 of this Part describes who is eligible to apply for re-sentencing. Section 3 describes what happens if you decide to apply. Section 4 explains how to apply for re-sentencing. Appendix B at the end of the Chapter provides forms you will need to apply for re-sentencing.

2. Eligibility: Who Is Allowed to Apply?

If you are serving time for a felony drug offense, you must first determine whether you are eligible for re-sentencing. Re-sentencing is only available to people who were convicted of A-I, A-II, and Class B felony drug offenses and are currently serving time for those offenses in the custody of the New York State Department of Corrections. The A-I felony drug offenses are criminal possession of a controlled substance in the first degree,[58] criminal sale of a controlled substance in the first degree,[59] and operating as a major trafficker.[60] The A-II felony drug offenses are criminal possession of a controlled substance in the second degree[61] and criminal sale of a controlled substance in the second degree.[62] The Class B felony drug offenses are criminal possession of a controlled substance in the third degree,[63] criminal sale of a controlled substance in the third degree,[64] criminal sale of a controlled substance in or near school grounds,[65] criminal sale of a

51. 2004 N.Y. Sess. Laws ch. 738 (A. 11895, S. 7802).
52. 2004 N.Y. Sess. Laws ch. 738 (A. 11895, S. 7802).
53. People v. Nelson, 21 A.D.3d 861, 862, 804 N.Y.S.2d 1, 1 (1st Dept. 2005) (holding that new sentencing ranges under the DLRA do not apply to persons sentenced for offenses committed before January 13, 2005, even where sentencing takes place after January 13, 2005). New York's highest court, the New York Court of Appeals, upheld this decision in the consolidated appeals of three inmates in People v. Utsey, 7 N.Y.3d 398, 855 N.E.2d 791, 822 N.Y.S.2d 475 (2006).
54. 2004 N.Y. Sess. Laws ch. 738 (A. 11895, S. 7802).
55. 2005 N.Y. Sess. Laws ch. 643 (S. 5880).
56. 2009 N.Y. ALS 56 (Apr. 9, 2009), codified at N.Y. Crim. Pro. L. § 440.46.
57. N.Y. Crim. Proc. Law § 440.46 (2010).
58. N.Y. Penal Law § 220.21 (2010).
59. N.Y. Penal Law § 220.43 (McKinney 2005).
60. N.Y. Penal Law § 220.77.
61. N.Y. Penal Law § 220.18 (2010).
62. N.Y. Penal Law § 220.41 (2010).
63. N.Y. Penal Law § 220.16 (2010).
64. N.Y. Penal Law § 220.39 (2010).
65. N.Y. Penal Law § 220.44 (2010).

controlled substance to a child,[66] and unlawful manufacture of methamphetamine in the first degree.[67] These offenses are all described in Section 220 of the New York Penal Law.[68] There are different re-sentencing eligibility requirements for people who are serving sentences for A-I, A-II, and Class B felony drug offenses.

(a) If You Are Serving a Sentence for an A-I Felony Drug Conviction

Generally, if you are serving an indeterminate sentence for an A-I felony drug offense and you were sentenced under the old law, you may apply for re-sentencing.[69] But there are some requirements: The law has been interpreted to mean that you must be "in the custody of the Department of Correctional Services" to qualify for re-sentencing.[70] A defendant who is incarcerated for a parole violation after being released from prison for his original A-I sentence is not considered to be "in the custody of the Department of Correctional Services" and cannot apply for re-sentencing under the Drug Reform Laws.[71]

To be eligible for A-I re-sentencing, you also must have been subjected to an indeterminate length of imprisonment of 15 or more years.[72] If you were sentenced to an A-I felony of 15 or more years, but then had your sentence commuted to less than 15 years, you might not be eligible for re-sentencing under an A-I felony drug offense.[73] However, you should look to Subsections (b) and (c) below to see whether you are eligible for re-sentencing under an A-II felony drug conviction or a Class B felony drug conviction, respectively.[74]

(b) If You Are Serving a Sentence for an A-II Felony Drug Conviction

If you are serving a sentence for an A-II felony drug offense and you were sentenced under the old law, you may apply for re-sentencing if you meet two further requirements.[75] The first requirement is the "Time to Parole Eligibility" requirement. This sets Guidelines on how long it must be until you are eligible for parole under your current sentence. The second requirement is the "Merit Time Eligibility" requirement. This concerns whether you are currently eligible for a merit time reduction. Both of these requirements are explained below. If you meet both of them, and you are serving a sentence for an A-II felony drug offense under the old law, then you may apply for re-sentencing.

(i) The Time to Parole Eligibility Requirement

The first requirement is that you must be a certain period of time away from being eligible for parole under your current sentence. This period has been determined by the New York courts to be three years, although the law itself does not clearly state how many years are required.[76] The law only says you must be "more than twelve months from being an eligible inmate as that term is defined in Subdivision 2 of Section 851 of the correction law."[77] An "eligible" person, according to Subdivision 2 of Section 851, is a prisoner "who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years."[78] In practice, the courts have stated that this means that you must be three years away from parole eligibility.[79] But, since this meaning of "eligible" has two parts—"eligible for release on parole"

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66. N.Y. Penal Law § 220.48 (2010).
67. N.Y. Penal Law § 220.75 (2010).
68. N.Y. Penal Law § 220 (2010).
69. 2004 N.Y. Sess. Laws ch. 738 (A. 11895, S. 7802).
70. People v. Bagby, 11 Misc. 3d 882, 886, 816 N.Y.S.2d 302, 304 (Sup. Ct. Westchester County 2006) (holding (1) that defendant whose A-I felony sentence was commuted to eight and one third years to life was not eligible for re-sentencing for an A-I offense; (2) that a defendant who has been placed on parole for an A-I or A-II offense, violates that parole, and is then incarcerated as a result of his parole violation, is not eligible for re-sentencing; and (3) that only those defendants incarcerated on their original prison sentence have a mechanism for resentencing).
71. People v. Bagby, 11 Misc. 3d 882, 886, 816 N.Y.S.2d 302, 304 (Sup. Ct. Westchester County 2006). *But see* People v. Figueroa, 894 N.Y.S.2d 724, 732, 736–39 (Sup. Ct. New York County 2010) (holding that neither the Drug Law Reform Act of 2009 nor the Drug Law Reform Act of 2004 bars parole violators from resentencing).
72. People v. Bagby, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).
73. People v. Bagby, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).
74. People v. Bagby, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).
75. 2005 N.Y. Sess. Laws ch. 643 (S. 5880).
76. *See* People v. Bautista, 26 A.D.3d 230, 230–31, 809 N.Y.S.2d 62, 63 (1st Dept. 2006) (holding that in order to be eligible for re-sentencing under the 2005 law, a prisoner serving time for an A-II drug felony must be at least three years away from his first possible parole date), *appeal granted*, 6 N.Y.3d 831, 847 N.E.2d 376, 814 N.Y.S.2d 79 (2006), *appeal dismissed,* People v. Bautista, 7 N.Y.3d 838, 857 N.E.2d 49, 823 N.Y.S.2d 754 (2006).ok
77. 2005 N.Y. Sess. Laws ch. 643 (S. 5880).
78. N.Y. Correct. Law § 851(2) (McKinney 2005).
79. *See* People v. Thomas, 35 A.D.3d 895, 826 N.Y.S.2d 456 (3d Dept. 2006) (holding that defendant who was

and "who will become eligible for release on parole or conditional release within two years"—there are two possible meanings of the time to parole eligibility requirement in the re-sentencing law. However, only the three-year requirement has been followed in New York.

(1) The Established Meaning of the Time to Parole Eligibility Requirement in New York

Basically, this requirement for re-sentencing means that you must be more than three years away from becoming eligible for release on parole or conditional release.[80] This was decided by the Appellate Division First Department in 2006.[81] The New York Court of Appeals (the state's highest court) agreed, denying appeal. The three-year requirement for eligibility has been followed by the Appellate Division in the Second, Third, and Fourth Departments in later cases.[82]

For example, if you will become eligible for release on parole or conditional release on December 1, 2014, you may apply for re-sentencing on or before November 30, 2011, but not on or after December 1, 2011. *If you file your application with the court more than three years before your earliest possible release date under your current sentence, you will be eligible for re-sentencing.*

You should be aware that if you have already become eligible for parole and have been denied parole, it is likely that you are not eligible for re-sentencing. Once you have been granted a parole hearing and your request has been denied, your next parole hearing will be scheduled within two years of your last hearing. So, once you have come up for parole and been denied, you are always "eligible for release on parole within two years" and are therefore ineligible for re-sentencing because you fail to meet the Time to Parole Eligibility Requirement.[83]

(2) Measuring Time to Parole Eligibility

Time to Parole Eligibility is measured from the date that the court receives your application for re-sentencing.[84] The day that you file the application with the court must be more than three years from your

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convicted of an A-II felony drug offense was not eligible for re-sentencing under the Drug Law Reform Act, because the defendant was eligible for parole within three years); People v. Parris, 35 A.D.3d 891, 828 N.Y.S.2d 429 (2d Dept. 2006) (holding that, since defendant was less than three years away from eligibility for parole, defendant could not seek re-sentencing under Chapter 643); People v. Nolasco, 37 A.D.3d 622, 831 N.Y.S.2d 197 (2d Dept. 2007) (holding that because defendant was less than three years from parole, he was an "eligible inmate" in the meaning of Chapter 643 and was not allowed to proceed with a motion for re-sentencing); People v. Perez, 44 A.D.3d 418, 843 N.Y.S.2d 68 (1st Dept. 2007) (holding that the Supreme Court was not required to assign counsel or conduct a hearing for a defendant who was less than three years from parole eligibility when he filed a motion for re-sentencing since defendant was ineligible for re-sentencing); People v. Corley, 45 A.D.3d 857, 847 N.Y.S.2d 148 (2d Dept. 2007) (holding that a defendant who had already been denied parole and whose motion for re-sentencing would always be less than three years away from the next parole hearing was not eligible for re-sentencing).

80. This determination is reached by adding the "more than twelve months" requirement to the "release within two years" requirement from the definition of "eligible" in Subdivision 2 of Section 851. N.Y. Correct. Law § 851(2) (McKinney 2005).

81. People v. Bautista, 26 A.D.3d 230, 809 N.Y.S.2d 62 (1st Dept. 2006).

82. *See* People v. Thomas, 35 A.D.3d 895, 896, 826 N.Y.S.2d 456, 457 (3d Dept. 2006) (holding that the two provisions of Subdivision 2 of Section 851 when read together require that in order to qualify for re-sentencing under the 2005 DLRA, a class A-II felony drug offender must not be eligible for parole within three years); People v. Parris, 35 A.D.3d 891, 892, 828 N.Y.S.2d 429, 430 (2d Dept. 2006) (holding that Chapter 643 does not apply to inmates who are three or fewer years from eligibility for parole); People v. Nolasco, 37 A.D.3d 622, 623, 831 N.Y.S.2d 197, 198 (2d Dept. 2007) (denying defendants motion for re-sentencing because he was fewer than three years from parole eligibility); People v. Corley, 45 A.D.3d 857, 858, 847 N.Y.S.2d 148, 149, (2d Dept. 2007) (holding that because "defendant's next parole hearing will always be less than three years away from any date he moves for resentencing in the future … chapter 643 does not and will not afford him the right to move for resentencing"); People v. Smith, 45 A.D.3d 1478, 1479, 846 N.Y.S.2d 520, 521 (4th Dept. 2007) (holding that the defendant could not be resentenced because she was eligible for parole within seven months); People v. Dunham, 46 A.D.3d 1416, 1417, 847 N.Y.S.2d 506, 506 (4th Dept. 2007) (denying application for re-sentencing because defendant was eligible for parole within two years); People v. Mills, 48 A.D.3d 1108, 1108, 849 N.Y.S.2d 855, 855 (4th Dept. 2008) (finding applicant ineligible for re-sentencing because he was scheduled to appear before the parole board within two years after his initial parole denial).

83. People v. Mills, No. 9854, slip op. at 7 (N.Y. Ct. App. Dec. 17, 2008) (holding that a prisoner who had been denied parole four times in eight years was not eligible for re-sentencing because he was necessarily within two years of his next parole hearing).

84. *See, e.g.*, People v. Perez, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dept. 2007) (holding that a prisoner who was less than three years away from becoming eligible for parole *at the time of his application* was ineligible for re-sentencing); People v. Then, 47 A.D.3d 404, 405, 849 N.Y.S.2d 234, 235 (1st Dept. 2008) (stating that a prisoner must be more than three years away from becoming eligible for parole at the time of his application for re-sentencing);

parole date. The three years should be counted from the day you file the application; the Appellate Division First Department noted in *People v. Perez* that, since the defendant "was less than three years from his parole eligibility date when he filed the motion," he was ineligible for re-sentencing.[85] The court looked at the date of the motion for re-sentencing to measure the time to parole, and denied it because the application was filed within three years of parole eligibility. Other courts in New York have followed the same procedure to determine whether prisoners were eligible for re-sentencing. Therefore, *if possible, you should make sure you file your re-sentencing application with the court more than three years before your earliest possible release date*.

A further issue under the 2005 DLRA is how to measure the three years from parole if you are serving cumulative sentences for an A-II felony along with other crimes. The government has argued that eligibility for re-sentencing should be based only on the time left in serving the A-II felony sentence. This would mean that if you have served two years of a four-year A-II sentence, but also have more than three years to serve for another sentence, you would not be eligible for re-sentencing. The Appellate Division, however, has not followed this argument. The First Department said that defendant's parole eligibility date was the date he would be eligible for parole on his cumulative sentence for both A-I and A-II felonies—not the date he would be eligible for parole if he was just serving his A-II felony.[86] The court stated that "[t]he pivotal measuring rod is not the time remaining on an A-II felony sentence, but the time before an inmate becomes an 'eligible inmate'"—in other words, when the inmate will actually be up for parole.[87] Therefore, you should file your application with the court more than three years before your earliest possible release date.

(ii) The Merit Time Eligibility Requirement

The second requirement is that you are eligible to receive a merit time reduction of your current sentence. As with the first requirement, the re-sentencing law states this requirement indirectly. Specifically, the re-sentencing law says that you must meet "the eligibility requirements of paragraph (d) of Subdivision 1 of Section 803 of the correction law."[88] In order to meet the merit time requirements for the purposes of the DLRA, you "must be serving a sentence of one year or more, be in the Correction Department's custody as of certain periods of time, not have been convicted of certain crimes, not have committed a 'serious disciplinary infraction' or commenced a frivolous civil lawsuit or other civil proceeding against a state agency, officer or employee, and have participated in certain programs."[89] The requirement that prisoners serving sentences for certain types of crimes are ineligible for merit time is found in Section 803(d)(1) of the New York Correction Law.[90] These crimes are listed below, in Subsection (1) of this Section. *If you are serving time for one of the disqualifying offenses listed below, you do not meet the merit time eligibility requirement for re-sentencing, and you may not apply for re-sentencing*.

(1) Eligibility for Merit Time Under New York Correction Law § 803(1)(d): Disqualifying Offenses

If you are serving time for certain types of offenses in addition to the A-II felony drug offense, you are not eligible for merit time under Section 803(1)(d) of the New York Correction Law, and therefore you are not eligible to apply for re-sentencing. The disqualifying offenses are:

(1) Any non-drug class A-I felony;
(2) Any violent felony offense as defined in Section 70.02 of the New York Penal Law;[91]
(3) Manslaughter in the second degree;
(4) Vehicular manslaughter in the first or second degree;
(5) Criminally negligent homicide
(6) Any sex offense defined in Article 130 of the New York Penal Law;[92]
(7) Incest;
(8) Any sexual performance by a child offense defined in Article 263 of the New York Penal Law;[93] and

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Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders at 3 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.mcacp.org/Rockefeller_Memo_A2.pdf.

85. People v. Perez, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dept. 2007).
86. People v. Paniagua, 45 A.D.3d 98, 105, 841 N.Y.S.2d 506, 511 (1st Dept. 2007).
87. People v. Paniagua, 45 A.D.3d 98, 105, 841 N.Y.S.2d 506, 512 (1st Dept. 2007).
88. 2005 N.Y. Sess. Laws ch. 643 (S. 5880).
89. People v. Paniagua, 45 A.D.3d 98, 106, 841 N.Y.S.2d 506, 513 (1st Dept. 2007).
90. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2010).
91. N.Y. Penal Law § 70.02 (McKinney 2010).
92. N.Y. Penal Law §§ 130.00–130.96 (McKinney 2010).

(9) Aggravated harassment of an employee by a prisoner.[94]

A question arises over whether you are eligible for re-sentencing if you were sentenced for both a disqualifying offense and a drug offense, and you have arguably finished serving the sentence for the disqualifying offense. For example, if you were sentenced to two years' imprisonment for a disqualifying offense, to be served concurrently or consecutively with a longer prison term for an A-II felony drug offense, and you have already served four years, it appears that you are no longer serving time for the disqualifying offense. It is possible that you could apply for re-sentencing, but you need to argue in your application that you are no longer serving the sentence for the disqualifying offense. This argument will likely be unsuccessful because two recent cases indicate that a defendant whose sentence originally included a disqualifying offense will not be re-sentenced.[95] The first case is *People v. Merejildo*,[96] in which the defendant was serving a consecutive sentence of two to four years for a violent felony, and eight years to life for an A-II felony. After serving more than four years, the defendant sought re-sentencing under DLRA, and argued that he was no longer serving the disqualifying offense. The court said, though, that "[p]ursuant to Penal Law §70.30(1)(b), defendant's consecutive sentences are merged into a single aggregate sentence, with a term of ten years to life."[97] This meant that the defendant was still considered to be serving for the disqualifying violent felony and was not eligible for re-sentencing.

A similar argument was unsuccessful for a defendant serving a concurrent sentence in *People v. Quiñones*, a 2008 decision by the New York Appellate Division First Department.[98] In that case, a defendant was sentenced to a violent felony offense (a disqualifying offense) with a maximum sentence of seven years along with a concurrent life sentence for class A-II felony violations. After serving more than seven years, Quiñones applied for re-sentencing and argued that he had finished serving the disqualifying offense. The court disagreed and said that since his sentence was concurrent, Quiñones remained imprisoned for a sentence that included a disqualifying offense. The defendant was therefore ineligible for re-sentencing.

The decisions in *Merejildo* and *Quiñones* mean that if you were simultaneously sentenced for a disqualifying offense and an A-II offense, you will be unlikely to successfully argue that you have finished serving the disqualifying offense, and you will therefore not be re-sentenced under the DLRA.

You are also probably not eligible to apply for re-sentencing if you were on parole for any one of the disqualifying offenses at the time that you were charged with the A-II felony drug offense. If this is your situation, the time owed to parole on the first sentence was probably added to the A-II felony drug sentence. This would make you ineligible for merit time and therefore ineligible for re-sentencing under the new law.[99]

You probably meet the merit time eligibility requirement if you are not serving time for any of the disqualifying offenses listed above (or listed in Section 803(1)(d)(ii) of the New York Correction Law), and if you were not on parole for any of those offenses at the time that you were charged with the A-II felony drug offense.[100] However, the judge may also look at the other restrictions on granting merit time that are included in Correction Law Section 803(1)(d). These restrictions are discussed below, in Subsection (b).

(2) Other Restrictions on Merit Time Under New York Correction Law § 803(1)(d)

Courts have noted other restrictions that might apply to merit time allowances in re-sentencing under the DLRA, according to Section 803(1)(d). "[T]o obtain a merit time allowance a defendant must … not have been convicted of certain crimes, not have committed a 'serious disciplinary infraction' or commenced a frivolous civil lawsuit or other civil proceeding against a state agency, officer or employee, and have participated in certain programs."[101] This means that there is a possibility that a judge may decide that you

93. N.Y. Penal Law §§ 263.00–263.30 (McKinney 2010).

94. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2010) (listing all of the disqualifying offenses).

95. People v. Merejildo, 45 A.D.3d 429, 430, 846 N.Y.S.2d 52, 53 (1st Dept. 2007); People v. Quiñones, 49 A.D.3d 323, 854 N.Y.S.2d 5 (1st Dept. 2008).

96. People v. Merejildo, 45 A.D.3d 429, 430, 846 N.Y.S.2d 52, 53 (1st Dept. 2007).

97. People v. Merejildo, 45 A.D.3d 429, 430, 846 N.Y.S.2d 52, 53 (1st Dept. 2007) (citing People v. Curley, 285 A.D.2d 274, 730 N.Y.S.2d 625 (4th Dept. 2001), *lv. denied,* 97 N.Y.2d 607, 738 N.Y.S.2d 290, 764 N.E.2d 394 (2001)).

98. People v. Quiñones, 49 A.D.3d 323, 854 N.Y.S.2d 5, 6 (1st Dept. 2008).

99. *See* Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders at 2 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf.

100. *See* Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders at 2 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf.

101. People v. Paniagua, 45 A.D.3d 98, 106, 841 N.Y.S.2d 506, 513 (1st Dept. 2007).

are ineligible for merit time—and therefore ineligible for re-sentencing—if you have a serious disciplinary infraction on your prison record or if, while you were in prison, you filed or proceeded with a lawsuit that was dismissed as frivolous.[102] This is the view expressed by the court in *People v. Hill* when describing the requirements: "To be eligible for re-sentencing under this legislation, a defendant must … meet the eligibility requirement of Correction Law § 803(1) (which requires a defendant be eligible to earn 'merit time,' which means the defendant cannot also be serving another sentence for which merit time is not available, such as certain sex offenses, all violent felony offenses, any homicide, or if the defendant has a poor disciplinary record, or has been found to have filed a frivolous lawsuit)."[103] In other words, even if you are not serving time for any of the disqualifying offenses, a judge might decide that you do not meet the merit time eligibility requirement for re-sentencing because, under Correction Law § 803(1)(d)(iv), you could not be granted merit time. This Section states that "allowance shall be withheld for any serious disciplinary infraction or upon a judicial determination that the person, while an inmate, commenced or continued a civil action, proceeding or claim that was found to be frivolous."[104]

However, in the way most courts apply the law, the re-sentencing law only requires that you be *eligible* for merit time under Correction Law § 803(1)(d), rather than requiring that you actually *earned* merit time under Correction Law § 803(1)(d). Therefore, a serious disciplinary infraction or a frivolous lawsuit or legal claim on your record does not necessarily prevent you from fulfilling the merit time eligibility requirement.[105] In December 2005, the Supreme Court of New York County held, in *People v. Quiñones*, that a serious disciplinary infraction *does not* hurt eligibility for re-sentencing under the new law.[106] That decision was endorsed by the Supreme Court, Appellate Division Second Department, in *People v. Sanders*.[107] The court stated, "the reference in the 2005 DLRA to the 'eligibility requirements' of Correction Law Section 803(1)(d), does not preclude a defendant from whom a merit time allowance has been withheld pursuant to Correction Law § 803(1)(d)(iv), from seeking re-sentencing under the 2005 DLRA."[108] This means that eligibility for re-sentencing under the Drug Reforms laws is different than under Section 803(1)(d) as a whole, and under the DLRA the only requirement that matters for merit time eligibility is that you are not serving time for a disqualifying offense.

However, the Supreme Court, Appellate Division First Department and the Supreme Court, Appellate Division Third Department both disagree. In *People v. Paniagua*, the First Department court held that the defendant was ineligible for merit time because he committed two serious disciplinary infractions. The court noted that a "'serious disciplinary infraction' is defined in the regulations of the Department of Correctional Services to include [actions resulting in the] 'receipt of disciplinary sanctions' that entail '60 or more days of SHU [Special Housing Unit] and/or keeplock time' [or] the 'receipt of any recommended loss of good time as a disciplinary sanction.'"[109] The defendant in *People v. Paniagua* argued that since he had not committed a disqualifying offense, such as a violent felony, he had met the eligibility requirements of "earning" a merit time allowance. He argued that this was all that was necessary to meet the merit time requirement for re-sentencing. The court here took a stricter view, holding that the defendant must have both earned and been granted merit time allowance in order to meet the requirement. The court stated:

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102. *See* Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders at 2 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf.

103. People v. Hill, 11 Misc. 3d 1053(A), 814 N.Y.S.2d 892 (Sup. Ct. Kings County 2006) (holding that a prisoner who was serving time for an A-II felony and a violent felony was ineligible for re-sentencing because he failed to meet the merit time eligibility requirement).

104. N.Y. Correct. Law § 803(1)(d)(iv) (McKinney 2010).

105. *See* People v. Quiñones, 11 Misc. 3d 582, 597, 812 N.Y.S.2d 259, 270 (N.Y. Sup. Ct. 2005) (holding that the merit time eligibility requirement of the A-II re-sentencing law only requires that a prisoner not be serving time for any of the disqualifying offenses listed in N.Y. Correct. Law § 803(1)(d)(ii), and not that the prisoner meet any of the other requirements for actual granting of merit time). *See also* Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders at 4 (Oct. 5, 2005, *revised* Oct. 24, 2005) *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf. But, note that the New York Department of Corrections, prior to the decision in *Quiñones*, has taken the position that prisoners with serious disciplinary infractions and prisoners found to have filed frivolous lawsuits while in prison do not meet the merit time eligibility requirement. Memorandum from Anthony J. Annucci, Deputy Commissioner and Counsel for N.Y. Dept. of Corr. Servs., to Criminal Justice Practitioners, at 2 (Sept. 20, 2005) (on file with the *JLM*).

106. People v. Quiñones, 11 Misc. 3d 582, 598, 812 N.Y.S.2d 259, 271 (N.Y. Sup. Ct. 2005).

107. People v. Sanders, 36 A.D.3d 944, 829 N.Y.S.2d 187 (2d Dept. 2007).

108. People v. Sanders, 36 A.D.3d 944, 946, 829 N.Y.S.2d 187 (2d Dept. 2007).

109. People v. Paniagua, 45 A.D.3d 98, 107, 841 N.Y.S.2d 506, 513–14 (1st Dept. 2007) (citations omitted); N.Y. Comp. Codes R. & Regs. tit. 7, § 280.2(b)(3)–(4) (2006).

> Thus, the requirements set forth in § 803(1)(d)(iv), no less than those in § 803(1)(d)(i) and (ii), constitute the "eligibility" requirements for the grant of merit time. Nothing in the 2005 DLRA or § 803(1)(d) supports defendant's argument that the phrase "eligibility requirements" refers only to the requirements for earning a merit time allowance, and not also to those for being granted one.[110]

In 2008, the Third Department decided *People v. Williams*, finding that a prisoner who had incurred serious disciplinary infractions during his incarceration was not eligible for re-sentencing because he failed to meet the merit time eligibility requirement. The court specifically adopted the First Department's reasoning in *People v. Paniagua* and stated:

> Here, it is undisputed that defendant has been found to have committed numerous disciplinary infractions while incarcerated which resulted in sanctions being imposed that exceeded 60 days in the special housing unit and/or keeplock. As a result of these infractions, defendant is not eligible for a merit time allowance under the provisions of Correction Law § 803(1)(d) and, as such, is not eligible for resentencing under DLRA 2005.[111]

Thus, there is disagreement between the departments about whether being eligible for merit time requires 803(1)(d)(iv) (freedom from serious disciplinary infractions or frivolous lawsuits) in addition to 803(1)(d)(ii) (freedom from a disqualifying offense). In the First and Third Departments, the court may find that you are not eligible for re-sentencing if you have committed a "serious disciplinary infraction."[112] You will have to argue, consistent with the Second Department's reasoning in *People v. Sanders*. that Section 803(1)(d)(i) and (ii) are the only requirements for being "eligible for merit time." Additionally, you probably do not have to meet the work or program assignment requirement described in New York Correction Law Section 803(1)(d)(iv). This statute, effective until September 2011, also states that you *may* be granted merit time when you successfully obtain one of the following: your general equivalency diploma (GED), an alcohol and substance abuse treatment certificate, a vocational trade certificate after six months of vocational programming, or completion of 400 hours of community service as part of a community work crew.[113] In fact, the opinion in *Paniagua* suggests that participation in these programs is included under the eligibility requirements of the DLRA.[114] However, most courts adhere to the position taken by the Second Department in *People v. Sanders,* which does not require participation in the programs listed above; therefore, you probably do not need to participate in any of these programs in order to be considered eligible for merit time.[115]

(c) If You Are Serving a Sentence for a Class B Felony Drug Conviction

If you are serving an indeterminant sentence with a maximum term of more than three years for a Class B felony drug offense, committed before January 13, 2005, you may apply for re-sentencing.[116] Moreover, as part of the re-sentencing application, you may also move to be re-sentenced for Class C, D, or E felony drug offenses for which you received a sentence at the same time or in the same judicial order as the underlying

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110. People v. Paniagua, 45 A.D.3d 98, 108, 841 N.Y.S.2d 506, 514 (1st Dept. 2007).

111. People v. Williams, 48 A.D.3d 858, 859–60, 850 N.Y.S. 2d 717, 718 (3rd Dept. 2008).

112. *See* People v. Paniagua, 45 A.D.3d 98, 108, 841 N.Y.S.2d 506, 514 (1st Dept. 2007) (finding a prisoner ineligible for merit time based on two serious disciplinary infractions while incarcerated); People v. Williams, 48 A.D.3d 858, 859–60, 850 N.Y.S. 2d 717, 718 (3d Dept. 2008) (concluding that inmate who committed serious disciplinary infractions was ineligible for merit time and therefore could not apply for resentencing under DLRA). *See also* N.Y. Correct. Law § 803(1)(a) (McKinney 2009) ("Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned."); N.Y. Comp. Codes R. & Regs. tit. 7, § 280.2(b) (2006).

113. N.Y. Correct. Law § 803(1)(d)(iv) (2010).

114. People v. Paniagua, 45 A.D.3d 98, 106, 108, 841 N.Y.S.2d 506, 513, 514 (1st Dept. 2007).

115. *See, e.g.*, People v. Quiñones, 11 Misc.3d 582, 595–96, 812 N.Y.S.2d 259, 269 (Sup. Ct. 2005); *see also* New York State Senate Introducer's Memorandum in Support of Bill No. S. 5880, Governor's Bill Jacket, L 2005, ch 643, at 2 ("The law is intended to apply to those class A-II felony controlled substance offenders who are eligible to earn merit time, but is not intended to require that they have earned the merit time allowance before they may apply for resentencing pursuant to the provisions of this bill.").

116. N.Y. Crim. Proc. Law § 440.46.1 (McKinney 2010).

Class B felony drug offense.[117] The applications for resentencing under this provision are governed by the provisions of the 2004 DLRA for A-II felony drug offenses, and courts are instructed to consider your disciplinary history and your participation or willingness to participate in treatment or other programming while serving your sentence when determining whether you are eligible for re-sentencing.[118]

However, you are ineligible to apply for re-sentencing under the 2009 DLRA if you committed a so-called "exclusion offense."[119] You are ineligible if you were convicted within the preceding ten years of a violent felony[120] or of a felony that makes you ineligible for merit-time allowance under Section 803(1)(d)(ii) (as

117. N.Y. Crim. Proc. Law § 440.46.2 (McKinney 2010).
118. N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).
119. N.Y. Crim. Proc. Law § 440.46.5 (McKinney 2010).
120. These include:
    (1) Class B violent felony offenses, which are:
        a. Attempted murder in the second degree
        b. Attempted kidnapping in the first degree
        c. Attempted arson in the first degree
        d. Manslaughter in the first degree
        e. Aggravated manslaughter in the first degree
        f. Rape in the first degree
        g. Criminal sexual act in the first degree
        h. Aggravated sexual abuse in the first degree
        i. Course of sexual conduct against a child in the first degree
        j. Assault in the first degree
        k. Kidnapping in the second degree
        l. Burglary in the first degree
        m. Arson in the second degree
        n. Robbery in the first degree
        o. Incest in the first degree
        p. Criminal possession of a weapon in the first degree
        q. Criminal use of a firearm in the first degree
        r. Criminal sale of a firearm in the first degree
        s. Aggravated assault upon a police officer or a peace officer
        t. Gang assault in the first degree
        u. Intimidating a victim or witness in the first degree
        v. Hindering prosecution of terrorism in the first degree
        w. Criminal possession of a chemical weapon or biological weapon in the second degree
        x. Criminal use of a chemical weapon or biological weapon in the third degree
    (2) Class C violent felony offenses, which are:
        a. Attempts to commit any of the class B felonies specified above
        b. Aggravated criminally negligent homicide
        c. Aggravated manslaughter in the second degree
        d. Aggravated sexual abuse in the second degree
        e. Assault on a peace officer, police officer, fireman or emergency medical services professional
        f. Gang assault in the second degree
        g. Strangulation in the first degree
        h. Burglary in the second degree
        i. Robbery in the second degree
        j. Criminal possession of a weapon in the second degree
        k. Criminal use of a firearm in the second degree
        l. Criminal sale of a firearm in the second degree
        m. Criminal sale of a firearm with the aid of a minor
        n. Soliciting or providing support for an act of terrorism in the first degree
        o. Hindering prosecution of terrorism in the second degree
        p. Criminal possession of a chemical weapon or biological weapon in the third degree
    (3) Class D violent felony offenses, which are:
        a. Attempts to commit any of the Class C felonies described above
        b. Reckless assault of a child
        c. Assault in the second degree
        d. Menacing a police officer or peace officer
        e. Stalking in the first degree
        f. Strangulation in the second degree
        g. Rape in the second degree
        h. Criminal sexual act in the second degree

discussed above), or if you were ever adjudicated a second violent felony offender or a persistent violent felony offender.[121]

(i) The Meaning of "In Custody"

Courts have interpreted these eligibility requirements as stipulating that an applicant must be in the custody of the Department of Corrective Services (DOCS) at the time of the court's decision on re-sentencing, rather than at the time the application was filed.[122] In *People v. Tavarez*, for example, the court explicitly applied appellate court precedent under the 2004 and 2005 DLRAs finding defendants ineligible for re-sentencing once released on parole, even if they were subsequently returned to Department of Corrective Services custody.[123] The court held that this precedent applied to the 2009 DLRA to hold that "the fact that defendant was in NYSDOCS custody when the motion was filed ... does not determine his eligibility for re-sentencing at the time the motion is considered" such that a defendant released from the DOCS custody at the time the motion is considered is ineligible to be re-sentenced under the 2009 DLRA.[124] Additionally, in *People v. Figueroa*, the court explicitly stated that "[o]nce a defendant is released to parole and is thus no longer incarcerated, even if reincarcerated on the original sentence for a parole violation, the defendant is no longer entitled to the ameliorative provisions of the Drug Law Reform Acts."[125]

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i. Sexual abuse in the first degree
j. Course of sexual conduct against a child in the second degree
k. Aggravated sexual abuse in the third degree
l. Facilitating a sex offense with a controlled substance
m. Criminal possession of a weapon in the third degree
n. Criminal sale of a firearm in the third degree
o. Intimidating a victim or witness in the second degree
p. Soliciting or providing support for an act of terrorism in the second degree
q. Making a terroristic threat
r. Falsely reporting an incident in the first degree
s. Placing a false bomb or hazardous substance in the first degree
t. Placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall
u. Aggravated unpermitted use of indoor pyrotechnics in the first degree

(4) Class E violent felony offenses, which are:
a. Attempts to commit various forms of criminal possession of a weapon in the third degree
b. Persistent sexual abuse
c. Aggravated sexual abuse in the fourth degree
d. Falsely reporting an incident in the second degree
e. Placing a false bomb or hazardous substance in the second degree.

N.Y. Penal Law § 70.02(a–d) (McKinney2010).

121. N.Y. Penal Law § 440.46.5 (McKinney 2010); *see also* Memorandum from Al O'Connor, New York State Defenders Association, to Criminal Defense Attorneys, at 4 (Apr. 8, 2009), *available at* http://www.communityalternatives.org/publications/drugCases.html.

122. *See, e.g.*, People v. Villalona, No. 02455, slip op. at 1 (N.Y. Sup. Ct. May 3, 2010) ("Because the defendant is no longer in the custody of the Department of Correctional Services, he is ... ineligible for re-sentencing.") (citing People v. Rodriguez, 68 A.D.3d 676 (1st Dept. 2009), a case pertaining to the 2005 DLRA); People v. Sherwood, Nos. 6512/2000 & 678/2001, slip op. at 3 (N.Y. Sup. Ct. Apr. 7, 2010) (following lower court precedent of applying People v. Mills, 11 N.Y.3d 527 (2008), to the 2009 DLRA and finding that "[s]ince a *re-incarcerated* parole violator is not considered to be 'in custody' for re-sentencing purposes, then *a fortiori*, a parolee who is at liberty is not 'in custody' for such purpose."); People v. Young, No. 12215, slip op. at 2 (N.Y. Sup. Ct. Apr. 7, 2010) (analogizing to the court's interpretation of the 2005 DLRA in *People v. Mills*, 11 N.Y.3d 527 (2008), to find that a defendant no longer in the custody of DOCS at the time of the court's consideration of his re-resentencing motion is not eligible for re-sentencing under the 2009 DLRA); People v. Wiggins, No. QN10727, slip op. at 2 (N.Y. Sup. Ct. Mar. 30, 2010) (holding that defendant arrested for felony drug offense in 2004 and granted release to parole supervision in January 2010 was ineligible for re-sentencing under the 2009 DLRA because he was no longer in custody at the time of the court's consideration); People v. Suriel, No. 10325, slip op. at 3–4 (N.Y. Sup. Ct. Nov. 13, 2009) (holding that defendant released from DOCS custody and deported by Immigration and Customs Enforcement officials after applying for re-sentencing was no longer eligible for re-sentencing because not *currently* in DOCS custody).

123. People v. Tavarez, Nos. 5241, 5261 & 1824, slip op. at 3–4 (N.Y. Sup. Ct. Mar. 15, 2010) (citing *People v. Mills*, 11 N.Y.3d 527, 536–37 (2008), and *People v. Rodriquez*, 68 A.D.3d 676 (1st Dept. 2009)).

124. People v. Tavarez, Nos. 5241, 5261 & 1824, slip op. at 4–5 (N.Y. Sup. Ct. Mar. 15, 2010).

125. People v. Figueroa, No. 2606, slip op. at 2 (N.Y. Sup. Ct. Mar. 29, 2010) (applying appellate court precedent from 2004 and 2005 DLRAs to defendant's case under 2009 DLRA).

Two court decisions, however, have found a defendant eligible for re-sentencing even while out of custody at the time of the court's consideration of the application, provided that the application was filed when the defendant was still in custody. In *People v. Cruz*, the court approved the defendant's re-sentencing application and imposed a determinate sentence of two years, with one year of post-release supervision.[126] The defendant originally pled guilty to a felony drug offense in 2004 and failed to complete the mandated court-monitored treatment program such that he was sentenced to a jail alternative indeterminate sentence of two to six years in 2008. In 2009, the defendant filed a motion for re-sentencing under the 2009 DLRA, but in November of that year, he was released on parole.[127] The court was persuaded by the fact that defendant was a first time non-violent felony offender at the time of his original sentence, as well as the fact that the state opposed the application only on the grounds that he was presently at liberty in the community.[128]

In *People v. Sanabria*, the court found that a defendant released on parole several days after filing his application for re-sentencing was not ineligible for re-sentencing, because the "in custody" provision of the 2009 DLRA meant that a person had to be in DOCS custody on the day of filing the application.[129]

The decisions of the court in *People v. Cruz* and *People v. Sanabria* notwithstanding, the rule in most New York courts appears to be that the defendant must be in DOCS custody at the time the court considers the motion for re-sentencing. Thus, petitioners filing for re-sentencing under the 2009 DLRA are probably not eligible if they are out of custody at the time the court considers the motion.

(ii) The Meaning of the Ten-Year "Look Back"

The majority of New York courts have interpreted the ten-year "look back" for determining exclusion offenses to mean ten years from the date of *filing* the re-sentencing application, rather than ten years from the present felony drug offense or the effective date of the statute.[130] In *People v. Danton*, for example, the court found that, in light of the ameliorative (relieving) purpose of both the 2004 and 2005 DLRAs, as well as

126. People v. Cruz, No. 2939, slip op. at 1 (N.Y. Sup. Ct. Jan. 22, 2010).

127. People v. Cruz, No. 2939, slip op. at 1 (N.Y. Sup. Ct. Jan. 22, 2010).

128. People v. Cruz, No. 2939, slip op. at 1–2 (N.Y. Sup. Ct. Jan. 22, 2010).

129. People v. Sanabria, No. 2316-92, slip op. at 2 (N.Y. Sup. Ct. Mar. 29, 2010).

130. *See* People v. Arroyo, No. 4776-2003, slip op. at (N.Y. Sup. Ct. June 25, 2010) (basing its decision that the ten-year look back should be measured from the date of the re-sentencing application on the ameliorative purpose of the 2009 DLRA, the absence of any language similar to that in other Penal Law provisions specifying the date of commission of the instant felony as the starting point for the 10-year look back, and similar decisions by other lower courts); People v. Lee, No. 01408-2000, slip op. at 2 (N.Y. Sup. Ct. June 17, 2010) (following "the weight of authority at the trial court level ... that the preceding ten years [in the 2009 DLRA] refers to the ten year period immediately preceding the filing of the motion for resentence"); People v. Walltower, No. N10539/96, slip op. at 5 (N.Y. Sup. Ct. Apr. 6, 2010) (holding that "in light of both the dearth of legislative guidance and the ameliorative purposes of the 2009 DLRA, the natural meaning of the term 'within the preceding ten years' ... is the ten-year period immediately preceding the date of filing of the application for resentencing"); People v. Lashley, No. N10596/04, slip op. at 4 (N.Y. Sup. Ct. Apr. 5, 2010) (analogizing to interpretation of "other recidivist sentencing statutes" to find that "the plain meaning of the phrase 'within the preceding ten years,' unadorned as it is by any limiting language, appears intended to run from the time immediately preceding the [re-sentencing] application"); People v. Estela, Nos. 720/2004 & 4336/2004, slip op. at 4 (N.Y. Sup. Ct. Mar. 24, 2010) (holding that "the relevant point in time from which the statutory 'preceding ten years' is to be measured is the date of the filing of the petition for re-sentence"); People v. Austin, No. 6738/02, slip op. at 4 (N.Y. Sup. Ct. Mar. 22, 2010) (using the interpretation of "[n]umerous trial level courts" to find that the 10-year look back means "ten years from the date the application is filed"); People v. Murray, No. 121/03, slip op. at 3 (N.Y. Sup. Ct. Mar. 22, 2010) (citing *People v. Danton* to hold that the 10-year look back "refer[s] to the ten years immediately preceding the application for resentence"); People v. Loftin, No. 2003-0035-1, slip op. at 2–3 (N.Y. Sup. Ct. Mar. 2, 2010) (citing *People v. Roman* to "agree with an increasing number of other trial courts who have ruled that the statute, by its plain meaning, contemplates eligibility determinations from the present date ... and that the most natural construction of the law is to read the reference point as the date of a resentencing application") (internal citations omitted); People v. Stanley, No. 3242-04, slip op. at 5–6 (N.Y. Sup. Ct. Mar. 1, 2010) (using the court's opinion in *People v. Brown* to hold that the 10-year look back is measured from the date of the re-sentencing application); People v. Brown, No. 4097/02, slip op. at 5–7 (N.Y. Sup. Ct. Jan. 4, 2010) (citing *People v. Roman* to find that the 10 year period is "measured from the date of a violent felony conviction to the date of a resentencing application); People v. Roman, Nos. 4931/96 & 6894/96, slip op. at 2 (N.Y. Sup. Ct. Dec. 4, 2009) (holding that "the statute by its plain meaning contemplates eligibility determinations from the present date," especially in light of the clear purpose of the 2004, 2005, and 2009 DLRAs to "ameliorate the lengthy sentences given to defendants for selling or possessing a small amount of drugs"). *See also* Center for Community Alternatives, "Resentencing Eligibility (2009): Calculating the 10 Year Look Back Simplified," available at http://www.communityalternatives.org/pdf/ClassBDrugOffense-10YearLookBack.pdf.

the similarly ameliorative provisions of the 2009 DLRA, the ten-year look back provision ought to mean the ten years immediately preceding the date of filing the re-sentencing application.[131]

But three court decisions found the ten-year "look back" should be measured from the commission of the present drug offense for which the defendant has been sentenced. In *People v. Jimenez*, the court found the defendant ineligible for re-sentencing because the time between the commission of the present drug offense and the date of the commission of the exclusion offense was approximately six years, meeting the ten-year look back stipulation of the 2009 DLRA.[132] In *People v. Turner*, the court similarly found the defendant ineligible based on an exclusion offense committed six years, five months and eleven days before the commission of the first of the present drug offenses.[133] Finally, in *People v. Wallace*, the court found the defendant ineligible for re-sentencing because he had a previous violent felony conviction, "which was committed within ten years prior to the date of the original sentencing date, with appropriate tolling."[134]

Despite these three decisions, the general outcome in the New York trial courts is that the ten-year look back is measured from the date of the re-sentencing application.[135] No appellate court has spoken on the matter to date.

(d) Conclusion

To sum up, you may apply for re-sentencing if, (1) you are serving a sentence for an A-I felony drug offense and you were sentenced under the old law, (2) you are serving a sentence for an A-II felony drug offense, you were sentenced under the old law, and you meet the time to parole eligibility and merit time eligibility requirements described above, or (3) you are serving a sentence for a Class B felony drug offense, you were sentenced under the old law, and you are not serving time for an "exclusion offense," meaning you were not convicted within the ten years preceding the re-sentencing application of a violent felony offense, an offense that renders you ineligible for merit time under Section 803(1)(d)(ii), a second violent felony offense, or a persistent violent felony offense. Sections 3 and 4 below will describe what happens if you apply for re-sentencing, and how to apply.

3. Re-Sentencing: What Happens If You Apply?

(a) The Re-Sentencing Process

The re-sentencing process is the same for A-I, A-II, and Class B felony drug offenses. When you apply, you should send your application to the court in which you were convicted, but you must also send a copy of your application to the District Attorney's office that prosecuted your conviction.[136] The application will be decided by the judge that gave you your original sentence if that judge still works in the same court.[137] Otherwise, the application will be decided by another judge in that court, chosen at random.[138] Or, if the original judge has moved to another court that has jurisdiction over your case, and if you and the District Attorney both agree, your application may be sent to the original judge at the new court.[139]

(b) How the Judge Will Make a Decision

If the judge finds that you meet the requirements for applying for re-sentencing, described in Part B above, the judge may consider any facts or circumstances that relate to whether you should be re-sentenced, including your prison record.[140] For Class B felony drug offenders, the judge is also instructed to consider your "participation in or willingness to participate in treatment or other programming while incarcerated"

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131. People v. Danton, Nos. 5759/03, 620/04, 5394/98 & 7375/02, slip op. at 5–19 (N.Y. Sup. Ct. Feb. 2, 2010) ("[V]iewing the re-sentencing provision generally, and its look-back provision particularly, in the context of the spirit and purpose underlying the legislation as a whole, it is appropriate to resolve any ambiguity in favor of the more ameliorative, rather than the more punitive, construction.").

132. People v. Jimenez, No. 2004-0073-1, slip op. (Onondaga Cty. Ct. Dec. 9, 2009).

133. People v. Turner, Nos. 2004-1159-1 & 2004-1084-1, slip op. at 3 (Onondaga Cty. Ct. Dec. 9, 2009).

134. People v. Wallace, No. 0763/92, slip op. (N.Y. Sup. Ct. May 17, 2010).

136. See footnote 130, above, for a list of many of these cases.

136. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (2010).

137. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880) ; N.Y. Crim. Proc. Law § 440.46.3 (2010).

138. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880) ; N.Y. Crim. Proc. Law § 440.46.3 (2010).

139. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (2010).

140. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880).

and your disciplinary history, though an inability to participate in such a program won't count against you when making the determination.[141] It is up to you to give the facts and circumstances that you want the judge to consider.[142] Similarly, the District Attorney may submit the facts and circumstances that the prosecutor wants the judge to consider.[143] The judge may also consider your institutional record of confinement.[144] Furthermore, the judge may only consider information that relates to whether you should be re-sentenced, and may not consider information about whether or not you were correctly charged and convicted in the first place.[145]

If you are eligible to apply for re-sentencing, you have a right to have an attorney represent you on your application.[146] If you cannot pay for an attorney, you have a right to have one appointed by the court.[147] Part D of this Chapter, "How to Apply for Re-Sentencing," explains how to get an attorney appointed. You also have a right to a hearing on your re-sentencing application and to be present at that hearing.[148] The court may also order a hearing to determine whether you are actually eligible to apply for re-sentencing, or to decide any relevant factual issues that are in dispute.[149]

After reviewing the information submitted by you and the District Attorney, and after any necessary hearings, the judge will reach a decision. "[U]nless substantial justice dictates that [your] application should be denied," the judge must choose an appropriate new sentence from the current sentencing ranges, and tell you what that sentence is.[150] You will then have a choice of accepting the suggested new sentence, withdrawing your application, or appealing the suggested new sentence.[151] If you withdraw your application, you will keep serving your original sentence. If you do not take any action, the judge will vacate your original sentence and impose the new sentence.[152] All of the time you have served toward your old sentence will be counted towards your new sentence.[153] Whether the judge grants or denies your application, he must write an opinion explaining his findings of fact and legal reasoning.[154]

The success or failure of achieving re-sentencing often turns on whether "substantial justice dictates that the application should be denied." While the judge is not supposed to have discretion beyond applying the law in determining whether a defendant is eligible for re-sentencing—i.e. meeting the time to parole requirements, the merit time eligibility requirements, the ten-year look back—the judge does have some discretion in determining what substantial justice dictates. For example, courts have previously denied re-sentencing of cases because of substantial justice. Situations that may lead to a denial of re-sentencing due to substantial justice have included where the defendant is a high level drug offender,[155] where the drug

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141. N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

142. In other words, it is up to you to convince the judge that you deserve to be re-sentenced. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws Ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (2010).

143. In other words, the District Attorney may try to convince the judge that you do *not* deserve to be re-sentenced. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

144. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

145. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

146. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802) (citing N.Y. County Law §§ 717.1, 722.4 (2010)); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.4 (McKinney 2010).

147. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802) (citing N.Y. County Law §§ 717.1, 722.4 (2010)); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.4 (McKinney 2010).

148. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

149. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

150. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

151. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

152. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (2010).

153. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

154. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

155. People v. Perez, No. 5450/03, slip op. at 9–11 (N.Y. Sup. Ct. Mar. 4, 2010) (denying re-sentencing application as a result of a long criminal record with convictions that were "not a single sale for a couple of dollars," but which included violent felony offenses and several severe infractions while in prison); People v. Morales, 46 A.D.3d 1395, 1396,

trafficking operation that the defendant participated in was very extensive,[156] where the amount of drugs the defendant was convicted for was high,[157] where the defendant had disciplinary infractions while in prison and a long prior criminal history,[158] and where the defendant showed no remorse for his crime and continued to deny guilt after pleading guilty.[159]

Finally, you may also appeal a proposed, but not yet imposed, new sentence on the ground that it is harsh or excessive.[160] If you do so, you can still decide to withdraw your application after the appeal is decided and keep serving your original sentence.[161]

(c) Sentences: What Sentence Could You Receive?

While felony drug sentences imposed under the old law are indeterminate, the new sentencing laws require determinate sentences for drug felonies.[162] If you are re-sentenced, you will be given a determinate sentence.

A determinate sentence is a sentence for a fixed amount of time (eight years, for example). Under current law, you can receive good time or merit time reductions of a determinate sentence imposed for a drug offense.[163] These reductions are calculated and granted by the Department of Correctional Services. However, there is no parole from a determinate sentence, so the Parole Board has no say in when you are released.

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848 N.Y.S.2d 486, 487 (4th Dept. 2007) (affirming the lower court's denial of re-sentencing application, under the "substantial justice" provision, because defendant's conviction involved a large amount of cocaine and defendant was therefore not a "low level offender"); People v. Montoya, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dept. 2007) (holding that "substantial justice" required denial of re-sentencing to a defendant who was a high-level participant in an international narcotics distribution ring).

156. People v. Estela, Nos 720/2004 & 4336/2004, slip op. at 4–5 (N.Y. Sup. Ct. Mar. 24, 2010) (denying defendant's re-sentencing application because of "[t]he defendant's history [as] one of a drug seller, not an addict," given the fact that on one arrest "he was in possession of thirty-seven glassines of heroin and over one thousand dollars, and was observed selling four additional bags" and was later arrested "in possession of 200 glassines" while on parole); People v. Arana, 45 A.D.3d 311, 311, 844 N.Y.S.2d 696, 696–97 (1st Dept. 2007) (affirming lower court's denial of defendant's application for re-sentencing based on "substantial justice," since defendant had been a participant in "a very extensive drug trafficking enterprise"); People v. Montoya, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dept. 2007) (holding that "substantial justice" required denial of re-sentencing to a defendant who was a high-level participant in an international narcotics distribution ring).

157. People v. Montoya, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dept.2007) (denying re-sentencing for defendant who was "a high-level participant in an international narcotics distribution ring" and was arrested in possession of 50 kilograms of cocaine).

158. People v. Walltower, No. N10539/96, slip op. at 8 (N.Y. Sup. Ct. Apr. 6, 2010) (denying defendant's application for re-sentencing under 2009 DLRA because of his "poor inmate disciplinary record, consisting of 32 infractions, 21 of which are of the more serious tier 3 level," as well as his "violent felony conviction"); People v. Rivers, 43 A.D.3d 1247, 1248, 842 N.Y.S.2d 611, 612 (3d Dept. 2007) (denying defendant's application for re-sentencing based on defendant's number of disciplinary violations while incarcerated and lengthy criminal record predating the conviction, even though defendant had achieved significant educational and vocational accomplishments while incarcerated); People v. Vega 40 A.D.3d 1020, 1020, 836 N.Y.S.2d 685, 686 (2d Dept. 2007) (denying defendant's application for re-sentencing after considering that defendant had a criminal history that included convictions for other controlled substances offenses and second-degree murder and that defendant's prison disciplinary record was not good); People v. Sanders, 36 A.D.3d 944, 946–47, 829 N.Y.S.2d 187, 189 (2d Dept. 2007) (denying defendant's application for re-sentencing after considering that defendant received disciplinary violation for which he was confined to a special housing unit for at least 60 days after only 11 months in prison); People v. Paniagua, 45 A.D.3d 98, 108–09, 841 N.Y.S.2d 506, 515 (1st Dept. 2007) ("[a]n inmate's … repeated commission of serious acts of insubordination while incarcerated[] can only be viewed adversely in considering his likelihood of re-adjusting to life outside of prison.").

159. People v. Rodriguez, No. 254/98, slip op. at 10–11 (N.Y. Sup. Ct. May 13, 2010) (noting that defendant had absconded prior to sentencing in two cases and subsequently was convicted for another drug felony); People v. Sanders, 36 A.D.3d 944, 946–47, 829 N.Y.S.2d 187, 189 (2d Dept. 2007) (noting that defendant showed no remorse and continued to deny his guilt of the crime for which he was convicted, even though he had plead guilty, at hearing on defendant's application for re-sentencing); People v. Rivers, 43 A.D.3d 1247, 1248, 842 N.Y.S.2d 611, 612 (3d Dept. 2007) (denying defendant's application for re-sentencing and noting that defendant did not freely admit guilt for either his criminal acts or his disciplinary violations).

160. 2004 N.Y. Sess. Laws ch. 738 § 23 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

161. 2004 N.Y. Sess. Laws ch. 738 § 23 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

162. N.Y. Penal Law §§ 70.70, 70.71 (McKinney 2010).

163. N.Y. Correct. Law §§ 803, 804 (McKinney 2010).

An indeterminate sentence consists of two terms: a minimum term and a maximum term (for example, five to ten years). The minimum term must be at least one year, and it is the amount of time you must serve before you can become eligible for parole. The maximum term must be at least three years, although it can be as much as life imprisonment. The maximum term is the amount of time you will have to spend in prison if there are no reductions made to your sentence and you are not paroled. Many prisoners serving indeterminate sentences for non-violent offenses can receive reductions for good time or merit time as well as parole.[164] This means that both the Department of Correctional Services and the Parole Board may have a say in when you will be released.

The new determinate sentencing ranges for A-I, A-II, and Class B felony drug offenses, effective January 13, 2005, are:

If Your Class A-I Drug Offense Is Your:	Determinate Sentence Range[165]
First Felony Offense	Between 8 and 20 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 12 and 24 years
Second Felony Offense (Prior Felony = Violent)	Between 15 and 30 years

If Your Class A-II Drug Offense Is Your:	Determinate Sentence Range[166]
First Felony Offense	Between 3 and 10 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 6 and 14 years
Second Felony Offense (Prior Felony = Violent)	Between 8 and 17 years

If Your Class B Drug Offense Is Your:	Determinate Sentence Range[167]
First Felony Offense	Between 1 and 9 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 2 and 12 years
Second Felony Offense (Prior Felony = Violent)	Between 6 and 15 years

Each of these determinate sentences includes a five-year period of post-release supervision.[168]

If you are re-sentenced, you will receive a specific term of imprisonment, not a range. The term will fall *within* the appropriate determinate sentence range, depending on your felony record, shown in the tables above. Any time you have already served of your original sentence will be subtracted from the time you will have to serve under your new sentence. After your release, you will be subject to a five-year period of supervision.

When deciding whether to apply for re-sentencing and whether to accept a suggested new sentence, you will want to compare your earliest likely release date under your old sentence with your earliest likely release date under your new sentence. Keep in mind that, depending on your prison record, you may or may not receive reduction for good time and/or merit time. Also, consider whether the Parole Board is likely to grant you parole under your indeterminate sentence. It is possible that your earliest re-sentenced determinate date could be longer than your earliest possible release date under your current sentence. For example, in *People v. Newton*, the defendant was originally sentenced six years to life, and the proposed re-sentencing was eleven years, which on appeal was found to be neither harsh nor excessive.[169] Remember, though, that even if the minimum term of your indeterminate sentence is shorter than the determinate

164. *See* N.Y. Correct. Law §§ 803, 804 (McKinney 2010).
165. N.Y. Penal Law § 70.71 (McKinney 2010).
166. N.Y. Penal Law § 70.71 (McKinney 2010).
167. N.Y. Penal Law § 70.70 (McKinney 2010).
168. N.Y. Penal Law § 70.45 (McKinney 2010).
169. People v. Newton, 48 A.D.3d 115, 120, 847 N.Y.S.2d 645, 649 (2d Dept. 2007).

sentence you receive at re-sentencing, you may be better off in some cases with the determinate sentence if you think that the Parole Board is unlikely to grant you parole at an early date.[170]

4. How to Apply for Re-Sentencing

You have the right to an attorney to represent you in your application for re-sentencing. If you cannot afford one, you can have one appointed.[171] You can file an application to have an attorney appointed together with a notice of motion and basic application for re-sentencing. Once you are appointed an attorney, your attorney can prepare a more detailed and complete application for you. You can find a sample application for an appointed attorney, including a sample notice of motion and basic application for re-sentencing, attached to this Supplement as Appendix B.[172]

If you are applying for re-sentencing for an A-II felony drug offense and your earliest possible release date is not much more than three years away, it is important that your application for an appointed attorney include an application for re-sentencing. This is because you need to make sure your application is filed in time to meet the Time to Parole Eligibility requirement, explained above in Part C(2)(b)(i) of this Chapter. If you are applying for re-sentencing for a Class B felony drug offense, you need to make sure your application is not barred by the ten-year look back for exclusion offenses, explained above in Part (C)(2)(c)(ii) of this Chapter. You should try to exercise your right to have an attorney represent you in your re-sentencing application, and should only file a detailed application *pro se* if you have trouble getting an attorney.

(a) Filing a *Pro Se* Application

If you are applying for re-sentencing for an A-II felony drug offense under the alternate, one-year-to-parole-eligibility reading, you may have to prepare your own application because you may have trouble getting an attorney appointed.[173] You may also have trouble getting an attorney if you were also sentenced for a disqualifying offense at the time you were sentenced for the felony drug offense, even if you have clearly finished serving the sentence for the disqualifying offense, as described above in Part C(2)(b)(ii)(a).[174]

If you file your application *pro se*, you should explain in that application why you deserve a new sentence. You might want to include information about: your role in the offense, the nature of the offense, the judge's position at the original sentencing, your prior criminal history (or lack of), your health, your prison disciplinary record, favorable evaluations from correctional personnel, participation in educational, drug-treatment, or work programs while in prison, other attempts to rehabilitate yourself, and your plans for re-entry into your community, such as where you plan to live and how you plan to look for work when you are released.[175] You should provide as much documentation as possible—for example, you should include any certificates you received for program participation while in prison.[176]

If you think they will be helpful, you can try to request certain documents, including your medical file, your disciplinary file, your visit log, your education file, your guidance file, and your legal file from the prison records office. A sample document request letter is attached to this Chapter as Appendix B-4. However, some prisons refuse to cooperate with document requests from prisoners. It may be easier for a lawyer to request your records than for you to do it yourself—this is one reason that you should try to get a lawyer appointed instead of filing your application for re-sentencing *pro se*.

If you file your application *pro se*, you should submit a notice of motion and basic petition for re-sentencing (a sample is attached in Appendix B) along with a signed, written statement, or affirmation, in support of your application and any supporting documents you have collected. Your affirmation in support of your application should include: (1) a description of your original sentence, including the offense of which you were convicted, the term of the original sentence, the date it was imposed, how much of it you have

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170. *See* "Understanding the A-II Resentencing Law," Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders at 2 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://communityalternatives.org/pdf/A-II Resentencing Memo Revised NYSDA.pdf.

171. 2004 N.Y. Sess. Laws ch. 738 § 220.21 (A. 11895, S. 7802) (citing N.Y. County Law §§ 717.1, 722.4 (2010)); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.4 (McKinney 2010).

172. The sample document in Appendix B is for a prisoner serving time for an A-II felony drug offense.

173. E-mail from William Gibney, The Legal Aid Society, to Sydney Bird, contributing author of this Chapter (Nov. 17, 2005) (on file with the *JLM*).

174. *See* e-mail from William Gibney, The Legal Aid Society, to Sydney Bird, contributing author of this Chapter (Nov. 17, 2005) (on file with the *JLM*).

175. Ctr for Cmty. Alternatives, Rockefeller Drug Law Reform: Mitigation and Re-entry Planning Tips (2005) (on file with the *JLM*).

176. Ctr. for Community Alternatives, Rockefeller Drug Law Reform: Mitigation and Re-entry Planning Tips (2005) (on file with the *JLM*).

served, and the judge who imposed it; (2) an explanation of why you are eligible for re-sentencing under the requirements of Chapter 738, Section 23 of the Laws of 2004 (for an A-I felony), Chapter 643 of the Laws of 2005 (for an A-II felony), or Section 440.46 of the Criminal Procedure Law (for a Class B felony); (3) what new sentence you think the judge should give you, according to the new sentencing law (for example, the minimum sentence allowed under the new law); (4) the reasons you deserve the suggested new sentence, including, for example, an explanation of your prison disciplinary record, your participation in any work or drug-rehabilitation programs while in prison, any serious health problems you may have, and your plans to find housing and employment once you leave prison.[177]

Remember that when you file your application for re-sentencing, you must send it to the District Attorney's office that prosecuted your conviction as well as to the court.[178] You must do this regardless of whether you are filing only a basic application or one combined with an application for an appointed attorney.

5. Conclusion

In conclusion, changes to the New York State drug laws, which went into effect in 2009, allow some prisoners serving time for drug offenses to apply for re-sentencing under the new, better sentencing framework. Prisoners serving time for A-I felony drug offenses are automatically eligible for re-sentencing,[179] while prisoners serving time for A-II and Class B felony drug offenses must meet additional requirements.[180] If you are serving time for an A-I, A-II, or Class B felony drug offense that occurred prior to January 13, 2005, you should consider whether you are eligible for re-sentencing, and whether re-sentencing is likely to give you an earlier release date. If you are eligible and think you might benefit from re-sentencing, you should try to get an attorney appointed to prepare your re-sentencing application, or, if you have trouble getting an attorney, file a re-sentencing application *pro se*.

D. Conclusion

Recent changes in the federal law and the law of New York have made some prisoners eligible to apply for re-sentencing. Because the changes in the laws are relatively recent, some aspects of the laws are still unclear. You should make sure to conduct your own research to find out as much as you can about how these new amendments are being applied to cases similar to your own. If you were convicted of a drug crime in either New York State or in federal court, you may be eligible for a reduction in your sentence, but you will need to make sure to apply for re-sentencing since your sentence will not simply be reduced automatically.

177. Sample Affirmation provided by William Gibney, The Legal Aid Society (2005) (on file with the *JLM*).

178. 2004 N.Y. Sess. Laws ch. 738 § 23 (A. 11895, S. 7802); 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.3 (McKinney 2010).

179. 2004 N.Y. Sess. Laws ch. 738 § 23 (A. 11895, S. 7802).

180. 2005 N.Y. Sess. Laws ch. 643 § 1 (S. 5880); N.Y. Crim. Proc. Law § 440.46.1, 5 (McKinney 2010).

APPENDIX A: SAMPLE FORMS FOR APPLYING FOR FEDERAL RE-SENTENCING

A-1. SAMPLE EX-PARTE APPLICATION FOR APPOINTMENT OF COUNSEL[181]

UNITED STATES DISTRICT COURT
DISTRICT OF _____
_____ DIVISION
UNITED STATES OF AMERICA,

Plaintiff,_____ NO. CR_____
v.
Defendant._____ Ex Parte Application for Appointment of Counsel; Exhibits

Defendant hereby respectfully requests that this Court re-appoint his counsel under the Criminal Justice Act to assist him in preparing and filing a motion for reduction of sentence pursuant to 18 U.S.C.§ 3582(c).

This application is made pursuant to 18 U.S.C. § 3006A, and is based on the attached memorandum of points and authorities, declaration of counsel, and exhibits; the files and records of this case; and any such further information as shall be made available to the Court.

Respectfully submitted,

DATED: February __, 2008 By_____

181. Adapted from an example from Office of Defender Services, Retroactivity of Crack Cocaine Amendments: Sample Motions and Orders, *available at* http://www.fd.org/odstb_CrackSampleMotions.htm. (last visited January 14, 2009).

Memorandum of Points and Authorities

_____ respectfully applies to this Court to appoint counsel for his proceeding under 18 U.S.C. § 3582(c). As set forth in the attached declaration, undersigned counsel was appointed to represent _____ in his criminal proceedings. He was convicted of _____ and sentenced by this Court to a term of _____ months' imprisonment. His case involved cocaine base. Based on a review of records and files in this case, as well as the law, counsel believes that _____ is likely eligible to file a motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c).

This Court should appoint counsel. The amendments to USSG § 1B1.10, effective March 3, 2008, now invite the presentation of new facts and arguments in the context of § 3582(c) proceedings. See Amendment 712 to Guidelines. Moreover, in United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that, when resentencing defendants pursuant to § 3582(c)(2), district courts must treat the Guidelines as advisory, as required by United States v. Booker, 543 U.S. 220 (2005). In view of these changes to § 3582(c) proceedings, _____ will be greatly assisted by the appointment of counsel. In addition, appointment of counsel will allow for negotiation with the Government, facilitate factual and legal presentation to the Court, and promote the efficient use of judicial resources.

_____ is still indigent. See Exhibit A. As the Court is aware, the Administrative Office of the United States Courts has established a new representation type for appointment of counsel in these cases. See Exhibit B.

For the foregoing reasons, _____ respectfully submits that appointment of counsel, as set forth in the proposed order, is appropriate.

Respectfully submitted,

DATED: February __, 2008 By_____

A-2. SAMPLE APPLICATION FOR RE-SENTENCING[182]

[DEFENDANT'S NAME]

UNITED STATES DISTRICT COURT
*** DISTRICT OF ***
*** DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

[DEFENDANT'S NAME],
Defendant.

NO. CR_____

NOTICE OF MOTION; MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(2); MEMORANDUM OF POINTS AND AUTHORITIES
Hearing Date: [INSERT DATE]
Hearing Time: [INSERT TIME]

TO: UNITED STATES ATTORNEY ***, AND ASSISTANT UNITED STATES ATTORNEY [AUSA'S NAME]:

PLEASE TAKE NOTICE that on [DATE], at [TIME], defendant, [NAME], will bring on for hearing the following motion:

MOTION

Defendant, [NAME], hereby moves this Honorable Court for a reduction in the sentence imposed in this case on [DATE]. This motion is made pursuant to 18 U.S.C. § 3582(c)(2) and is based upon the attached memorandum of points and authorities, all files and records in this case, and such further argument and evidence as may be presented at the hearing on this motion.

Respectfully submitted,

DATED: Month __, 20__ By_____

182. Adapted from an example from Office of Defender Services, Retroactivity of Crack Cocaine Amendments: Sample Motions and Orders, *available at* http://www.fd.org/odstb_CrackSampleMotions.htm (last visited January 14, 2009).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On [DATE], [NAME] was sentenced for [TYPE OF CRACK OFFENSE, I.E., DISTRIBUTION, POSSESSION WITH INTENT TO DISTRIBUTE, CONSPIRACY, ETC.], to serve _____ months of imprisonment and _____ years of supervised release. The sentence was imposed under the sentencing Guidelines [QUALIFY THIS IF POST-BOOKER], with a base offense level computed under § 2D1.1 of the Guidelines for a crack cocaine quantity of [INSERT AMOUNT IN YOUR CASE] grams. That base offense level – under the Guidelines in effect at the time – was _____. Combined with other Guidelines factors, it produced a guideline range of _____. The sentence imposed by the Court was _____ months, [WHICH WAS THE LOW END/WHICH WAS THE HIGH END/WHICH WAS WITHIN THE RANGE/WHICH WAS BELOW THE RANGE/ABOVE THE RANGE, BASED ON A [DESCRIBE DEPARTURE IF ANY]].

Subsequent to [NAME]'s sentencing – on November 1, 2007 – an amendment to § 2D1.1 of the Guidelines took effect, which, generally, reduces base offense levels for most quantities of crack cocaine by two levels and, specifically, reduces the base offense level for the [INSERT AMOUNT IN YOUR CASE] gram quantity of crack cocaine in this case by two levels, to _____. *See* U.S.S.G. § 2D1.1. This amendment was adopted in response to studies that raise grave doubts about the fairness and rationale of the 100-to-1 crack/powder ratio incorporated into the sentencing Guidelines. *See generally* United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) (hereinafter Commission Report"); United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995). *See also Kimbrough v. United States*, 128 S. Ct. 558, 568-69 (2007) (discussing history of crack cocaine guideline and various Sentencing Commission reports). Yet the amendment is only a partial response, as the Sentencing Commission itself recognized. The Commission explained:

> The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to- 1 drug quantity ratio. It is neither a permanent nor a complete solution to these problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio. 2007 Sentencing Commission Report, *supra*, at 10.

Subsequent to the effective date of this amendment to § 2D1.1, the Sentencing Commission considered whether to make the amendment retroactive under the authority created by 18 U.S.C. § 3582(c)(2). It took that action on December 11, 2007, by including this amendment in the list of retroactive amendments in § 1B1.10 of the Guidelines. *See* 73 Fed. Reg. 217-01 (2008). Based on this retroactivity, the statutory authority underlying it, and the Supreme Court's intervening [ONLY IF ALL OF FOLLOWING CASES WERE AFTER SENTENCING] decisions in *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); and *Kimbrough v. United States*, 128 S. Ct. 558 (2007),

[NAME] brings this motion to reduce his sentence.

II. ARGUMENT

A. [NAME]'S OFFENSE LEVEL SHOULD BE REDUCED FROM _____ TO _____, AND THE GUIDELINE RANGE REDUCED FROM _____ TO _____ BASED ON THE AMENDMENT TO § 2D1.1.

18 U.S.C. § 3582(c)(2) provides as follows:

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a

> sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant ... the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Section 1B1.10 is the Guidelines policy statement which implements 18 U.S.C. § 3582(c)(2). Subsection (c) of that policy statement lists amendments that are covered by the policy statement, and one of the amendments listed is amendment 711 to the Guidelines. Amendment 711 reduced the base offense level for crack cocaine offenses. *See* U.S.S.G., App. C, § 711.
Application of this amendment to the crack cocaine guideline in the present case results in a decrease of the base offense level from _____ to _____, a decrease in the total offense level from _____ to _____, and a decrease in the resulting guideline range from _____ to _____. [THEN GO THROUGH CALCULATIONS TO ESTABLISH THIS AND ALSO DISCUSS ANY OTHER ISSUES THAT ARE RELEVANT SUCH AS MANDATORY MINIMUMS THAT LIMIT REDUCTION, WHETHER QUESTION OF SAFETY VALVE CAN BE REOPENED, ETC.].

B. THE COURT SHOULD REDUCE [NAME]'S SENTENCE [TO [INSERT SPECIFIC AMOUNT]/A SIGNIFICANT AMOUNT/SOME OTHER CHARACTERIZATION YOU CHOOSE].

Based on the amendment to § 2D1.1, the Court should significantly reduce [NAME]'s sentence. It follows from the discussion in the preceding section that the amendment alone justifies a reduction of [INSERT DIFFERENCE BETWEEN GUIDELINE RANGES] months.

[THIS PARAGRAPH ONLY IF ORIGINAL SENTENCING PRE-BOOKER, BUT CONSIDER ADAPTING HICKS AND KIMBROUGH DISCUSSION EVEN IF POST-BOOKER.] The Court should not stop there, however. At the time of [NAME]'s original sentence, the Court was required to treat the Guidelines as mandatory, under the controlling law at that time. Since then, the Supreme Court has held the Guidelines in their mandatory form are unconstitutional and – through severing 18 U.S.C. § 3553(b) – made them "effectively advisory." *Booker*, 543 U.S. at 245. *Booker* and subsequent Supreme Court cases clarifying it – namely, *Rita v. United States, supra*; *Gall v. United States, supra*; and *Kimbrough v. United States, supra* – have created a brave new world, in which the Guidelines are but one of several factors to be considered under § 3553(a). What the Supreme Court has described as the "overarching provision" in § 3553(a) is the requirement that courts "'impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing. *Kimbrough*, 128 S. Ct. at 570.

Moreover, *Booker* and its progeny apply to the imposition of a new sentence under 18 U.S.C. § 3582(c)(2). The Ninth Circuit considered this question in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) and held, put most succinctly, that "*Booker* applies to § 3582(c)(2) proceedings." *Hicks*, 472 F.3d at 1169. As the court explained in more depth:

> *Booker* explicitly stated that, "as by now should be clear, [a] mandatory system is no longer an open choice." Although the Court acknowledged that Congress had intended to create a mandatory guideline system, *Booker* stressed that this was not an option: "[W]e repeat, given today's constitutional holding, [a mandatory Guideline regime] is not a choice that remains open ... . [W]e have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law." The Court never qualified this statement, and never suggested, explicitly or implicitly, that the mandatory Guideline regime survived in any context.
>
> In fact, the Court emphasized that the Guidelines could not be construed as mandatory in one context and advisory in another. When the government suggested, in *Booker*, that the Guidelines be considered advisory in certain, constitutionally-compelled cases, but mandatory in others, the Court quickly dismissed this notion, stating, "we do not see how it is possible to leave the Guidelines as binding in other cases... . [W]e believe that Congress would not have

> authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create." In short, *Booker* expressly rejected the idea that the Guidelines might be advisory in certain contexts, but not in others, and Congress has done nothing to undermine this conclusion. Because the "mandatory system is no longer an open choice," district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2). *Hicks*, 472 F.3d at 1170 (citations omitted).

Here, there are a number of non-Guidelines factors that justify a sentence below even the new guideline range. [EITHER HERE OR BELOW, INSERT ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH*] [EITHER CONTINUATION OF LAST TEXT SENTENCE ABOVE OR NEW PARAGRAPH] One [OR ANOTHER?] consideration to which the Court should give particular weight is a consideration expressly recognized by the Supreme Court in *Kimbrough v. United States*, *supra* as a ground for not following the Guidelines – the questionable provenance of the crack/powder ratio. As the Government itself acknowledged in *Kimbrough*, "the Guidelines 'are now advisory' and ... , as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" *Kimbrough*, 128 S. Ct. at 570 (quoting Brief for United States 16). While the government then tried to distinguish policy disagreement with the 100-to-1 crack/powder ratio from other policy disagreements, the Supreme Court squarely rejected that argument. *See Kimbrough*, 128 S. Ct. at 570-74.

Indeed, the Court suggested that policy disagreement in this area was even *more* defensible than in other areas. It noted that "in the ordinary case, the Commission's recommendation of a sentence will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives,' *id.* at 574 (quoting *Rita*, 127 S. Ct. at 2465), and so "closer review may be in order when the sentencing judge varies from the Guidelines, based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575. The Court then explained that this was not the case with the crack cocaine Guidelines, however.

> The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of "empirical data and national experience." Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses "greater than the necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, *even in a mine-run case*. *Kimbrough*, 128 S. Ct. at 574-75 (emphasis added) (citations omitted).

These concerns are only partially assuaged by the recent amendment reducing crack cocaine offense levels, moreover. This also was recognized by the Supreme Court in *Kimbrough*:

> This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. (Citation and footnote omitted.) Describing the amendment as "only ... a partial remedy" for the problems generated by the crack/powder disparity, the Commission noted that "[\a]ny comprehensive solution requires appropriate legislative action by Congress." *Kimbrough*, 128 S. Ct. at 569 (quoting 2007 Sentencing Commission Report, *supra* pp. 3-4 at 10).

Kimbrough's rationale for varying from the crack Guidelines therefore

remains even after the new guideline is applied. [CONSIDER APPLYING THIS *KIMBROUGH* ARGUMENT TO YOUR SPECIFIC CASE IN SOME WAY; FOR EXAMPLE, BY POINTING OUT WHAT YOUR SENTENCE WOULD HAVE BEEN IF IT WAS JUST POWDER]

[INSERT ANY ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH* NOT ALREADY INSERTED ABOVE]

III. CONCLUSION

The Court should adjust [NAME]'s sentencing guideline range downward to _____. It should then [RECOMMEND SPECIFIC SENTENCE AND/OR MORE GENERAL URGING FOR LOWER SENTENCE, IF DON'T WANT TO RECOMMEND SPECIFIC SENTENCE].

Respectfully submitted,

DATED: MONTH DAY, YEAR By_____

APPENDIX B: SAMPLE APPLICATION FOR NY STATE RE-SENTENCING[183]

B-1. SAMPLE PETITION FOR RE-SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK[184]
_____ COUNTY CRIMINAL TERM

_____x		
THE PEOPLE OF THE STATE OF NEW YORK,	:	
Plaintiffs,	:	
	:	PETITION FOR
- against -	:	RE-SENTENCE
	:	
_____,	:	_____ County
Defendant.	:	
_____x	Ind. No. _____	

PLEASE TAKE NOTICE that, upon the annexed affirmation of _____, and all the prior proceedings, the undersigned will move this Court, at 100 Centre Street, New York, New York, 10013, on _____, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order vacating the sentence imposed by the Court on _____(_____, J.); re-sentencing defendant pursuant to the Rockefeller Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)]; and granting such other relief as the Court may deem proper.

Please also accept this as an application for appointment of counsel. I am indigent, currently incarcerated, and I cannot afford counsel to represent me in this application for re-sentence.

Dated: _____, New York
_____ , 20__

Yours,

_____

TO: Clerk of the Court
New York County Supreme Court
100 Centre Street
New York, New York 10013

Hon. Robert M. Morgenthau
New York County District Attorney
1 Hogan Place
New York, New York 10013
or
Hon. Bridget Brennan
Special Narcotics Prosecutor
80 Centre Street
New York, New York 10013

183. Adapted from New York Legal Aid Society sample document. This sample is tailored to a prisoner serving time for an A-II felony drug offense.

184. Your Notice of Appeal is addressed to the court you were tried in, not the Appeals Court. This sample presumes you were tried in a Supreme Court. If you were tried in a County Court, be sure to replace this court for the Supreme Court at the top of the form. Make sure to address the form to the correct individuals in the "To:" section.

B-2. SAMPLE AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
_____ COUNTY CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
	:	AFFIRMATION
- against -	:	
	:	_____ County
Defendant.	:	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Defendant _____, hereby affirms, under penalty of perjury, that the following statements are true.

1. I [pleaded guilty to] [was convicted after a trial of] second-degree criminal [possession] [sale] of a controlled substance (P.L. ' [possession: 220.18] [sale: 220.41]) and [list other counts, if any]. On_____, the court sentenced defendant to imprisonment for an indeterminate term of _____ years toon the second-degree [sale] [possession] count to run [concurrently with] [consecutively to] [note other sentences, if any].

2. I am presently incarcerated on an A-II drug conviction.

3. Defendant is more than 12 months from being an "eligible inmate" as that term is defined in Subdivision 2 of Section 851 of the Correction Law.

4. Defendant meets the statutory eligibility requirements for merit time under Correction Law Section 803(1)(d).

5. For the above-stated reasons, defendant believes that [he] [she] is eligible to be re-sentenced under the Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)] and defendant, thus, moves for such relief.

6. Defendant has yet to receive [his] [her] program and disciplinary records from the Department of Corrections. Defendant is filing this motion now to protect [his] [her] rights under the DLRA. Nevertheless, defendant requests the opportunity to supplement this motion and to provide the Court with additional pertinent information when that information becomes available.

WHEREFORE, Defendant respectfully requests that the Court grant [his] [her] petition for re-sentence. Defendant further requests that the Court grant [him] [her] permission to supplement this application after additional information is obtained.

Dated: _____, New York
_____, 20__

_____
[Name of Defendant]

B-3. SAMPLE AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	AFFIDAVIT OF SERVICE
	:	_____ County
Defendant.	:	
	x	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

_____ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the _____ day of _____ 20___, deponent served the within Petition for Re-sentence upon _____ in this action, at _____, the address designated by _____ for that purpose by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in _____ a post office _____official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

_____
Signature

Subscribed and sworn to before
me this _____ day of ____ 20___

_____
Notary Public

APPENDIX B-4: SAMPLE DOCUMENT REQUEST LETTER[185]

_____ Correctional Facility
Attn: Inmate Records
Box ___
_____, NY _____

[Date]

Dear Sir/Madam,

I am writing to request a copy of my entire inmate record. My name is _____, my date of birth is __/__/__, and my NYSID No. is _____. Please include the following records:

(9) Complete copy of my legal file.
(10) Complete copy of my guidance file.
(11) Complete copy of my education file.
(12) Complete copy of my package room file.
(13) Complete copy of my medical file.
(14) Complete copy of my disciplinary and disposition file.
(15) Explanation of codes used in the inmate progress note sheets.
(16) Visit log.

Thank you for your attention to this matter.

Sincerely,

_____
[Your Name]

185. Adapted from New York Legal Aid Society sample document.

APPENDIX C: SAMPLE PRO SE APPLICATION[186]

C-1. SAMPLE PETITION FOR RE-SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK
_____ COUNTY CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	PETITION FOR RE-SENTENCE
	:	_____ County
Defendant.	:	Ind. No. _____

PLEASE TAKE NOTICE that, upon the annexed affirmation of _____, and all the prior proceedings, the undersigned will move this Court, at 100 Centre Street, New York, New York, 10013, on _____, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order vacating the sentence imposed by the Court on_ (__, J.); re-sentencing defendant pursuant to the Rockefeller Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)]; and granting such other relief as the Court may deem proper.

Dated: _____, New York
_____, 20__

Yours,

_____

TO: Clerk of the Court
New York County Supreme Court
100 Centre Street
New York, New York 10013

Hon. Robert M. Morgenthau
New York County District Attorney
1 Hogan Place
New York, New York 10013
or
Hon. Bridget Brennan
Special Narcotics Prosecutor
80 Centre Street
New York, New York 10013

186. Adapted from New York Legal Aid Society sample document. This sample is tailored to a prisoner serving time for an A-II felony drug offense.

C-2. SAMPLE AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
_____ COUNTY CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	AFFIRMATION
	:	_____ County
Defendant.	:	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Defendant _____, hereby affirms, under penalty of perjury, that the following statements are true.

1. I [pleaded guilty to] [was convicted after a trial of] second-degree criminal [possession] [sale] of a controlled substance (P.L. [possession: 220.18] [sale: 220.41]) and [list other counts, if any]. On_____, the court sentenced defendant to imprisonment for an indeterminate term of years on the second-degree [sale] [possession] count to run [concurrently with] [consecutively to] [note other sentences, if any].

2. I am presently incarcerated on an A-II drug conviction.

3. Defendant is more than 12 months from being an "eligible inmate" as that term is defined in Subdivision 2 of Section 851 of the Correction Law.

5. Defendant meets the statutory eligibility requirements for merit time under Correction Law Section 803(1)(d).

6. For the above-stated reasons, defendant believes that [he] [she] is eligible to be re-sentenced under the Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)] and defendant, thus, moves for such relief.

7. Defendant has yet to receive [his] [her] program and disciplinary records from the Department of Corrections. Defendant is filing this motion now to protect [his] [her] rights under the DLRA. Nevertheless, defendant requests the opportunity to supplement this motion and to provide the Court with additional pertinent information when that information becomes available.

WHEREFORE, Defendant respectfully requests that the Court grant [his] [her] petition for re-sentence. Defendant further requests that the Court grant [him] [her] permission to supplement this application after additional information is obtained.

Dated: _____, New York
_____, 20__

_____
[Name of Defendant]

C-3. SAMPLE AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	AFFIDAVIT OF SERVICE
	:	_____ County
Defendant.	:	
	x	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

_____ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the _____ day of _____ 20___, deponent served the within Petition for Re-sentence upon _____ in this action, at _____, the address designated by _____ for that purpose by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in _____ a post office _____official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

_____
Signature

Subscribed and sworn to before
me this _____ day of ____ 20__

_____
Notary Public

A JAILHOUSE LAWYER'S MANUAL

Chapter 11: Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER 11

USING POST-CONVICTION DNA TESTING TO ATTACK YOUR CONVICTION OR SENTENCE*

A. Introduction

As of September 27, 2009, 242 individuals have been exonerated in the United States through post-conviction DNA testing.[1] This is because DNA is uniquely capable of proving innocence in crimes where biological material was left by the perpetrator.[2] Many people in prison were convicted before DNA testing was possible, or before it was considered reliable, and they were not able to present evidence at their trial that might have helped prove their innocence. There are many organizations throughout the country that help prisoners recover DNA evidence and secure DNA testing. Because of the complexity of applying for testing, we strongly recommend that you contact one of these organizations rather than proceeding *pro se* (on your own).

If you do decide to litigate on your own, this Chapter can help you understand some legal issues involved in the process. This Chapter explains how you may be able to use DNA testing of physical evidence to challenge your conviction or sentence and how DNA testing is currently being used within the criminal justice system. Part B of this Chapter discusses some ways you can petition to reopen your case based on DNA testing. Part C explains how to seek assistance from a legal organization and Appendix A lists some legal organizations that might be able to help you obtain DNA testing.

B. Common Procedures Used to Obtain DNA Testing

In the past, methods of testing evidence found at crime scenes were crude, and identifications or exonerations based on crime scene evidence were often inaccurate. DNA testing is much more accurate than older methods. If you believe there might have been biological evidence (like blood, semen, hair, or sweat) collected at the scene of your crime of conviction, and if you think DNA tests of the evidence would exonerate you, you can make several motions to try to get this evidence tested and the results admitted in court.

Finding evidence is one of the biggest obstacles to getting DNA testing. A big part of finding evidence is understanding the difference between biological evidence that was introduced at your trial (for instance, a bloody shirt) and evidence that was collected during the investigation, but not introduced at your trial (for instance, a rape kit—the evidence collected from a rape victim when she was examined by a doctor). You do not need to actually locate the evidence you want tested. You only need to prove that it was either collected during the course of the investigation or introduced into evidence at your trial (or both). When filing a motion, you must be specific about what evidence you want to test, why that evidence is important, and the last known location of the evidence. It is very important to identify the last known location of the evidence.

1. Motion to Secure DNA Testing

Before filing a motion for a new trial based on newly discovered evidence (see Part B(2) for more information), you need to file a motion to secure DNA testing. How you will file your motion will depend on whether your state has a post-conviction DNA testing statute. Forty-seven states have some sort of post-conviction DNA testing statute.[3] If you are a state prisoner in one of these states, read Subsection (a) below on how to make your motion.

As of September 2009, states that do NOT have a post-conviction DNA statute are Alaska, Massachusetts, and Oklahoma.[4] If you are a prisoner in Alaska, Massachusetts, or Oklahoma which do not have post-conviction statutes, then you will need to file a Section 1983 action. See Subsection (b) below and

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* This Chapter was revised by Susan Maples, based on previous versions by Kristin Jamberdino, Oluwashola Ajewole, and Sara Manaugh.

1. The Innocence Project, *available at* http://www.innocenceproject.org/Content/351.php (last visited Jan. 5, 2010).
2. DNA (which stands for "deoxyribonucleic acid") is a substance contained in every human cell. Each strand of DNA is encoded with information about the specific physical characteristics of the individual whom it comes from.
3. The Innocence Project, *available at* http://www.innocenceproject.org/Content/304.php (last visited Jan. 5, 2010).
4. The Innocence Project, *available at* http://www.innocenceproject.org/Content/304.php (last visited Jan. 5, 2010).

Chapter 16 of the *JLM* to learn about Section 1983 claims. If you are a federal prisoner, you should file your motion under the recently passed Justice for All Act. Subsection (c) below explains how this statute works.

(a) State Prisoners in States with a Post-Conviction DNA Testing Statute

As of September 2009, forty-seven U.S. states had enacted laws allowing post-conviction DNA testing. The U.S. Congress has also enacted legislation. State statutes vary greatly regarding the conditions under which you may request testing. For example, some only allow those convicted of certain felonies to petition.[5] Some impose strict due diligence requirements[6] or only grant requests if identity was an issue at trial.[7] Others provide strict time limits within which a petition may be filed.[8] You should carefully read the requirements and conditions for petitioning for post-conviction DNA testing in your state. Footnote sixteen lists the state statutes to help you do this research.

New York was the first state to allow for post-conviction DNA testing, and its provisions are some of the most flexible.[9] According to the provisions of that law, which are incorporated into Article 440 of the New York Criminal Procedure Law,[10] there is no express due diligence requirement,[11] identity does not need to have been an issue at your trial, and there is no time limit for filing a petition. In New York, the court will order testing if it determines that you have met the following requirements:

(1) Your Article 440 motion requests that a forensic test be performed on *specific* evidence, which you have clearly identified;
(2) The evidence you are requesting a DNA test on was obtained in connection with your trial (the trial which resulted in your conviction); and
(3) There is a "reasonable probability" that if the results of a DNA test had been admitted at the trial, the verdict would have been more favorable to you.[12]

The "reasonable probability" requirement is probably the most important. The court will not order a DNA test if it believes there is no "reasonable probability" that the verdict would have been different, *even if you are right about whatever you are trying to prove with the DNA test.*[13] This requirement does not mean

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5. *See*, *e.g.*, Ind. Code §§ 35-38-7-1, 35-38-7-3, 35-38-7-5 (LEXIS through 2009) (indicating that only those convicted of murder or a class A, B, or C felony may petition).

6. "Due diligence" means you should believe that the evidence you want tested will show that you are innocent and that you are pursuing the testing within the proper amount of time, usually the time determined by the statute.

7. "Identity at issue at trial" means that you or your attorney claimed that you did not commit the crime for which you were on trial. *See*, *e.g.*, Ark. Code § 16-112-201 (LEXIS through 2009) (strict due diligence requirement); Fla. Stat. § 925.11 (LEXIS through 2009) (due diligence requirement); 725 Ill. Comp. Stat. 5/116-3 (LEXIS through 2009) (identity must have been an issue at trial); Mich. Comp. Laws § 770.16(3)(a)(iii) (LEXIS through 2009) (identity must have been an issue at trial); Mo. Stat. § 547.035 (LEXIS through 2009) (due diligence requirement, identity must have been an issue at trial); Tex. Code Crim. Proc. art. 64.03(a)(1)(B) (LEXIS through 2009) (identity must have been an issue at trial).

8. Md. Code Crim. Proc. § 8-201 (LEXIS through 2009) (only those incarcerated on or after October 1, 2001 may petition).

9. The text of the New York provision reads as follows:

> Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

N.Y. Crim. Proc. Law § 440.30(1-a(a)) (Consol. 2009).

10. For more information on Article 440, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

11. *But see* People v. Kellar, 218 A.D.2d 406, 410, 640 N.Y.S.2d 908, 910 (3d Dept. 1996) (finding that the legislature did not mean to eliminate the due diligence requirement for DNA testing: "We do not read CPL 440.30 (1-a) as granting a second opportunity to those who have failed to take advantage of available DNA testing prior to trial"); People v. Sterling, 6 Misc. 3d 712, 719, 787 N.Y.S.2d 846, 851 (Sup. Ct. Monroe County 2004) (noting "CPL 440.10 (1) (g), in fact, does contain the additional requirement that a motion based upon the ground of newly discovered evidence must be made with due diligence after its discovery.").

12. N.Y. Crim. Proc. Law § 440.30 (1-a(a)) (Consol. 2005).

13. N.Y. Crim. Proc. Law § 440.30 (1-a(a)) (Consol. 2005); *see also* People v. Tookes, 167 Misc. 2d 601, 604–06, 639 N.Y.S.2d 913, 915–16 (Sup. Ct. N.Y. County 1996) (finding no reasonable probability where (1) there was no case for mistaken identity; (2) there was clear evidence of rape; and (3) available biological specimens were unlikely to have contributed to defendant's case, given the equivocal results of blood and saliva tests, the defendant's earlier failure to

that the court must be certain that the evidence will prove you are innocent, but it does impose a significant burden on you. A court can legally deny your request for testing if it believes that your conviction was justifiable, regardless of what a DNA test might show.[14]

The New York law is unusual in that it allows you to request DNA testing as part of your Article 440 motion to vacate judgment (request a new trial).[15] Not all states allow you to combine the request for testing and motion for a new trial in the same motion, and you may find that the law in your state is more difficult to use. For instance, some states have different deadlines, called "statutes of limitations," for filing a motion for a new trial and for requesting post-conviction DNA testing. The deadline to request a new trial may have passed even though your opportunity to request DNA testing is still technically available. Furthermore, some states have stricter requirements for granting a request for testing than for granting a motion for a new trial (or vice versa).

Because there is such variation among state statutes, you must look carefully at your state's post-conviction DNA testing statute. When deciding whether to request post-conviction testing, consult both the statute governing motions for new trial and the case law, if any, governing post-conviction DNA testing.[16]

When filing your motion, it is important that you know which pieces of evidence you want tested, show that you understand your state's post-conviction DNA testing statute, and explain why you believe you meet every qualification set out by that statute. You should write out your state's entire post-conviction DNA testing statute in your motion, then go through each requirement of the statute separately and show how the facts of your case meet each qualification. By being as clear as possible about the pieces of evidence you want tested, why you are seeking post-conviction DNA testing, and how you meet all the requirements of your state's statute, your motion will have a better chance of succeeding.

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pursue an enzyme analysis, and the indeterminate age of the recovered sperm).

14. *See*, *e.g.*, People v. Smith, 245 A.D.2d 79, 79, 665 N.Y.S.2d 648, 649 (1st Dept. 1997) (finding that, in prosecution for first degree rape and related crimes, post-conviction DNA tests probably would not have resulted in more favorable verdict for defendant where (1) fact that defendant was not source of semen was consistent with victim's testimony that she had intercourse with her boyfriend shortly before rape and that she did not know whether defendant ejaculated; (2) evidence of guilt was overwhelming; and (3) there was no claim of mistaken identity); People v. De Oliveira, 223 A.D.2d 766, 767–68, 636 N.Y.S.2d 441, 443 (3d Dept. 1996) (finding defendant not entitled to DNA testing because it was improbable that results of DNA testing would have effect on his second degree murder conviction where it was undisputed that victim was sexually active about the time of her murder, there was no evidence that the killing was part of a sexual encounter, and there was no critical testimony that could be seriously impeached by test results).

15. For more information on Article 440, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

16. The following lists all the state laws governing post-conviction DNA testing, in alphabetical order of the states: Alabama: Ala. Code §§ 36-18-24 to 25 (2009); Arizona: Ariz. Rev. Stat. Ann. § 13-4240 (2001); Arkansas: Ark. Code Ann. § 16-112-201 to -208 (2006); California: Cal. Penal Code § 1405 (2006); Colorado: Colo. Rev. Stat. Ann. §§ 18-1-411 to -416 (2004); Connecticut: Conn. Gen. Stat. Ann. § 54-102kk (2007); Delaware: Del. Code Ann. tit. 11, § 4504 (2001); District of Columbia: D.C. Code Ann. § 22-4133 (2007); Florida: Fla. Stat. Ann. § 925.11 (2007); Fla. R. Crim. P. 3.853 (2009); Georgia: Ga. Code Ann. § 5-5-41 (2007); Hawaii: Haw. Rev. Stat. Ann. § 844D-121 to -133 (2007); Idaho: Idaho Code Ann. § 19-4902 (2004); Illinois: 725 Ill. Comp. Stat. Ann. 5/116-3 (2007); Indiana: Ind. Code Ann. §§ 35-38-7-1 to -19 (2006); Iowa: Iowa Code Ann. § 81.10 (2007); Kansas: Kan. Stat. Ann. § 21-2512 (2006); Kentucky: Ky. Rev. Stat. Ann. §§ 422.285, 422.287 (2007); Louisiana: La. Code Crim. Proc. Ann. art. 926.1 (2007); Maine: Me. Rev. Stat. Ann. tit. 15, §§ 2136–2138 (2006); Maryland: Md. Code Ann., Crim. Proc. § 8-201 (2007); Michigan: Mich. Comp. Laws Ann. § 770.16 (2006); Minnesota: Minn. Stat. Ann. §§ 590.01–.06 (2007); Mississippi: Miss. Code §47-5-183 (2007); Missouri: Mo. Ann. Stat. § 547.035 (2002); Montana: Mont. Code Ann. § 46-21-110 (2007); Nebraska: Neb. Rev. Stat. §§ 29-2101, 29-4126 (2005); Nevada: Nev. Rev. Stat. Ann. §§ 176.0917–.0919 (2006); New Hampshire: N.H. Rev. Stat. Ann. §§ 651-D:1 to -D:4 (2005); New Jersey: N.J. Stat. Ann. § 2A:84A-32a (2007); New Mexico: N.M. Stat. § 31-1A-2 (2007); New York: N.Y. Crim. Proc. Law § 440.30 (2005); North Carolina: N.C. Gen. Stat. § 15A-269 (2005); North Dakota: N.D. Cent. Code § 29-32.1-15 (2006); Ohio: Ohio Rev. Code Ann. § 2901.07 (2006); Oklahoma: Okla. Stat. Ann. tit. 22, §§ 1360, 1371.1, 1371.2 (2008); Oregon: Or. Rev. Stat. Tit. 14, Ch. 138, Prec. 138.690 (2007). Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9543.1 (2007); Rhode Island: R.I. Gen. Laws §§ 10-9.1-10 to 10-9.1-12 (2006); South Carolina: S.C. Code § 23-3-660 (2008); South Dakota: S.D. Cod. Laws §§ 23-5A-1 to 23-5A-32 (2009); Tennessee: Tenn. Code Ann. §§ 40-30-110, -301 to -313 (2005); Texas: Tex. Code Crim. Proc. arts. 64.01–.05 (2006); Utah: Utah Code Ann. §§ 78-35a-301 to -304 (2007); Vermont: 13 V.S.A. §§ 5561-70 (2009); Virginia: Va. Code Ann. § 19.2-327.1 (2003); Washington: Wash. Rev. Code Ann. § 10.73.170 (2007); West Virginia: W. Va. Code Ann. § 15-2B-14 (2007); Wisconsin: Wis. Stat. Ann. §§ 974.02, .06, .07 (2006); Wyoming: Wyo. Stat. §§7-12-303 to 7-12-305 (2009). For information about statutes versus cases, see Chapter 2 of the *JLM*.

(b) Possible State Constitutional Rights

Until recently, it was unclear whether there was a federal constitutional right to DNA testing. However, in *District Attorney's Office for Third Judicial Dist. v. Osborne*, the Supreme Court held that there is no constitutional right to have post-conviction access to DNA testing.[17] The Court stated that allowing prisoners access to DNA testing was a decision best left in the hands of the legislature.[18] If you are a prisoner in one of the few remaining states without a DNA testing statute, you can argue that DNA testing access is required under your state constitution.

The five main arguments most often used to support the right to post-conviction DNA testing are (1) the procedural due process right to exculpatory evidence under the doctrine of *Brady v. Maryland*;[19] (2) the substantive due process right to be free from arbitrary government restrictions on life, liberty, or property; (3) the right to access the courts and to petition the government; (4) the unconstitutionality of continued confinement of an actually innocent person; and (5) the right a person has to seek executive clemency (for example, to ask the governor of a state to release a prisoner even without a new trial).

(c) Federal Prisoners: Filing Under the Federal Post-Conviction DNA Testing Statute: The Justice for All Act of 2004

On October 30, 2004, the Justice for All Act was signed into federal law. Because it is a relatively new law, there might not be much case law about it yet in your jurisdiction. This law gives prisoners the right to request post-conviction DNA testing, but it applies only to federal prisoners.[20] If you are a state prisoner, you must use your state's post-conviction DNA testing statute listed in footnote sixteen (see part B(1)(a)). If your state does not have a statute, then file a Section 1983 action (see part B(1)(b)).

The Justice for All Act works exactly like a state post-conviction DNA statute if you are serving time for a federal crime. It lays out the standards states should have for post-conviction DNA testing, and it provides the rules and procedures for federal prisoners who are serving a prison or death sentence and applying for DNA testing.[21] The Act requires that:

(1) The applicant must assert under penalty of perjury that he is "actually innocent" of the federal offense he is imprisoned or on death row for; or
(2) In death penalty cases, that he is "actually innocent" of another federal or state offense, if being exonerated of this offense would give him the right to a reduced sentence or a new sentencing hearing; and
(3) The specific evidence to be tested must not have been previously tested, except that testing using a newer and more reliable method of testing may be requested; and
(4) The proposed DNA testing may produce new evidence raising a reasonable probability that the applicant did not commit the offense; and
(5) The applicant must provide a current DNA sample for comparison with existing evidence.[22]

You should file for DNA testing within three years of your conviction. If you do not, your motion will be considered late, and you will have to show a specified reason or "good cause," in other words, a very good reason you did not file in time.[23]

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17. 129 S. Ct. 2308, 2323, 174 L. Ed. 2d 38 (2009).

18. District Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316, 174 L. Ed. 2d 38 (2009) (figuring out the best way to use DNA testing is a task that "belongs primarily to the legislature").

19. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1961) (holding that the prosecution's suppression of evidence favorable to the accused upon request was a due process violation).

20. 18 U.S.C. § 3600 (2004).

21. 18 U.S.C. § 3600 (2004).

22. 18 U.S.C. § 3600(a)(1)(A-B), (a)(3)(A), (a)(8-9) (2004); *available at* the Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=40&did=1234#subA (last visited Sept. 27, 2009).

23. 18 U.S.C. § 3600(a)(10)(A-B) (2004). If you do not file within three years of your conviction, there is a presumption that your motion is not timely. That presumption can be rebutted by showing (1) that you were incompetent and that the incompetence was the reason that you did not file in a timely manner; (2) that the evidence to be tested is newly discovered DNA evidence; (3) that you are not appealing to assert your innocence but that to deny the appeal would lead to a manifest injustice, or that you have "good cause" for filing your motion late. *See also* the Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/article.php?scid=40&did=1234#subA (last visited March 4, 2008).

The government is not allowed to destroy DNA evidence from a federal criminal case while the defendant remains incarcerated, with certain exceptions. The government may destroy DNA evidence: (1) if a court has denied a motion for DNA testing; (2) if the defendant knowingly and voluntarily waived the right to DNA testing; (3) if the defendant was notified after his conviction became final that the evidence may be destroyed and did not file a motion for testing (4) if the evidence has already been tested and the results included the defendant as the source. If the evidence is large or bulky, the government may preserve only a representative sample.[24]

One word of caution: *If you assert your innocence and the DNA evidence does not show you to be innocent, the court can hold you in contempt and if you are convicted of making false assertions, your term of imprisonment will be extended by at least three years.*[25] However, if the evidence excludes you as the source of the DNA evidence, then you can petition for a new trial, which shall be granted when the test results, considered with all other evidence in the case (whether introduced at trial or not), establish by compelling evidence that a new trial would result in an acquittal.[26] Also, if you are a federal defendant, you may file a motion for a new sentencing hearing if evidence of an offense was admitted during a federal death sentencing hearing and exoneration of that offense would entitle you to a reduced sentence or to a new sentencing proceeding.[27]

2. Motion for a New Trial Based on Newly Discovered Evidence

Once you have succeeded in your motion to secure DNA evidence, gotten the DNA testing you asked for, and have obtained results that point to your innocence, it is time to file a motion for a new trial. Every state, and the federal government, allows you to file a motion for a new trial based on newly discovered evidence. Because DNA technology is so new, the results of DNA analysis may be considered "newly discovered evidence," even if the substance being analyzed is not *itself* newly discovered.

Every jurisdiction has a test that courts apply in deciding whether to grant a motion for a new trial based on newly discovered evidence. In the federal system, courts traditionally ask five questions to determine whether to grant a defendant's motion for a new trial: [28]

(1) Was the evidence available before the trial?
(2) Could it have been discovered before the trial through the exercise of due diligence?[29]
(3) Is the evidence "material" (relevant) to the issue you raise in your motion?
(4) Is the evidence merely "cumulative" (does it only support the other similar evidence already admitted at trial) or "impeaching" (does it only contradict other evidence admitted at trial)?; and
(5) Would the evidence probably change the result if a new trial were granted?[30]

State courts use similar tests to determine whether to grant a motion for a new trial. New York courts have historically used a formula like the federal test.[31] While the trial court is bound by these questions, it

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24. 18 U.S.C. § 3600A(a), (c)(1-5) (2006).
25. 18 U.S.C. §§ 3600 (f)(2)(B)(i), (f)(3) (2004).
26. 18 U.S.C. § 3600 (g)(2) (2004).
27. 18 U.S.C. § 3600 (g)(2)(B) (2004).
28. In federal courts, Rule 33 of the Federal Rules of Criminal Procedure authorizes a request for a new trial. Rule 33 allows the court to grant a new trial on defendant's motion if "the interest of justice so requires." Fed. R. Crim. P. 33.
29. Due diligence in this context means that you and/or your attorney should have been able to find the evidence had you looked for it. There should be a reason why you were not able to find the evidence before trial, and you should make this known to the court.
30. *See* John A. Glenn, Annotation, *What Constitutes "Newly Discovered Evidence" Within Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A.L.R. Fed. 13 (2002); *see also* United States v. Carlone, 603 F.2d 63, 66–67 (8th Cir. 1979) (using this standard to deny a new trial when a newly discovered defense witness claimed F.B.I. agents asked him to plant weapons and drugs in the defendant's home); Pitts v. United States, 263 F.2d 808, 810–11 (9th Cir. 1959) (going through all five questions to show that evidence submitted by defense would not meet any of the standards, even if it had been newly discovered); United States v. Bertone, 249 F.2d 156, 160 (3rd Cir. 1957) (rejecting motion for a new trial based on testimony from newly available witnesses because the witnesses were available and known by defendant during trial); United States v. Marachowsky, 213 F.2d 235, 238–39 (7th Cir. 1954) (applying this test to reject three witnesses newly brought by the defense to secure a new trial).
31. *See* People v. Priori, 164 N.Y. 459, 472, 58 N.E. 668, 672 (1900) (using a six-step test to deny the defendant's motion for a new trial, and splitting question four of the federal test into two separate questions about cumulative and impeaching evidence).

has some discretion to decide whether to grant a new trial. These motions are extraordinary, so courts do not grant them freely, and appellate courts rarely reverse a trial judge's decision to deny a new trial motion.

Note also that most states, as well as the federal government, limit the period of time after your conviction during which you may file such a motion.[32] These time limits, called the "statute of limitations," are based on the idea that evidence becomes less reliable over time. If the time has expired to file for this motion, you must try other, less direct, post-conviction remedies (such as a writ of habeas corpus, discussed in Section 3 below), which may offer a longer statute of limitations period.

To file your motion on time, you need "newly discovered evidence." For you, this is the DNA results of the biological evidence at issue.

Depending on your jurisdiction's statute, you may be able to file a motion for a new trial based on newly discovered evidence if biological evidence from the crime for which you were convicted still exists, but:

(1) DNA testing was never performed on it;
(2) DNA analysis was performed, but the results were not admitted in court (because, for example, DNA testing was not regarded as reliable evidence at the time of your trial); or
(3) DNA analysis was performed, but the methods then used to analyze the evidence are now known to be unreliable (for example, microscopic hair comparison).

If you pleaded guilty at trial, you may be denied your motion for a new trial based on newly discovered evidence and/or your request for DNA testing. This might occur even if the statute does not specifically say so. New York, for example, does not explicitly bar people who pleaded guilty from requesting DNA testing, but courts have held that those who pleaded guilty have admitted their factual guilt and have waived the right to a new trial based on newly discovered evidence.[33] You should consult both your state's statutes and case law to determine whether a guilty plea prevents you from seeking a new trial based on DNA evidence.

One further point to keep in mind is that even if your state has not passed a statute providing for post-conviction DNA testing, this does not mean that you cannot request a test. Courts might treat such a request as a matter of discretion and will probably determine whether to grant it based on a combination of factors similar to the ones listed in the various state statutes that have been passed.

3. Habeas Corpus Relief

It might be possible for you to get post-conviction relief by petitioning for a writ of habeas corpus, although it is unlikely.[34] A habeas corpus writ is a court's written order demanding a prisoner be brought before the court to see whether his imprisonment or detention is illegal. Unlike most post-conviction DNA cases, in which motions are made to find evidence, in habeas cases it is assumed you already have the evidence to exonerate you.[35] So, this remedy is not available unless the biological evidence from the crime scene has already been subjected to DNA testing. Another problem federal habeas corpus petitioners encounter is it is traditionally assumed relief cannot be granted unless a constitutional error occurred at trial.[36]

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32. Herrera v. Collins, 506 U.S. 390, 410–11, 113 S. Ct. 853, 865–66, 122 L. Ed. 2d 203, 223 (1993), (finding that while some states required filing a motion within weeks of conviction, some provide a time limit of one, two, or three years, and a few states have no time limit). Since *Herrera*, the federal statute of limitations for filing a motion based on new evidence was extended from two to three years. Fed. R. Crim. P. 33.

33. *See* People v. Jackson, 163 Misc. 2d 224, 226, 620 N.Y.S.2d 240, 241 (Sup. Ct. N.Y. County 1994) ("By pleading guilty, the defendant admitted his factual guilt and waived his right to confront his accusers. He may not now seek to defend himself against those accusers by a motion based upon newly discovered evidence.").

34. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for more information on habeas corpus petitions.

35. If you are already bringing a petition for habeas corpus on other grounds, then you can also request DNA testing; however, because a petition for habeas corpus is a difficult route to take to seek testing, it is only recommended if you are already filing a habeas petition. *See* Cherrix v. Braxton, 131 F. Supp. 2d 756, 761–62 (E.D. Va. 2001) (defending decision to order DNA testing on previously tested material due to technological advances and principle that newly-discovered DNA evidence would "illuminate" federal habeas claim). *See also* Thomas v. Goldsmith, 979 F.2d. 746, 749–50 (9th. Cir. 1992) (requiring state to turn over allegedly exculpatory DNA evidence in order to allow the prisoner to make a colorable showing of innocence and overcome procedural default on habeas claim).

36. *But see* In re Davis, 130 S. Ct. 1, 174 L. Ed. 2d 614 (2009) (remanding case to district court where defendant made a strong claim of "actual innocence" in an original habeas petition). Although there was no constitutional error in the defendant's trial, the extraordinary showing of innocence later presented by the defendant forced the Court to remand the case in order to decide whether the defendant had grounds for relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It remains to be seen whether *In re Davis* has significant value as precedent.

You may request access to crime scene evidence through the right to demonstrate actual innocence in habeas corpus review. This idea is based on *Herrera v. Collins,* in which the Supreme Court left open the possibility that "a truly persuasive post-trial demonstration of 'actual innocence'" in a capital case could lead to relief in the event there was not a state-sanctioned review of the evidence.[37] In *House v. Bell*, the Supreme Court decided that in some cases where new evidence would have been likely to cast a reasonable doubt on a state prisoner's conviction, that state prisoner may file for a federal habeas corpus writ, even if the laws of the state where he was convicted would have normally barred a federal habeas filing.[38]

In connection with habeas review, you may find success through the *Brady* obligation (also known as the *Brady* material doctrine).[39] Under this rule, the prosecution in a criminal case must reveal any evidence that may prove your innocence. Note, however, the evidence referred to is the *results* from DNA testing, not the *material* being tested. You may have a claim for habeas corpus relief if (1) evidence was subjected to DNA testing; (2) the prosecution withheld the results of that test from you; and (3) the results may have helped to prove your innocence. But, if DNA analysis was never performed on the material, you cannot allege a *Brady* violation based on the prosecution's withholding of that evidence (since the "evidence" did not exist).[40]

The Supreme Court has interpreted *Brady* not to impose a constitutional duty on the state to perform DNA tests on evidence, or to preserve evidence so it can be tested.[41] But, this rule changed when Congress passed the Justice for All Act of 2004.[42] The Justice for All Act imposes uniform rules for the preservation of evidence for DNA testing in federal crimes but does not provide for damages.[43] But, whether a violation of those procedures would be the basis for other claims for relief, like a claim under Section 1983, is unclear.

C. Legal Assistance for Those Seeking Post-Conviction DNA Testing

If you do not have a lawyer and want to seek post-conviction DNA testing, there are many not-for-profit organizations—usually called "innocence projects"—that might help. These organizations receive huge numbers of requests, therefore they are often forced to choose a few cases over others that may be just as worthy. You may want to consider contacting multiple organizations for help.

Appendix A below lists organizations that may help you use DNA evidence to prove your innocence. To have one of these offices consider your case, you should mail a brief factual summary of the case and a list of the evidence used against you. The case must involve biological evidence (semen, blood, saliva, skin, sweat, or hair). If possible, you should indicate what evidence you want to test, why it would be important to your case, and the last known location of that evidence (if you include this information, it may help the attorneys get back to you faster). Also, include your full name, mailing address, and prison identification number.

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37. *See* Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 869, 122 L. Ed. 2d 203, 227 (1993) (noting that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim).

38. *See* House v. Bell, 547 U.S. 518, 535-37, 126 S. Ct. 2064, 2076–77, 165 L. Ed. 2d 1, 21 (2006).

39. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) (holding "the suppression by the prosecution of evidence favorable to an accused … violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); United States v. Agurs, 427 U.S. 97, 110, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342, 353–54 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."). The *Agurs* standards explaining when evidence must be disclosed are no longer good law, but the idea behind them is. *See* United States v. Bagley, 473 U.S. 667, 675, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 489–90 (1985) (holding that the prosecutor is required to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial"). See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information on the *Brady* duty.

40. *But see* Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 369–70 (E.D. Pa. 2001) ("since DNA testing of the genetic material could indeed provide material exculpatory [*Brady*] evidence for a jury to consider along with the inculpatory evidence of plaintiff's detailed confession … plaintiff has a due process right of access to the genetic material for the limited purpose of DNA testing").

41. *See* Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that "failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant" does not violate the Due Process Clause).

42. 18 U.S.C. § 3600A(a) (2006).

43. 18 U.S.C. § 3600A(f) (2006).

D. Conclusion

If you believe DNA can prove your innocence, there are legal options you may be able to use summarized in the sections above. The legal options differ depending on whether you are in state versus federal prison, or whether you are in a state with or without a post-conviction DNA testing statute. Appendix A provides a list of organizations with expertise in helping prisoners seek post-conviction testing. These organizations may be able to help you.

APPENDIX A

PROJECTS THAT MAY OFFER ASSISTANCE IN OBTAINING DNA TESTING—BY STATE

Alaska
Innocence Project Northwest
University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145
E-mail: jackiem@u.washington.edu
Phone: 206-616-5780
Fax: 206-685-2388

Arizona
Arizona Justice Project
Carrie Spelling, Executive Director
c/o Sandra Day O' Connor College of Law
P.O. Box 877906
Tempe, AZ 85287
E-mail: carrie@azjusticeproject.org
Phone: 480-727-0009

Northern Arizona Justice Project
Robert Schehr, Director
Department of Criminal Justice
Northern Arizona University
P.O. Box 15005
Flagstaff, AZ 86011-5005
Phone: 928-523-7082

Arkansas
Arkansas Innocence Project
James Hensley, Jr.
P.O. Box 639
Cabot, Arkansas 72023
Phone: 501-843-2770

California (Northern)
Northern California Innocence Project
Santa Clara University, School of Law
900 Lafayette Street, Suite 105
Santa Clara, CA 95050
Phone: 408-554-1945
Fax: 408-554-5440

California (Southern)
California Innocence Project
Justin Brooks, Project Director and Institute Professor
California Western School of Law
350 Cedar Street
San Diego, CA 92101
E-mail: jbrooks@cwsl.edu

Colorado
Colorado Innocence Project
James E. Scarboro
370 17th Street, Suite 4500
Denver, CO 80202
Phone: 303-863-2311
Fax: 303-832-0428

Connecticut
Connecticut Innocence Project
c/o McCarter & English
City Place 1, 36th Floor
185 Asylum Street
Hartford, Connecticut 06103
Phone: 860-275-6140

New England Innocence Project
Project Coordinator
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: coordinator@newenglandinnocence.org

Delaware
Office of the Public Defender
Lisa M. Schwind, Director
Carvel State Building
820 French Street, 3rd floor
Wilmington, DE 19801
Phone: 302-577-5125

District of Columbia
Mid-Atlantic Innocence Project
American University,
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8184
E-mail: Dsatin@exonerate.org
Phone: 202-895-4519
Fax: 202-774-4226.

Florida
Innocence Project of Florida, Inc.
1100 East Park Avenue
Tallahassee, FL 32301
Phone: 850-561-6767

Georgia
Georgia Innocence Project
2645 North Decatur Road
Decatur, Georgia 30033
Phone: 404-373-4433

Hawaii
Hawai'i Innocence Project
Justin Brooks, Project Director and Institute Professor
California Western School of Law
350 Cedar Street
San Diego, CA 92101
E-mail: jbrooks@cwsl.edu

Idaho
Idaho Innocence Project
Boise State University
1910 University Drive
Boise, ID 83725-1515

Innocence Project Northwest
University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145
E-mail: jackiem@u.washington.edu
Phone: 206-616-5780
Fax: 206-685-2388

Illinois
Center on Wrongful Convictions
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: 312-503-2391
Fax: 312-503-8977

Indiana
Innocence Project of Indiana
Indiana University School of Law, Indianapolis
Fran Watson, Professor of Law
530 West New York Street
Indianapolis, IN 46202
Phone: 317-274-8523

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-263-7461 or 608-262-1002

Iowa
Nebraska Innocence Project
P.O. Box 24183
Omaha, NE 68124-0183
Phone: 402-341-7954

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-263-7461 or 608-262-1002

Kansas
Midwestern Innocence Project
Jay Swearingen, Executive Director
6320 Brookside Plaza
P.O. Box 1500
Kansas City, MO 64113
Phone: 816-221-2166

Kentucky
University of Kentucky Innocence Project
Roberta M. Harding, Professor of Law
University of Kentucky College of Law
209 Law Building
Lexington, KY 40506-0048
Phone: 859-257-1880

Kentucky Innocence Project
Department of Public Advocacy
Kentucky Innocence Project DNA Program
207 Parker Drive, Suite 2
La Grange, KY 40031
Phone: 502-222-2626
Fax: 502-564-3949

Louisiana
Innocence Project New Orleans
3301 Charters Street
New Orleans, LA 70117
Phone: 504-943-1902
Fax: 504-943-1905

Innocence Project of Northwest Louisiana
400 Travis Street, Suite 1222
Shreveport, LA 71101

Maine
New England Innocence Project
Project Coordinator
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: coordinator@newenglandinnocence.org

Maryland
Mid-Atlantic Innocence Project
American University,
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8184
E-mail: Dsatin@exonerate.org
Phone: 202-895-4519
Fax: 202-774-4226.

Massachusetts
New England Innocence Project
Project Coordinator
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: coordinator@newenglandinnocence.org

Michigan
Thomas M. Cooley Innocence Project
300 S. Capitol Avenue
P.O. Box 13038
Lansing, MI 48901
Phone: 517-371-5140, ext. 5764

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-263-7461 or 608-262-1002

Minnesota
Innocence Project of Minnesota
Erika Applebaum, Executive Director
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
Phone: 651-523-3152
Fax: 651-523-2967

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-263-7461 or 608-262-1002

Mississippi
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117
Phone: 504-943-1902
Fax: 504-943-1905

Missouri
Midwestern Innocence Project
Jay Swearingen, Executive Director
6320 Brookside Plaza
P.O. Box 1500
Kansas City, MO 64113
Phone: 816-221-2166 OK.

Montana
Innocence Project Northwest
University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145
E-mail: jackiem@u.washington.edu
Phone: 206-616-5780
Fax: 206-685-2388

Nebraska
Nebraska Innocence Project
P.O. Box 24183
Omaha, NE 68124-0183
Phone: 402-341-7954

Nevada
Rocky Mountain Innocence Center
358 South 700 East, Box B235
Salt Lake City, UT 84102
Phone: 801-355-1888

New Hampshire
New England Innocence Project
Project Coordinator
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: coordinator@newenglandinnocence.org

New Jersey
Centurion Ministries
Jim McCloskey
221 Witherspoon Street
Princeton, NJ 08542

New Mexico
New Mexico Innocence and Justice Project
Professors April Land,
Barbara Bergman, and Rob Schwartz
University of New Mexico School of Law
1117 Stanford Drive NE
Albuquerque, NM 87131
Phone: 505-277-5265

New York
Innocence Project
Benjamin N. Cardozo School of Law
100 Fifth Avenue, 3rd Floor
New York, NY 10011
Phone: 212-364-5340
Fax: 212-364-5341
Serves New York City, Westchester County

Pace Post-Conviction Project
78 North Broadway, Room G210
White Plains, NY 10603

New York State Defenders Association
194 Washington Avenue, Suite 500
Albany, NY 12210
Phone: 518-465-3524

Second Look Program
Professor Will Hellerstein
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201
Phone: 718-780-7964

North Carolina
North Carolina Center on Actual Innocence
3713 University Drive, Suite D
Durham, NC 27707
Phone: 919-489-3268

North Dakota
Innocence Project of Minnesota
Erika Applebaum, Executive Director
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
Phone: 651-523-3152
Fax: 651-523-2967

Ohio
Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project
University of Cincinnati College of Law
P.O. Box 210040
Cincinnati, OH 45221-0040
Phone: 513-556-0752
Fax: 513-556-1236

Innocence Institute
Point Park College, Dept. of Journalism and Mass Communications
201 Wood Street
Pittsburgh, PA 15222
Phone: 412-765-3164
Fax: 412-392-3917

Oklahoma
Oklahoma Indigent Defense System
DNA Forensic Testing Program
P.O. Box 926
Norman, OK 73070
Phone: 405-801-2666
Fax: 405-801-2690

Oregon
Innocence Project Northwest
University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145
E-mail: jackiem@u.washington.edu
Phone: 206-616-5780
Fax: 206-685-2388

Pennsylvania
Innocence Institute
Point Park University, Dept. of Journalism and Mass Communications
201 Wood Street
Pittsburgh, PA 15222
Phone: 412-765-3164
Fax: 412-392-3917

Duquesne Law Innocence Project
Professor John T. Rago, Director
600 Forbes Avenue, 632 Fisher Hall
Pittsburgh, PA 15282
Phone: 412-396-4704
Fax: 412-396-5287

Rhode Island
New England Innocence Project
Project Coordinator
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: coordinator@newenglandinnocence.org

South Carolina
Palmetto Innocence Project
P.O. Box 11623
Columbia, SC 29211
Phone: 803-779-0005
Fax: 803-779-0666

South Dakota
Innocence Project of South Dakota
Professor Chris Hutton, Director
University of South Dakota School of Law
414 E. Clark Street
Vermillion, SD 57069
Phone: 605-677-5443

Innocence Project of Minnesota
Erika Applebaum, Executive Director
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
Phone: 651-523-3152
Fax: 651-523-2967

Tennessee
Tennessee Innocence Clinic
c/o UT - Pro Bono
University of Tennessee Innocence Clinic
1505 West Cumberland Avenue
Knoxville, TN 37996
Phone: 865-974-9791
Fax: 865-974-6782

Texas
University of Houston Innocence Network
Professor David Dow, Director
University of Houston Law Center
100 Law Center
Houston, TX 77204-6060
Phone: 713-743-7552

Texas Center for Actual Innocence
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705
Phone: 512-232-1463

Innocence Project of Texas
1511 Texas Ave
Lubbock, Texas 79401
Phone: 806-744-6525
Fax: 806-744-6480

Utah
Rocky Mountain Innocence Center
358 South 700 East, Box B235
Salt Lake City, UT 84103
Phone:801-355-1888

Vermont
New England Innocence Project
Project Coordinator
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: coordinator@newenglandinnocence.org

Virginia
Mid-Atlantic Innocence Project
American University,
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8184
E-mail: Dsatin@exonerate.org
Phone: 202-895-4519
Fax: 202-774-4226.

Washington
Innocence Project Northwest
University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145
E-mail: jackiem@u.washington.edu
Phone: 206-616-5780
Fax: 206-685-2388

Idaho Innocence Project
Boise State University
1910 University Drive
Boise, ID 83725-1515

West Virginia
Innocence Project at West Virginia University
College of Law
P.O. Box 6130
Morgantown, WV 26506
Phone: 304-293-7249

Wisconsin
Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-263-7461 or 608-262-1002

Wyoming
Rocky Mountain Innocence Center
358 South 700 East, Box B235
Salt Lake City, UT 84103
Phone: 801-355-1888

A JAILHOUSE LAWYER'S MANUAL

Chapter 12: Appealing Your Conviction Based on Ineffective Assistance of Counsel

Columbia Human Rights Law Review

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CHAPTER 12

APPEALING YOUR CONVICTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

Many prisoners appeal their conviction because of ineffective assistance of counsel. A claim of ineffective assistance requires two things. First, your lawyer did not follow professional standards during his representation of you. Second, there must be a "reasonable probability" that the lawyer's poor representation negatively affected the outcome of your case.[1] The right to effective counsel comes from the Sixth and Fourteenth Amendments of the U.S. Constitution. If you are in New York State, Article I, Section 6 of the New York State constitution also protects the right to effective counsel.[2] There are different reasons why counsel can be considered ineffective and different ways to appeal your conviction based on this claim. This Chapter summarizes how to bring these claims, but other *JLM* Chapters, listed in footnote 3, can give you more detailed procedural information.

B. Ways to Claim Ineffective Counsel

There are three general ways to attack your conviction: direct post-conviction appeal, state post-conviction appeal, and a federal and/or state habeas corpus claim. Other *JLM* Chapters cover these topics.[3] In New York, if you are appealing your conviction based on ineffective counsel at the trial level, you should first raise your claim (1) in your direct appeal,[4] and then (2) in your federal habeas petition in federal court.[5] If you are filing a claim in New York state court and there are not enough facts in the record to let the court review an ineffectiveness claim on appeal, you should (3) also file an Article 440 motion in New York state court.[6] It is important to note that there is no Sixth Amendment right to counsel before you are actually charged with a crime, so you can only claim ineffective counsel under the Sixth Amendment starting from the time at which charges were actually brought against you.[7]

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1. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). It is important to note the "outcome" that might be negatively affected by attorney ineffectiveness is not limited to the trial outcome. For example, you might claim your lawyer's ineffectiveness caused you to proceed to trial when you should have accepted a plea, or to accept a plea when you should have gone to trial. Or, you might claim your lawyer's ineffectiveness caused you to not file an appeal when you should have filed an appeal, or caused you to lose your appeal when you might have won.

2. Even if you do not live in New York, your state constitution may also provide the right to effective counsel. Regardless of whether your state constitution has a provision regarding the right to counsel, the Sixth and Fourteenth Amendments of the U.S. Constitution give you a federal right to effective counsel.

3. Review the following *JLM* Chapters for more information: Chapter 9, "Appealing Your Conviction or Sentence" (direct appeals); Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence" (state post-conviction); Chapter 13, "Federal Habeas Corpus;" and Chapter 21, "State Habeas Corpus."

4. In New York, an ineffective assistance claim that is based only on the trial record must be made in the direct appeal. *See* People v. Love, 57 N.Y.2d 998, 1000, 443 N.E.2d 486, 487, 457 N.Y.S.2d 238, 239 (1982) ("Here ... we cannot conclude that defendant's counsel was ineffective simply by reviewing the trial record without the benefit of additional background facts that might have been developed had an appropriate after-judgment motion been made pursuant to CPL 440.10."); People v. Brown, 45 N.Y.2d 852, 853–54, 382 N.E.2d 1149, 1149–50, 410 N.Y.S.2d 287, 287 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record, but in this case it is."); People v. Terry, 44 A.D.3d 1157, 1159, 845 N.Y.S.2d 145, 147 (3d Dept. 2007) (holding defendant must raise his ineffective assistance claim on direct appeal rather than in an Article 440 motion).

5. If you are not in New York, you may not be able to file both a direct appeal and a federal habeas claim. *See* Peoples v. United States, 403 F.3d 844, 848 (7th Cir. 2005) (holding that "a defendant who chooses to make an ineffective-assistance argument on direct appeal cannot present it again on collateral review").

6. For claims of ineffective assistance of trial counsel, an Article 440 motion, not a state habeas petition, is the appropriate procedural method in New York State. *See* Chapter 20 of the *JLM* for further discussion of Article 440. A state habeas petition may be the appropriate procedure in other states. *See, e.g.*, State v. Leecan, 198 Conn. 517, 541, 504 A.2d 480, 493, *cert. denied,* 476 U.S. 1184, 106 S. Ct. 2922, 91 L .Ed. 2d 550 (1986) (stating the proper procedural vehicle for raising a claim of ineffective counsel in Connecticut is generally a state habeas petition).

7. Moran v. Burbine, 475 U.S. 412, 430–31, 106 S. Ct. 1135, 1145–46, 89 L. Ed. 2d 410, 427 (1986) (holding "the Sixth Amendment right to counsel does not attach until after the initiation of formal charges"); People v. Claudio, 83

You have the right to have effective counsel during a first appeal.[8] A finding of ineffective counsel at the appellate level can lead to a *de novo* (new) appeal and, sometimes, a reversal of your conviction.[9] If you are appealing your conviction based on ineffective counsel at the appellate level, you should file the appropriate state post-conviction motion in your state court or a federal habeas petition. In New York, the appropriate procedure for filing an ineffective appellate counsel claim is to file a *coram nobis* motion[10] in the court where the appeal was filed,[11] but each state has its own state post-conviction appeals procedure.[12] There is, however, no federal constitutional right to counsel in state post-conviction proceedings, so a claim of ineffective counsel at the post-conviction level based on the U.S. Constitution will not succeed.[13] But, some states do have a right to counsel in state post-conviction proceedings based on state statutory or state constitutional law, and some states allow courts to require effective counsel in state post-conviction proceedings when it is in the interest of justice.[14] If you are in a state that does have a right to counsel in state post-conviction hearings, you may also have a right to effective representation in those hearings.[15]

You must raise your ineffective counsel claims within the proper time and with the proper procedure.[16] If not raised during the proper time and using the proper procedure, your claim could be barred.[16] In federal

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N.Y.2d 76, 80–81, 629 N.E.2d 384, 386, 607 N.Y.S.2d 912, 914 (1993) (holding the right under both the U.S. Constitution and the New York State constitution to effective counsel does not attach until the start of adversarial judicial proceedings). But, note that some state constitutions grant broader rights to counsel than the U.S. Constitution does. *See* People v. McCauley, 163 Ill. 2d 414, 423–24, 206 Ill. Dec. 671, 645 N.E.2d 923, 929 (1994) (giving a broader reading to article 1, section 10 of the Illinois constitution than the 5th Amendment right against self-incrimination as discussed in Moran v. Burbine). Also, you have a right to counsel under the 5th Amendment if you are interrogated while in custody. *See* Miranda v. Arizona, 384 U.S. 436, 469, 86 S. Ct. 1602, 1626, 16 L. Ed. 2d 694, 721 (1966). But that right may not include the right to *effective* counsel. *See* Sweeney v. Carter, 361 F.3d 327, 333 (7th Cir.), *cert. denied,* 543 U.S. 1020, 125 S. Ct. 657, 160 L. Ed. 2d 496 (2004) ("[A]s far as we can tell, the Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath, let alone set forth a clearly established right to that effect.").

8. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) (establishing that the defendant's 14th Amendment right to effective counsel at the trial level extends to a first appeal as of right).

9. *See*, *e.g.*, McHale v. United States, 175 F.3d 115, 119 (2d Cir. 1999) (reinstating appeal upon finding that appellate counsel's ineffectiveness caused dismissal of original appeal).

10. A motion to restore you to a pre-conviction state alleging an erroneous conviction.

11. *See* People v. Bachert, 69 N.Y.2d 593, 600, 516 N.Y.S.2d 623, 628, 509 N.E.2d 318, 323 (1987) (holding that a claim of ineffective assistance of counsel must be filed "in the appellate tribunal which considered the primary appeal.").

12. In most states, ineffective appellate counsel can be raised as part of your state post-conviction motion, but you should check your state's laws. *See*, *e.g.*, State v. Davis, 2008 Ohio 4608, 119 Ohio St. 3d 422, 894 N.E.2d 1221 (2008) (holding Ohio statute requires ineffective appellate counsel claims be made only to the state appellate court, rather than to the trial court in a post-conviction petition). For information on *coram nobis* motions, see Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

13. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640, 670 (1991) (citing Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989)).

14. For example, the Alaska post-conviction statute provides for counsel in one post-conviction appeal. Alaska Stat. § 18.85.100(c) (2009). Florida does not provide a statutory right, but the court may, in the interest of justice, determine whether, given the facts of the case, the prisoner should have the assistance of counsel. State v. Weeks, 166 So. 2d 892, 897 (Fla. 1964) ("Each case must be decided in the light of 5th Amendment Due Process requirements."). You should research your state's post-conviction act and relevant case law to see if such a right exists in your state.

15. *See*, *e.g.*, Lozada v. Warden, 223 Conn. 834, 613 A.2d 818 (1992) (finding statutory right to counsel on habeas petition encompassed right to effective counsel, which could be vindicated by means of a second habeas petition); *compare* Moore v. Commonwealth, 199 S.W.3d 132, 139 (Ky. 2006) (reinstating appeal from denial of post-conviction relief, on grounds that statutory right to post-conviction counsel included right to competent counsel, but cautioning that "[o]ur holding ... should not be construed as sanctioning" the filing of a subsequent post-conviction motion based on previous post-conviction counsel's ineffectiveness).

16. "Procedural default" occurs when your lawyer did not properly raise a claim or objection in earlier proceedings and, as a result, you are not able to raise this claim on appeal. *See* Chapter 13 of the *JLM*, "Federal Habeas Corpus," for a further explanation of procedural default.

17. In a New York claim, courts have said that an Article 440 motion is usually the correct way to raise an ineffective assistance of counsel claim. People v. Brown, 45 N.Y.2d 852, 853–54, 382 N.E.2d 1149, 1149–59, 410 N.Y.S.2d 287, 287 (1978) ("Generally, the ineffectiveness of counsel is not demonstrable on the main record. ... Consequently, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10."). If matters outside of the trial record must be examined, such as reasons for counsel's actions, New York courts require you

court and in many states, you should not raise an ineffective assistance claim on direct appeal because the trial record usually does not contain enough information to evaluate the claim. Instead, you should make the claim in a collateral proceeding, allowing the trial court to hear testimony specifically about the adequacy of your representation. In a collateral proceeding, you can also argue that your appellate counsel was ineffective for not raising an ineffective trial counsel claim. If you had the same lawyer at trial and on direct appeal, failure to raise ineffectiveness on direct appeal does not procedurally bar you from raising the claim in a post-conviction proceeding.[17] But, in some states like New York, an ineffective assistance claim that can be decided based on the trial record alone must be made in the direct appeal, otherwise you are barred from raising it in a post-conviction motion.[18] Be sure to check the laws in your state for the proper procedure.

C. How to Prove Ineffective Counsel

As discussed above, there is a federal right to effective counsel and, in many states, a separate state right as well. The federal and New York standards for ineffective counsel are discussed below. If you were convicted in a state other than New York, you should research your state constitution and case law to find out whether there is a different state standard for ineffective assistance of counsel that you can argue was not met at trial.[19] You should always raise ineffective assistance of counsel as a federal constitutional claim, even if you also claim violation of state effective counsel guarantees. If you do not present the claim as a federal constitutional violation at this point, you may not be able to do so in a later federal habeas petition.[20]

1. The Federal Standard

The standard for ineffective assistance of counsel under the U.S. Constitution is the same no matter where you are. There are three ways in which you can make an ineffective counsel claim under federal law: you can claim (1) that your lawyer was actually ineffective, (2) constructively ineffective, or (3) that he had a

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to raise an ineffective counsel claim in an Article 440 motion, rather than in a motion to set aside the verdict or in a direct appeal. *See* People v. Love, 57 N.Y.2d 998, 1000, 443 N.E.2d 486, 487, 457 N.Y.S.2d 238, 239 (1982); People v. Monroe, 2008 NY Slip Op 5531, 1, 52 A.D.3d 623, 623, 860 N.Y.S.2d 564, 565 (2d Dept. 2008); People v. Bagarozy, 182 A.D.2d 565, 566, 582 N.Y.S.2d 424 (1st Dept. 1992) (motion to set aside); People v Garcia, 187 A.D.2d 868, 590 N.Y.S.2d 565 (3d Dept. 1992). You can use an Article 440 motion to raise claims that are based on information in the record, but in such a case you must have first made the claim in your direct appeal. N.Y. Crim. Proc. Law § 440.10(b)–(c) (McKinney 2008). See Chapter 13 of the *JLM* for an additional explanation of barred claims, and Chapter 20 of the *JLM* for more on how to file an Article 440 motion.

17. Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding an ineffective "assistance of counsel claim may be brought in a collateral proceeding ... whether or not the petitioner could have raised the claim on direct appeal"); *see also* United States v. Martinez, 136 F.3d 972, 979 (4th Cir. 1998) ("A defendant can raise the claim of ineffective assistance of counsel ... by a collateral challenge pursuant to [federal habeas corpus]."); People v. Dor, 132 Misc. 2d 568, 569–70, 505 N.Y.S.2d 317, 319 (Sup. Ct. Kings County 1986) (holding that, in an Article 440 motion, a defendant cannot make further attacks on "any issues that were raised or could have been raised in the appeal," but could claim ineffective assistance, which is "an issue that could not possibly be raised in an appeal by the same counsel.").

18. *See*, *e.g.*, Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993), *overruled in part by* Massaro v. United States, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003) (stating that ineffectiveness of counsel claims cannot be waived in cases where the lawyer bringing the appeal also represented the defendant at trial, and also holding that an ineffectiveness claim may be brought in a collateral proceeding when evidence of ineffectiveness lies outside the record and an evidentiary hearing would be necessary or useful in determining whether counsel was ineffective); Alston v. Donnelly, 461 F. Supp. 2d 112, 123 (W.D.N.Y. 2006) ("where the record is sufficient to allow appellate review of [an ineffective assistance] claim, the failure to raise that claim on appeal precludes subsequent collateral review"); People v. Jossiah, 2 A.D.3d 877, 877, 769 N.Y.S.2d 743, 743 (2d Dept. 2003) ("[Since the] record ... clearly presented sufficient facts from which the defendant could have raised his [ineffective assistance claim] ... on direct appeal, it could not be raised on the CPL 440.10 motion."); Hartman v. Bagley, 492 F.3d 347, 357–58 (6th Cir. 2007) (holding that although Ohio's statute provided "adequate and independent" grounds to bar ineffective assistance claims in collateral proceedings, it did not apply to defendant's claim that relied on information outside of the trial record); Nixon v. Epps, 405 F.3d 318, 323 (5th Cir. 2005) (holding that a Mississippi statute, requiring defendant to raise ineffective assistance claim on direct review when he uses a different counsel, created an "adequate and independent" procedural default when defendant failed to comply on direct appeal).

19. For more information on legal research, see Chapter 2 of the *JLM*, "An Introduction to Legal Research."

20. For more information on filing a federal habeas corpus claim, see *JLM*, Chapter 13, "Federal Habeas Corpus."

conflict of interest that caused him to be actually ineffective. Each claim requires you to prove different things.

(a) Actual Ineffectiveness: The *Strickland* Test

In general, to show ineffective assistance of counsel under the U.S. Constitution, you must pass the two-part *Strickland* test.[21] The first part of this test, the "deficient performance prong," requires you to prove your lawyer's performance was "deficient."[22] The court decides whether your lawyer's representation fell below an "objective standard of reasonableness."[23] This means the court asks if your lawyer acted in a way that most other lawyers would think is acceptable. Since this standard can apply differently in different situations, you must identify the specific things your lawyer did that were so bad that you were effectively deprived of your right to counsel.[24] You cannot just say that you had a bad lawyer or that your lawyer did not do enough to help you. You must point to the specific things your lawyer did badly or did not do at all and show that these failures made your representation fall below the professional standards for lawyers.

If the court finds your lawyer's representation fell below this objective standard of reasonableness, it will apply the second part of the *Strickland* test. The second part, the "prejudice prong," requires you to prove there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[25] This means you not only have to point out what your lawyer did wrong, but you also have to show that your lawyer's actions hurt you and possibly changed the outcome of your case. You can only win on an ineffective counsel claim if both parts of the test are met.[26] You should remind the court that the Supreme Court has specifically said the "prejudice prong" requires you to show only a "reasonable probability" of a different result, and you do not have to prove your lawyer's errors "more likely than not altered the outcome."[27]

Ineffective counsel claims are some of the most difficult claims to plead successfully because of the second part of the *Strickland* test. Courts usually do not find that an attorney's behavior affected a trial so strongly that the outcome is unreliable. When you are presenting an ineffective counsel claim, you should ask the court to consider the total effect of all of your lawyer's errors.[28] Try to find cases where defendants successfully presented similar claims and structure your claim in a similar way. Unfortunately, for every successful ineffective counsel claim, there are many other similar claims that are not granted, so be aware of cases that work against you as well and try to point out how those cases are different from your case.

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21. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (establishing federal standard for ineffective assistance of counsel). *See also* Knowles v. Mirzayance, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009) (counsel's decision not to pursue insanity defense was not deficient or prejudicial because it was reasonable to believe that the defense would fail).

22. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

23. These basic professional standards could include, but are not limited to, a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, the duty to consult with defendant on important decisions and to keep defendant informed of important developments during the prosecution, and a duty to use the level of skill and knowledge that make the trial truly adversarial. Strickland v. Washington, 466 U.S. 668, 688–89, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984) (outlining these duties but noting that they "neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance.").

24. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984) (in deciding an ineffectiveness claim, a judge will look at the reasonableness of counsel's conduct based on facts of the particular case, viewed at the time of the counsel's conduct).

25. Strickland v. Washington, 466 U.S. 668, 691–92, 694, 104 S. Ct. 2052, 2067, 2068, 80 L. Ed. 2d 674, 696, 698 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."); Williams v. Taylor, 529 U.S. 362, 390–91, 120 S. Ct. 1495, 1511–12, 146 L. Ed. 2d 389, 416 (2000) (holding that analysis of the prejudice prong should focus solely on whether there was reasonable probability that but for counsel's errors, the result of the proceeding would have been different); Wiggins v. Smith, 539 US 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471, 493 (2003) ("In assessing prejudice [in a capital case], we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

26. Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 2071, 80 L. Ed. 2d 674, 702 (1984) ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

27. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 697 (1984).

28. *See*, *e.g.*, Mackey v. Russell, No. 02-4237, 148 Fed. App'x. 355, 369 (6th Cir. August 9, 2005) (*unpublished*) (holding state court unreasonably applied *Strickland* when it failed to consider the cumulative effect of counsel's errors); *but see* Stainaker v. Bobby, 589 F. Supp. 2d 905, 931 (N.D. Ohio 2008) (holding that "there is some question whether cumulative error claims are cognizable on habeas review.").

(b) Constructive Ineffectiveness: The *Cronic* Standard

The second type of ineffective assistance of counsel claim available under the U.S. Constitution is a "constructive denial" of the assistance of counsel as described in *United States v. Cronic*.[29] You can claim constructive ineffective assistance if the circumstances of your trial were so unfair that prejudice and ineffective assistance can be presumed.[30] This means that under *Cronic*, unlike the *Strickland* test, you do not have to prove that there was actual prejudice.

The *Cronic* standard applies in three situations.[31] First, prejudice may be presumed if you were completely denied counsel during a "critical stage" of your trial.[32] Second, you can claim ineffective assistance under *Cronic* if your lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing."[33] Your lawyer's failure to test the state's case must have been "complete," meaning she put up no opposition whatsoever.[34] Third, you can also make a *Cronic* claim if the circumstances of your trial made it highly unlikely any lawyer could have provided effective assistance.[35] If your case falls within this third situation, you do not have to prove your lawyer's trial performance was deficient.

(c) Conflict of Interest

The third type of federal claim argues that counsel provided ineffective assistance due to a conflict of interest. To show that counsel had a conflict of interest, you must demonstrate that there was an actual conflict of interest that "adversely affected" your lawyer's performance.[36] For example, a conflict of interest can arise when one lawyer represents more than one co-defendant for the same crime.[37] The conflict must be

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29. United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d. 657, 667 (1984) (recognizing a right where performance of counsel deprived defendant of a fair trial).

30. United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d. 657, 667 (1984).

31. United States v. Cronic, 466 U.S. 648, 659–62, 104 S. Ct. 2039, 2047–48, 80 L. Ed. 2d. 657, 668–70 (1984); Bell v. Cone, 535 U.S. 685, 695–98, 122 S. Ct. 1843, 1850–52, 152 L. Ed. 2d 914, 927–29 (2002) (limiting *Cronic*'s holding that prejudice may be presumed to the three situations identified).

32. *See*, *e.g.*, Wright v. Van Patten, 128 S. Ct. 743, 746, 169 L. Ed. 2d 583, 588 (2008) (holding counsel's participation in plea hearing by speaker phone should not be treated as complete denial of counsel); Rickman v. Bell, 131 F.3d 1150, 1156–60 (6th Cir. 1997) (affirming judgment of ineffective assistance where counsel had abandoned defendant's interests by repeatedly expressing contempt for client at trial and portraying client as crazy and dangerous, effectively acting as a second prosecutor); Javor v. United States, 724 F.2d 831, 833–34 (9th Cir. 1984) (finding prejudice inherent when counsel slept through much of the trial). *But see* Tippins v. Walker, 77 F.3d 682, 683–85 (2d Cir. 1996) (holding ineffective assistance claim should be judged under *Strickland* when counsel slept through the trial).

33. United States v. Cronic, 466 U.S. 648, 6598, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668 (1984).

34. Bell v. Cone, 535 U.S. 685, 697, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914, 928 (2002) (holding counsel's failure to produce mitigating evidence and waiver of closing argument did not constitute a complete failure to test the prosecutor's case and that *Strickland* applied rather than *Cronic*). This is a difficult standard to meet. For example, counsel's decision to concede guilt in a capital trial and focus instead on the sentencing phase, even though his client entered a "not guilty" plea, is not automatically a complete failure to subject the prosecution's case to adversarial testing. *Compare* Florida v. Nixon, 543 U.S. 175, 188–89, 125 S. Ct. 551, 561–62, 160 L. Ed. 2d 565, 579–80 (2004) ("The Florida Supreme Court's erroneous equation of [counsel's] concession strategy to a guilty plea led it to [wrongly apply the *Cronic* standard] in determining whether counsel's performance ranked as ineffective assistance."), *with* State v. Carter, 270 Kan. 426, 440–41, 14 P.3d 1138, 1148 (2000) (finding that a breakdown in the adversarial system of justice when counsel premised defense on defendant's guilt against his client's wishes).

35. *Compare* Powell v. Alabama, 287 U.S. 45, 56–58, 53 S. Ct. 55, 59–60, 77 L. Ed. 158, 164–65 (1932) (holding denial of effective counsel when defendants, who were "young, ignorant, illiterate, [and] surrounded by hostile sentiment," were tried for a capital offense, and when defense counsel was designated only minutes earlier and thus had no opportunity to investigate the facts or to prepare), *with* U.S. v. Cronic, 466 U.S. 648, 658–67, 104 S. Ct. 2039, 2046–51, 80 L. Ed. 2d. 657, 667–73 (1984) (rejecting defendant's constructive ineffective assistance argument based on counsel's lack of experience in criminal law or jury trials, and 25-day preparation time).

36. Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 348 (1980); *see also* United States v. Iorizzo, 786 F.2d 52, 57–58 (2d Cir. 1986) (applying *Cuyler* and finding that defendant's trial counsel had a conflict of interest because he had previously represented the state's key witness on a related matter and failed to effectively cross examine this witness after the trial judge had told him that he might encounter ethical problems if he pursued certain lines of questioning).

37. A conflict of interest may also arise in other situations, for example, if your lawyer represented a government or defense witness in a related trial, if the victim was a client of your lawyer, or if your lawyer collaborated or had a connection with the prosecution. *See*, *e.g.*, Mickens v. Taylor, 535 U.S. 162, 174–76, 122 S. Ct. 1237, 1245–46, 152 L. Ed. 2d 291, 306–07 (2002) (holding that *Cuyler* applied to petitioner's claim that counsel was conflicted because he represented the victim in an unrelated case); Perillo v. Johnson, 205 F.3d 775, 808 (5th Cir. 2000) (finding actual conflict

actual, not just potential, which means that your lawyer must have taken some action, or refrained from acting in some way, which harmed you and benefited the other person.[38] You are not required to show prejudice if your lawyer had an actual conflict of interest that adversely affected you, because prejudice is presumed.

2. New York State Standard

In addition to your federal right to effective counsel, New York State courts have said you are entitled to "meaningful representation" under Article I, Section 6 of the New York State constitution.[39] This means in New York, you must show your lawyer's failures harmed you so much that you did not have meaningful representation at trial.[40] Meaningful representation does not mean your attorney made no mistakes, but that your lawyer provided good enough representation to satisfy the court that you were properly represented.[41]

Note that claiming ineffective assistance of counsel means that you give up some of your attorney-client confidentiality privileges with that attorney.[42] This means once you file an ineffective counsel claim against your lawyer, your lawyer can then sometimes reveal information that otherwise would be kept secret. For example, your lawyer could cooperate with the prosecution by turning over case files, or even testifying for the prosecution against you.

3. Using a Claim of Ineffectiveness to Save a Procedurally Defaulted Claim

Ineffective assistance of counsel claims can be very useful because they can allow you to present claims that would otherwise be barred. As the various Chapters on attacking your conviction explain, many issues must be "preserved" in order to be appealed.[43] Usually, if you or your lawyer did not object to certain issues

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existed when counsel represented a co-defendant cooperating with the state as witness against accused); United States *ex rel.* Duncan v. O'Leary, 806 F.2d 1307, 1315 (7th Cir. 1986) (holding actual conflict existed when counsel was prosecutor's campaign manager for State's Attorney election, and counsel colluded with prosecutor and a police officer to get defendant to retain him because it would be good for the campaign).

38. *See*, *e.g.*, Burger v. Kemp, 483 U.S. 776, 783–85, 107 S. Ct. 3114, 3120–21, 97 L. Ed. 2d 638, 650–51 (1987) (holding petitioner failed to show actual conflict when lawyer's partner was appointed to represent co-defendant, because "defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation"); Edens v. Hannigan, 87 F.3d 1109, 1116 (10th Cir. 1996) (holding actual conflict of interest existed when counsel made no effort to present a defense for client because it would have harmed co-defendant); Burden v. Zant, 24 F.3d 1298, 1305–07 (11th Cir. 1994) (finding ineffective assistance where counsel, representing two co-defendants, made an agreement with the prosecutor that one co-defendant would testify against another in exchange for not prosecuting the co-defendant); Dawan v. Lockhart, 31 F.3d 718, 721–22 (8th Cir. 1994) (finding ineffective counsel where public defender also represented co-defendant who had pleaded guilty and made statements implicating the client in the crime).

39. People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.").

40. As mentioned above, if you are in a state other than New York, your state may have an independent source for the right to effective counsel and/or a different standard for proving ineffective counsel. You should research successful ineffective counsel claims in your state and look at what standard the courts use.

41. *See* People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) (holding that the New York State constitution guarantees meaningful but not perfect representation, and that representation does not have to be "errorless") (quoting People v. Aiken, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 274, 408 N.Y.S.2d 444, 447 (1978)); *see also* People v. Droz, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882–83, 384 N.Y.S.2d 404, 407 (1976) (finding improper representation where a lawyer failed to adequately prepare for trial, did not communicate with his client in a timely manner, made no attempt to contact potential witnesses, and neglected to study the record); *but see* People v. Young, 116 A.D.2d 922, 923, 498 N.Y.S.2d 667, 669 (3d Dept. 1986) (noting that the standards from *People v. Baldi* and *People v. Droz* only apply to ineffective assistance during trial; evaluation of attorney performance when the defendant has accepted a guilty plea rests on different grounds).

42. Model Rules of Prof'l Conduct R. 1.6(b)(5) (2004) (allowing that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to respond to allegations in any proceeding concerning the lawyer's representation of the client"); Standards for Crim. Just. § 4-8.6(d) (1993) ("Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence."). Note that this is not a complete waiver of confidentiality and does not allow for complete disclosure.

43. See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," regarding preservation of claims; *JLM*,

during the trial, you cannot raise them on appeal. However, even if a claim is not preserved, often it can still be raised as part of an ineffective counsel claim.[44] In other words, the fact that your lawyer did not raise certain issues during trial can be used as evidence that he did not effectively represent you.

Ineffective assistance claims are also useful in "procedural default" situations. Procedural default happens when your claim is kept out of federal court because you have not followed all the procedures in your state. In procedural default situations, federal courts will not hear your claim because you did not follow state procedures. If your claim has been procedurally defaulted, you can often raise it as an ineffective counsel claim instead.[45] You can argue that the jury was selected in a racially discriminatory manner because your lawyer failed to object. In addition, if any court has held that you have a procedurally defaulted claim, you can argue that your lawyer's ineffectiveness was the "cause" of the default.[46] As a general rule of thumb, if you are raising a claim for the first time that should have been raised earlier, you should allege that you did not raise the claim earlier because your attorney was ineffective.

To include a barred claim (a claim that is not preserved or is procedurally defaulted) in an ineffective assistance of counsel claim, you must restate the issue by saying your lawyer was ineffective for not properly arguing your claim. For example, if the wrong jury instructions were given at trial, but that claim is barred because it was not raised at trial or "preserved," you can claim that your attorney was ineffective for not objecting to the jury instructions. Remember, you still must prove that your attorney's mistake deprived you of your right to counsel because it negatively affected your trial. This means you must show both that (1) by not objecting to the instructions, your attorney performed below the standard attorneys are judged by; and (2) by not objecting, your attorney lost a chance to argue a claim that would have succeeded.

Here is an example of how to include a barred claim in an ineffective counsel claim: Suppose you believe that your jury was selected in a racially discriminatory manner, but this issue was not raised at trial or on direct appeal and now is procedurally barred. You can:

(1) Argue that your lawyer failed to object to the way in which the jury was selected and failed to select a racially unbiased jury. Argue that your lawyer's failure to correct or object to the discriminatory jury selection fell below the reasonable standard of performance for attorneys;
(2) Argue that this failure of your attorney meant you had a racially biased jury and, because of the circumstances of your case, you were denied a fair trial as a result of this jury selection error. Since there is a chance the outcome of your case would have been different, your lawyer's failure to object to or raise this claim resulted in prejudice.

To summarize, your overall claim is that by not objecting to the racially discriminatory way in which the jury was selected, your lawyer was ineffective because his performance fell below the standard of objective reasonableness for attorneys, and this resulted in a biased jury, which affected the outcome of your case.

A checklist for incorporating a barred claim into an ineffective counsel claim is:

(1) Identify the barred claim. Make sure the claim cannot be raised directly for procedural reasons;
(2) Determine whether the claim is barred because of your lawyer's ineffectiveness. Did your lawyer not raise the issue at trial? Did your lawyer say or do something at trial that decreased your chance of winning on the issue? Did your lawyer fail to raise the issue on direct appeal?;[47] and
(3) Argue that the reason the claim is barred is because of your lawyer's ineffectiveness. Then show that if your lawyer had not been ineffective in this way, this claim would have succeeded. Remember you must plead both the "deficient performance prong" and the "prejudice prong" of the *Strickland* test.

Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," regarding errors of record in the trial; and *JLM*, Chapter 13, "Federal Habeas Corpus," regarding procedural default.

44. In Kimmelman v. Morrison, 477 U.S. 365, 384–85, 106 S. Ct. 2574, 2587–88, 91 L. Ed. 2d 305, 325–26 (1986), for example, the trial court refused to rule on the defendant's motion to suppress evidence because counsel's motion was untimely. The defendant nonetheless ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion.

45. *See* Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

46. See *JLM*, Chapter 13 for an additional explanation of barred claims.

47. Jackson v. Leonardo, 162 F.3d 81, 84–87 (2d Cir. 1998) is an excellent example of how to turn a procedurally barred claim into a successful claim of ineffectiveness. In *Jackson,* the Court of Appeals held that the defendant's double jeopardy claim was procedurally barred, but granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim.

This means you must both (a) point out the specific failures of your lawyer and (b) show that your lawyer's failures to correct or address the issues hurt your case.

Note that in addition to re-framing the barred claim as an ineffective counsel claim, you should still raise the claim separately, alleging that counsel's ineffectiveness constitutes "cause and prejudice" for any procedural default.[48]

D. Common Ineffective Counsel Claims

Below are some of the most common ineffective counsel claims that have succeeded. This does not mean that these claims are always successful or that this list includes every possible ineffective counsel claim. When you plead these claims, be sure to check the case law in your state.

(1) Counsel is not qualified to practice law;[49]
(2) Counsel had a conflict of interest;[50]
(3) Counsel failed to investigate[51] or perform certain pretrial functions;[52]
(4) Counsel failed to properly select a jury;[53]
(5) Counsel failed to pursue defenses available to defendant;[54]
(6) Counsel did not properly advise defendant as to a plea;[55]

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48. *See*, *e.g.*, Williams v. Anderson, 460 F.3d 789, 799–801 (6th Cir. 2006) (finding that appellate counsel's ineffectiveness in raising trial counsel ineffectiveness claim on direct appeal constituted "cause and prejudice" for the procedural default that it caused).

49. *See* United States v. Novak, 903 F.2d 883, 890 (2d Cir. 1990) (holding that "counsel" does not include an individual who holds himself out as a lawyer but obtains admission to the bar under false pretenses). *See also* Solina v. United States, 709 F.2d 160, 167–69 (2d Cir. 1983) (requiring reversal where defendant was unaware that counsel was unlicensed to practice law in any state, and "the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character"); *but see* Waterhouse v. Rodriguez, 848 F.2d 375, 382-83 (2d Cir. 1988) (framing rule to exclude situation where licensed attorney is unknowingly disbarred during trial).

50. See the discussion in Part C(1)(c) of this Chapter.

51. *See* Wiggins v. Smith, 539 U.S. 510, 535–38, 123 S. Ct. 2527, 2542–44, 156 L. Ed. 2d 471, 493–95 (2003) (finding decision of counsel not to expand investigation of petitioner's life history for mitigating evidence beyond pre-sentence investigation report and department of social services records fell short of prevailing professional standards and amounted to ineffective assistance); Appel v. Horn, 250 F.3d 203, 215–18 (3d Cir. 2001) (finding counsel's failure to investigate or prepare for the petitioner's competency determination violated his right to effective assistance and merited granting habeas corpus relief); People v. LaBree, 34 N.Y.2d 257, 259–61, 313 N.E.2d 730, 731–32, 357 N.Y.S.2d 412, 413–15 (1974) (finding ineffective assistance based on counsel's inadequate investigation and preparation); *see also* Henry v. Poole, 409 F.3d 48, 67–72 (2d Cir. 2005) (finding counsel's failure to investigate led counsel to present alibi defense for the wrong date and bolstered an otherwise weak prosecution case).

52. *See* Kimmelman v. Morrison, 477 U.S. 365, 385–91, 106 S. Ct. 2574, 2588–91, 91 L. Ed. 2d 305, 326–29 (1986) (finding ineffective assistance of counsel where counsel failed to conduct any pretrial discovery and failed to file timely motion to suppress illegally seized evidence); Gersten v. Senkowski, 426 F.3d 588, 609–15 (2d Cir. 2005) (finding that attorney's failure to seek medical expert consultation for the defense or to investigate critical government evidence constituted ineffective assistance of counsel); People v. Donovan, 184 A.D.2d 654, 654–56, 585 N.Y.S.2d 70, 71–72 (2d Dept. 1992) (ordering a new trial after attorney provided ineffective assistance of counsel by not moving to suppress certain evidence and by failing to conduct an adequate investigation before the trial).

53. *See* Johnson v. Armontrout, 961 F.2d 748, 755–56 (8th Cir. 1992) (finding ineffective assistance where evidence showed that at least two jurors were biased, and counsel failed to request removal for cause of biased jurors); Hollis v. Davis, 912 F.2d 1343, 1350–52 (11th Cir. 1990) (finding ineffective assistance where trial counsel failed to challenge the racial composition of a jury chosen in 1959 when African-Americans were systematically excluded from the list of potential jurors).

54. *See* Wilcox v. McGee, 241 F.3d 1242, 1246 (9th Cir. 2001) (finding ineffective assistance where counsel failed to move at a second trial to dismiss an indictment barred by double jeopardy); Jackson v. Leonardo, 162 F.3d 81, 86 (2d Cir. 1998) (holding that appellate counsel's failure to raise the obvious double jeopardy claim constituted ineffective performance); DeLuca v. Lord, 77 F.3d 578, 590 (2d Cir. 1996) (determining that counsel's failure to pursue extreme emotional disturbance defense constituted ineffective assistance when a reasonable probability existed that a jury would have found this defense persuasive and would have reduced defendant's liability from second degree murder to first degree manslaughter). However, a defense counsel does not have to pursue defenses that he believes are futile, even if it is the only defense available and you have nothing to lose by pursuing it. *See* Knowles v. Mirzayance, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009).

55. The Supreme Court in *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 209 (1985), held that the two-prong *Strickland* standard is "applicable to ineffective-assistance claims arising out of the plea process." Hill claimed his guilty plea was induced by false information about his parole eligibility. The Court held that if a

(7) Counsel failed to use important evidence or testimony at trial;[56]
(8) Counsel failed to object to improper use of evidence at trial;[57]
(9) Counsel failed to request proper jury instructions; [58]
(10) Counsel failed to object to improper jury instructions;[59]

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defendant claims that he pleaded guilty because of ineffective assistance of counsel, the second prong of the *Strickland* test would be satisfied by showing "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); s*ee also* Meyers v. Gillis, 142 F.3d 664, 666–70 (3d Cir. 1998) (using the second prong of the *Strickland* test, the Court found the defendant would be eligible for parole after seven years when law required mandatory life sentence without possibility of parole); United States v. Hansel, 70 F.3d 6, 8 (2d Cir. 1995) (finding counsel provided ineffective assistance in plea bargaining when counsel failed to inform defendant that charges against him were time-barred and defendant would not have pleaded guilty but for counsel's error). Courts have extended this reasoning to the "reverse-*Hill*" claim where a defendant claims that counsel's ineffectiveness caused the defendant to proceed to trial when there is a reasonable probability that if correctly advised the defendant would have accepted a plea offer. *See* Mask v. McGinnis, 233 F.3d 132, 139–42 (2d Cir. 2000) (finding that reasonable probability that the defendant would have accepted a plea if counsel effectively advised him constitutes ineffective assistance of counsel); United States v. Gordon, 156 F.3d 376, 380–82 (2d Cir. 1998) (finding that the large disparity between "the actual maximum sentencing exposure under the Sentencing Guidelines and the sentence exposure represented by defendant's attorney" indicates a reasonable probability exists that had the defendant's counsel properly advised him, the proceedings would have gone differently); *but see* Purdy v. United States, 208 F.3d 41, 46-48 (2d Cir. 2000) (finding that although attorney should inform each client of the probable costs and benefits of accepting a plea bargain, he need not advise client explicitly to either plead guilty or not).

Normally, your lawyer is not required to advise you about the collateral consequences of a guilty plea. "Collateral consequences" refers to any effects of a guilty plea that do not arise directly from the plea. For example, if you lose your job or your immigration status is revoked because of a guilty plea, that is considered a collateral consequence. In some jurisdictions, however, if your lawyer provides incorrect information about collateral consequences that may be considered ineffective assistance of counsel. *See, e.g.*,United States v. Couto, 311 F.3d 179-89 (2d Cir. 2002). However, you should check the law in your state because some states do not allow ineffective assistance claims for collateral consequences even if your attorney has given you grossly erroneous advice. For example, the Kentucky Supreme Court recently held that an attorney's legally incorrect advice about the possible immigration consequences of a guilty plea did not constitute ineffective assistance of counsel. Commonwealth v. Padilla, 253 S.W.3d 482, 485 (KY. 2008). This issue may soon be settled as the U.S. Supreme Court has agreed to review *Padilla*. Padilla v. Kentucky, 129 S. Ct. 1317 (2009), *cert. granted*, 77 U.S.L.W. 3326 (U.S. Feb. 23, 2009) (No. 08-651). If this issue might apply to your case, you should try to review the Supreme Court's decision when it comes out.

56. *See* Lindstadt v. Keane, 239 F.3d 191, 201–02 (2d Cir. 2001) (finding ineffective assistance in part because trial counsel made no effective challenge to the only physical evidence of sexual abuse, which consisted of expert testimony based on unnamed studies which were essentially unchallenged at trial and disputed by other easily available, published studies); Pavel v. Hollins, 261 F.3d 210, 216–26, 223, 228 (2d Cir. 2001) (finding ineffective assistance where trial counsel did not prepare a defense, failed to call two important fact witnesses, and did not call a medical expert); Brown v. Myers, 137 F.3d 1154, 1156–58 (9th Cir. 1998) (finding ineffective assistance when counsel failed to investigate and present testimony supporting petitioner's alibi); Tosh v. Lockhart, 879 F.2d 412, 414-15 (8th Cir. 1989) (finding defense counsel's failure to procure alibi witnesses was ineffective assistance of counsel); People v. Jenkins, 68 N.Y.2d 896, 897, 501 N.E.2d 586, 586–87, 508 N.Y.S.2d 937, 937–38 (1986) (finding that failure to use crucial evidence, if due solely to attorney's erroneous assumption of its inadmissibility, may be so prejudicial as to be ineffective assistance of counsel); People v. Riley 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692–93 (4th Dept. 1984) (finding failure to impeach prosecution witnesses with available records of prior testimony contributed to ineffective assistance of counsel).

57. *See* Kimmelman v. Morrison, 477 U.S. 365, 385–87, 106 S. Ct. 2574, 2588–90, 91 L. Ed. 2d 305, 326–27 (1986) (finding ineffective assistance when counsel failed to move to suppress evidence because of counsel's failure to investigate); Tomlin v. Myers, 30 F.3d 1235, 1237–39 (9th Cir. 1994) (finding counsel ineffective for failure to move to suppress lineup identification evidence); People v. Wallace 187 A.D.2d 998, 998–99, 591 N.Y.S.2d 129, 130 (4th Dept. 1992) (finding attorney's failure to object to admission of evidence was ineffective assistance); People v. Riley 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692–93 (4th Dept. 1984) (finding failure to object to inadmissible hearsay evidence, and lack of preparation and the pursuit of a highly prejudicial cross-examination constituted ineffective assistance).

58. *See* People v. Norfleet, 267 A.D.2d 881, 883–84, 704 N.Y.S.2d 146, 148 (3d Dept. 1999) (finding ineffective assistance where counsel failed to seek jury instructions for lesser offense); People v. Wiley, 120 A.D.2d 66, 67–68, 507 N.Y.S.2d 928, 929 (4th Dept. 1986) (finding an attorney who fails to request an alibi charge may be found ineffective).

59. *See* Cox v. Donnelly, 432 F.3d 388, 390 (2d Cir. 2005) (finding that counsel's repeated failure to object to erroneous jury instruction constituted ineffective counsel); Everett v. Beard, 290 F.3d 500, 513, 515–16 (3d Cir. 2002) (holding that counsel performed deficiently by failing to object on due process grounds to jury instruction which incorrectly permitted jury to convict defendant of first degree murder even if his accomplice intended to cause the death of the victim); Gray v. Lynn, 6 F.3d 265, 269, 271–72 (5th Cir. 1993) (finding counsel fell below objective standard of reasonable assistance, thereby providing ineffective assistance, where counsel failed to object to erroneous jury

(11)Counsel failed to present or argue an appeal,[60] or to present a meritorious issue on appeal;[61] and
(12)Counsel's conduct at trial was simply so bad that it was ineffective.[62]

E. Conclusion

Ineffective assistance of counsel can be a very useful claim for prisoners who had inadequate legal representation at trial or on direct appeal. It can also be useful for prisoners who face procedural problems with some of their appellate claims. When you bring your ineffective counsel claim, it is important to check the relevant Chapters of the *JLM* and other sources to make sure you are using the right procedure. Your ineffective counsel claim will have a better chance of success if you make sure to show the court all the specific reasons why your lawyer performed poorly, and all of the ways in which this inadequate representation prejudiced the outcome of your case.

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instructions regarding elements of first degree murder).

60. *See* Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999–1000 (2000) (finding that defendant was entitled to effective assistance of counsel when deciding whether to file a notice of appeal, but that he must show a reasonable probability that but for counsel's errors, he would have filed the appeal); Garcia v. United States, 278 F.3d 134, 137–38 (2d Cir. 2002) (finding ineffective assistance of counsel where counsel incorrectly advised defendant on the record that he could not appeal and district court confirmed that advice); United States v. Phillips, 210 F.3d 345, 350–53 (5th Cir. 2000) (finding that counsel's failure to appeal an obstruction of justice sentencing enhancement constituted ineffective assistance); Castellanos v. United States, 26 F.3d 717, 719–20 (7th Cir. 1994) (finding attorney provides ineffective assistance of counsel in failing to appeal conviction following a guilty plea if the prisoner told his lawyer to appeal in a timely manner); United States v. Peak, 992 F.2d 39, 41–42 (4th Cir. 1993) (finding that counsel's failure to file for appellate review when requested by defendant deprives defendant of 6th Amendment right to assistance of counsel even if he would have not been likely to win on appeal); United States v. Horodner, 993 F.2d 191, 195–96 (9th Cir. 1993) (finding ineffective assistance of counsel which prejudiced the defendant if the defendant did not agree to waive the appeal); Bonneau v. United States, 961 F.2d 17, 18–19, 22–23 (1st Cir. 1992) (finding that where attorney never filed an appeal despite multiple time extensions, ineffective assistance of counsel denied the defendant his constitutionally guaranteed opportunity to appeal); People v. Stokes, 95 N.Y.2d 633, 638–39, 744 N.E.2d 1153, 1156, 722 N.Y.S.2d 217, 220 (2001) (finding defendant's right to appellate counsel was not adequately safeguarded because the brief submitted by appellate counsel contained no reference to the evidence or to defense counsel's objections at trial and made clear that counsel did not act like an advocate on behalf of the client); People v. Vasquez, 70 N.Y.2d 1, 3–4, 509 N.E.2d 934, 935, 516 N.Y.S.2d 921, 922 (1987) (finding that defense counsel's identification of points as being "without merit" in appellate brief, though defendant wished to raise them on appeal, denied defendant effective assistance of counsel).

61. *See, e.g.*, Ballard v. United States, 400 F.3d 404, 407–10 (6th Cir. 2005) (holding appellate counsel ineffective for failing to raise meritorious argument that sentence enhancement by judge violated right to jury trial).

62. This kind of general argument is very hard to make successfully. Your claim must include specific information about why your counsel's conduct was not acceptable. *See* Tippins v. Walker, 77 F.3d 682, 686–90 (2d Cir. 1996) (finding ineffective assistance where attorney slept through substantial portions of the trial such that judge interrupted proceedings to reprimand attorney); Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001) (finding ineffective assistance because counsel was unconscious during substantial portions of trial, leaving the petitioner without representation during critical stages of the trial); People v. Huggins, 164 A.D.2d 784, 786–87, 559 N.Y.S.2d 720, 721–22 (1st Dept. 1990) (finding ineffective assistance where attorney was an alcoholic who had once been disbarred for twenty years and was confused and inattentive at trial).

A JAILHOUSE LAWYER'S MANUAL

Chapter 13: Federal Habeas Corpus

Columbia Human Rights Law Review

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CHAPTER 13

FEDERAL HABEAS CORPUS*

A. Introduction

This Chapter explains an important right—the writ of habeas corpus. Habeas corpus is guaranteed by the Constitution to prisoners who believe they have been wrongfully convicted. As a prisoner, you can challenge your conviction or sentence by petitioning for a writ of habeas corpus in federal court. By petitioning for a writ, you are asking the court to determine whether your conviction or sentence is illegal. A writ of habeas corpus can be very powerful because if the court accepts your argument, it can order your immediate release, a new trial, or a new sentencing hearing. This Chapter will teach you more about federal habeas corpus and how to petition for it. Part A will introduce and explain a few basic concepts about federal habeas. The rest of the chapter will go into more detail.

1. What Is Habeas Corpus?

Habeas corpus is a kind of petition that you can file in federal court to claim that your imprisonment violates federal law.[1] Whether you are a state or federal prisoner, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated federal law. This would be true if any aspect of your arrest, trial, or actual sentence violated a federal statute, treaty, or the U.S. Constitution. If you believe that your imprisonment violates federal law, you can file a habeas petition regardless of whether your trial was in state court or federal court, and regardless of whether you are in a state prison or a federal prison. However, as you will learn in this Chapter, state prisoners and federal prisoners will have to go through different processes for filing habeas petitions. State prisoners may also find it more difficult than federal prisoners to win a habeas claim. In both cases, a federal habeas petition claims that your imprisonment is illegal because your arrest, trial, or sentence violated *federal* law.

It is important to understand what a habeas petition is not. A habeas petition is *not* a "direct appeal" of your conviction. A direct appeal asks the state or federal appeals court (the court above the trial court in which you were convicted) to review the objections you or your lawyer made during the trial. To learn more about direct appeals, read *JLM*, Chapter 9, "Appealing Your Conviction or Sentence." Federal habeas is a different kind of appeal. It is called a "collateral appeal" because you are claiming that a mistake was made during your trial or sentencing that violated federal law. You will probably base this claim on evidence that you did not present at your trial. You can only make a habeas claim *after* making other appeals.

If you are a state prisoner and lose your direct appeal, your state will have another appellate procedure you can follow to challenge your conviction. This procedure is usually called either "state post-conviction proceedings" or "state habeas corpus." State habeas corpus is the same thing as a state post-conviction appeal; it is a remedy provided by the state in which you were convicted, and is based on that state's statutes.[2]

If you are a state prisoner, you will need to "exhaust" your state remedies before being able to file a federal habeas petition. This means that you will only file a federal habeas petition if you have already lost your state direct appeal and your state post-conviction proceedings. In your federal habeas petition, you can ask the federal court to review the claims that you brought in your direct appeal and your post-conviction proceedings in state court. However, in your federal habeas petition, you can *only* include claims that are based on federal law (federal statutes, treaties, or the Constitution).

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1. A habeas challenge is a *civil* action, not a *criminal* action. It is an action that you bring against the government. Therefore, in habeas petitions, the prisoner is often referred to as the "plaintiff," "petitioner," or "complainant." For clarity, this Chapter often refers to the prisoner bringing the habeas petition as the "defendant."

2. For more information about state post-conviction proceedings, you can look at other chapters of the *JLM*. State post-conviction proceedings for Florida, New York, and Texas are described in *JLM*, Chapter 21, "State Habeas Corpus: Florida, New York, and Texas." Remember, state habeas proceedings are the same as state post-conviction proceedings. In this Chapter, the term "state post-conviction proceedings" will be used to refer to both. The term "habeas" will only be used to refer to federal habeas corpus.

If you are a federal prisoner, you will not file a state post-conviction proceeding. If you lose your direct appeals in federal court, you will be able to file a federal habeas petition right away. This Chapter will often discuss state proceedings. If you are a federal prisoner, you should keep in mind while reading this Chapter that discussions of state proceedings do not apply to you unless the Chapter specifically says that they do.

2. What Will This Chapter Teach You?

Part B ("The Fundamental Elements of a Federal Habeas Corpus Argument") will teach you about the basic elements of claims you can bring in a habeas petition and how the courts will treat your claims. Since most habeas petitions include claims of constitutional violations, Section 1 explains the portions of the U.S. Constitution that you are most likely to rely on in your habeas petition. Section 1 also lists examples of successful habeas claims and tells you how to discover a habeas claim in your arrest, trial, or sentence. Section 2 explains how the court evaluates your claim. This Section will teach you how to know which standard the courts use and how to show the court that your rights were violated. Section 3 teaches you how to show the court that the violation of your rights affected your conviction or sentence; this section also discusses the harmless error rule. Section 4 explains the special standard of review that federal courts must use when they review habeas claims brought by state prisoners.

Part C ("What You Cannot Complain About") tells you what violations or issues you cannot complain about in your habeas petition because the writ of habeas corpus is designed to only allow you to obtain relief in specific situations. Section 1 explains that you generally cannot bring habeas petitions that claim Fourth Amendment violations. Sections 2 and 3 discuss the relevance of laws that are passed after your trial, called new laws. Section 2 discusses what a new law is and explains that you normally cannot bring habeas claims based on new laws. Section 3 explains the exceptions to this rule—the situations when you *can* include claims based on a new law in your habeas petition.

Part D ("Procedures for Filing a Petition for Habeas Corpus") explains the basic requirements of your habeas petition, including that you are in custody, have exhausted state remedies, are not in procedural default, have filed within the proper time limit, and that your petition is not successive.

Part E ("The Mechanics of Petitioning for Federal Habeas Corpus") discusses the basic mechanical process surrounding habeas law: (1) when to file, (2) where to file, (3) whom to file against, (4) how to file, (5) what to expect after you file, and (6) how to appeal.

Part F ("How to Get Help from a Lawyer") discusses, as the title suggests, how to get help from a lawyer for your habeas petition. Even though you are entitled to a lawyer during your trial and direct appeals, you are not entitled to have a lawyer to help with your habeas petition. However, you should still try to get help from a lawyer if you can.

Appendix A is a chart of the appeals process, from your trial through your federal habeas petition. Appendix B provides a checklist you can refer to when putting together your federal habeas corpus petition.

3. When Do People File Habeas Petitions?

Usually prisoners file their federal habeas petitions after they have finished their direct appeals and state post-conviction proceedings:

Direct Appeal → Post-Conviction Appeal → Federal Habeas Claim

Because you are entitled to a lawyer during your direct appeal, you should always file a direct appeal before anything else. If you lose your direct appeal, you have to decide whether to file a state post-conviction appeal. It is not necessary to follow this sequence, but most people do. The reason that most people file a state post-conviction appeal is that before you can file any claim in your federal habeas petition, you must have filed that same claim with the state court. If you are filing any claims in your federal habeas petition that were not raised in your direct appeal, you must give the state court a chance to review those claims before filing your federal habeas petition. Giving the state court the chance to hear all of the claims you will raise in your habeas petition is called "exhaustion." It is an important requirement, and is discussed in more detail in Part D(2) ("Exhaustion of State Remedies and Direct Appeal") below. Because you will often want to raise issues in habeas that you were unable to raise on direct appeal, you have to raise them first in your state post-conviction proceeding.

After your direct appeal, you might find more errors that occurred during your trial. These errors may be based on outside information not in your transcript. If you want to bring these claims in your federal habeas petition and you are a state prisoner, you must first go to state court and file a state post-conviction appeal. Then, if you are denied relief, you can bring a federal habeas petition. Your federal habeas petition will be

filed after you finish all your state appeals (direct and collateral). There are strict timelines that apply to habeas petitions after you finish your state appeals, as discussed in Part D(4) ("Time Limit") below.

4. Which Laws Apply to Federal Habeas Corpus?

You can find all of the laws covering federal habeas corpus in 28 U.S.C. §§ 2241–66 (2006). Section 2241 is the habeas corpus statute, which gives courts the authority to release prisoners who are being held in violation of the Constitution. Sections 2242 and 2253 deal with issues relating to a habeas petition, such as evidence and appeals issues. There are additional statutes that apply separately to state and federal prisoners, in Sections 2254 and 2255 respectively.[3] When a state prisoner brings a habeas petition, he brings it under 28 U.S.C. § 2254.[4] When a federal prisoner brings a habeas petition, he brings it under 28 U.S.C. § 2255.[5] In some circumstances, a federal prisoner may bring a habeas action directly under 28 U.S.C. § 2241,[6] without using Section 2255. Additionally, in cases where the defendant faces the death penalty, special procedures in 28 U.S.C. §§ 2261–66 may be used if the state meets certain standards. See Part F ("How to Get Help from a Lawyer") of this Chapter for more information. There are also special rules governing procedures for filing and litigating habeas corpus cases. These can be found in the "Rules Governing Section 2254 Cases in the United States District Courts," and the "Rules Governing Section 2255 Proceedings in the United States District Courts."[7] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") also affects federal habeas corpus law.[8] These laws change often, and courts often decide cases changing these laws' interpretations. So, you should *Shepardize* the cases included in this Chapter before relying on them.[9]

5. Three Rules to Know Before Filing

Habeas corpus law is very complex. Different courts follow different rules. You will need to research cases in your district to understand how your district follows each rule. You should use this Chapter as a

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3. The differences between federal and state prisoners' petitions are mostly procedural, not substantive issues. This means that regardless of whether you are a state or federal prisoner, you may use cases brought under either 28 U.S.C. § 2255 or under 28 U.S.C. § 2254 as authority in your petition if you are discussing substantive issues. *See* United States v. Bendolph, 409 F.3d 155, 163 (3d Cir. 2005) ("[T]o provide guidance to the district courts, as well as to avoid confusion, we … should treat § 2255 motions and § 2254 petitions the same absent sound reason to do otherwise."); Miller v. New Jersey Dept. of Corrections, 145 F.3d 616, 619 n.1 (3d Cir. 1998) ("[W]e have followed the practice, whenever we decide an AEDPA issue that arises under § 2254 and the same holding would analytically be required in a case arising under § 2255, or vice versa, of so informing the district courts."). In this Chapter, the procedural differences are discussed as they arise, and you should pay careful attention to them

4. You are a state prisoner if you are imprisoned for committing a state crime. You are a federal prisoner if you are imprisoned for violating a federal law. Most crimes, including murder and theft, are state crimes. Some crimes, including kidnapping and drug-related offenses, may be federal crimes. If you are detained by a tribal court, you are neither a state nor a federal prisoner. To bring a habeas claim, prisoners of a tribal court should use 25 U.S.C. § 1303 (2006). This Chapter does not address habeas petitions by prisoners of a tribal court. Because tribes are not subject to the same provisions of the Constitution that states and the federal government are, if you are a tribal prisoner, you should do outside research to find out how habeas law applies to you. A few cases dealing with habeas claims by petitioners in tribal custody are United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420, 72 USLW 4277 (2004); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996); Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995).

5. Technically, 28 U.S.C. § 2255 (2006) is not an application for habeas corpus, but it has the same effect. Therefore, it is still referred to as a habeas petition.

6. Note that the restrictions in § 2241(e) denying federal court jurisdiction to detainees determined to be "enemy combatants" were found to be unconstitutional. Boumediene v. Bush, 553 U.S. 723, 728, 128 S. Ct. 2229, 2238, 171 L. Ed. 2d 41 (2008).

7. In the United States Code ("U.S.C.") the rules immediately follow the individual statute.

8. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C. and 21 U.S.C.). The changes this law made to the habeas statutes are all incorporated into later versions of the applicable statutes in title 28 of the United States Code. If you have a recent copy of the United States Code or recent supplements to the Code, the habeas statutes will contain the AEDPA changes. Such statutes include 28 U.S.C. §§ 2244, 2253, 2254, 2255, 2261–66 (2006) and 21 U.S.C. § 848 (2006).

9. By using LexisNexis and *Shepardizing*, you can make sure that the law has not changed. *See* Chapter 2 of the *JLM* for an explanation of how to *Shepardize* a case.

general guide to direct more intensive research. You should try to get a lawyer if you can,[10] but if you cannot, you should not give up on your habeas claim. Although it may seem confusing at first, after reading this Chapter the complexities of federal habeas corpus will be easier to understand. Read this Chapter very carefully, and try to understand what the rules are. Before you read the rest of this Chapter, however, there are three important rules of which you must be aware.

(a) File Your Petition Within One Year of the End of Your Direct Appeal

If you file a state post-conviction appeal, the one-year deadline will be extended while your case goes through the state post-conviction process. This deadline and extension will be discussed at greater length in Part D(4) ("Time Limit") of this Chapter. It is important for you to remember that time matters, and you must pay attention to the different time requirements.

(b) Present Any and All Claims You Bring in a Federal Court to the State Court First

This is called "exhaustion" and is discussed more fully in Part D(2) ("Exhaustion of State Remedies and Direct Appeal") of this Chapter. The point of this requirement is to give state courts a chance to correct any violations of federal law that occurred during your trial before you complain to a federal court in your habeas petition. So, if you do not ask the state court for relief first, the federal court will not address your claims.

(c) Be Aware that It Is Almost Impossible to File More than One Habeas Petition

Courts are very strict about this rule, and therefore you only have one chance to get your habeas petition right. This means that you have to meet all the deadlines, follow all the court procedures correctly, and include all the necessary information in your first habeas petition. If you make a mistake or miss deadlines, you probably will not be able to ask for habeas relief again. For more information about this, see Part D(5) ("Successive Petitions") of this Chapter.

6. Plea Agreements May Affect Habeas Corpus Relief

Unfortunately, plea agreements can sometimes affect habeas corpus relief. If your conviction was based on a plea, habeas relief may not be available to you. Some federal courts, including the Tenth Circuit and the Middle District of Pennsylvania, have found a successful post-conviction challenge like habeas to be a breach of a plea agreement, under which the defendant agreed to serve the imposed sentence without protest. These courts have dissolved protesting defendants' plea arrangements and later convicted them under the charges previously dropped by the agreements.[11] In other words, if your conviction was a part of a plea agreement, your habeas relief may violate that previous arrangement. If the court voids that plea agreement as part of your habeas relief, the prosecutor can try to convict and imprison you under another charge that had been previously dropped under the plea arrangement. In short, you may still end up in jail on another charge.[12]

But, at least one federal district court in New York has held that habeas relief does *not* violate prior plea agreements. The Southern District of New York has granted habeas relief and still held valid the previous plea arrangements. The court held that after the federal court releases you based on a successful habeas

10. Part F of this Chapter ("How to Get Help from a Lawyer") gives more information on how to get a lawyer for your habeas petition. You are not entitled to a lawyer and have to convince the court to give you one. If the court denies your request, you can write your own habeas petition and ask for a lawyer again after the court has seen your petition.

11. *See* United States v. Bunner, 134 F.3d 1000, 1002–05 (10th Cir. 1998) (concluding that the defendant's challenge of the plea agreement breaks the contract, so the charges that were dismissed by the plea agreement can be reinstated); United States v. Viera, 931 F. Supp. 1224, 1228–29 (M.D. Pa. 1996) (same). *But see* United States v. Sandoval-Lopez, 122 F.3d 797, 802 (9th Cir. 1997) (determining that defendant did not break plea bargain contract by vacating conviction because plea agreement prohibited attacks on the sentence, not the conviction); United States v. Gaither, 926 F. Supp. 50, 51–52 (M.D. Pa. 1996) (holding that defendant did not breach plea agreement by moving to vacate his conviction); DiCesare v. United States, 646 F. Supp. 544, 548 (C.D. Cal. 1986) (holding that government is still bound by obligations in plea agreement when defendant's conviction was vacated because of intervening change in law).

12. However, the state may be prevented from reinstating charges against you if (1) the statute of limitations has run on the dismissed charges, (2) you already served a substantial part of the sentence you received as part of the plea agreement, and (3) you did not agree to waive the statute of limitations defense in your plea agreement. *See* Rodriguez v. United States, 933 F. Supp. 279, 281–83 (S.D.N.Y. 1996) (ruling that, based on a new court ruling, the conviction should be dropped and that the other charges dropped by the plea agreement cannot be reinstated as defendant could not be returned to her position prior to the plea agreement, having already served more than half her sentence; distinguishing this case from other cases where the dropped charges could be reinstated).

petition, no prosecutor can try to convict you for charges that were dropped by the prior plea agreements.[13] The Ninth Circuit has also held that a grant of habeas relief does not entitle the court to set aside the entire plea agreement and let the State re-prosecute charges that had been dropped as part of the agreement.[14] If you are challenging the validity of your conviction on only one of multiple counts, you should probably assume that the court would set aside the invalid conviction and re-sentence you on the remaining crimes for which you pleaded guilty.

7. Can You Petition for Someone Else in Governmental Custody?

Filing a habeas petition for someone else is often allowed. The *petitioner* (the person who files the habeas petition) is called a "next friend" and may be a relative, friend, or lawyer. To be allowed to file a petition as a "next friend" in court, you must establish that (1) the prisoner cannot bring the petition himself and (2) you are truly dedicated to the best interests of the prisoner. Sometimes the courts may require that you have some significant relationship with the prisoner.[15] In addition, courts seek proof that the next friend is in a better position to file the petition than the prisoner.[16] In general, filing a habeas petition for someone else is not allowed if it goes against the competent adult prisoner's wishes.[17] However, courts usually permit parents to petition on behalf of their underaged children who are in governmental custody.[18]

B. The Fundamental Elements of a Federal Habeas Corpus Argument

Prisoners in both state and federal custody can complain about the same types of problems under federal habeas corpus law. This part of the Chapter will give you an idea of what types of claims you can make in a habeas petition and how to prove you are entitled to relief. It is important to remember that if you are a state prisoner, you must present any claim in your habeas petition to the state court first. This requirement, called exhaustion, will be discussed in Part D(2) ("Exhaustion of State Remedies and Direct Appeal").

To argue for federal habeas relief, you will try to show that you are being held in prison illegally because you have been wrongfully convicted in violation of your rights. Because the Constitution is the only federal law that governs state criminal procedures, *habeas claims by state prisoners must claim a violation of the Constitution*. Federal prisoners may claim violations of other federal laws. The Constitution does not describe in detail what is included in the set of constitutional rights that you have. The U.S. Supreme Court interprets the Constitution, so the cases it decides describe specifically what makes up a constitutional right or violation. To argue that you deserve federal habeas relief, you will first need to show which of your federal rights were violated. Section 1 of this Part explains how to find constitutional violations and gives many examples and cases to reference. Once you have identified at least one possible violation, you will need to

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13. Rodriguez v. United States, 933 F. Supp. 279, 281–83 (S.D.N.Y. 1996) (ruling that the conviction should be dropped based on a new court ruling and that the other charges dropped by the plea agreement cannot be reinstated as defendant could not be returned to her position prior to the plea agreement, having already served more than half her sentence; distinguishing this case from other cases where the dropped charges could be reinstated). It is important to note that the Second Circuit has not addressed this issue, and that New York district courts are not in agreement about this case. You will need to examine the cases in your district to see whether this ruling is accepted there.

14. United States v. Barron, 172 F.3d 1153, 1158–60 (9th Cir. 1999) (holding that a defendant seeking to set aside a conviction for conduct that was innocent under a statute neither breached the plea agreement nor repudiated the agreement and that, as a result, the district court could only vacate the judgment and resentence the defendant on the counts of conviction that still stood, not those counts that had been dropped).

15. *See* Whitmore v. Arkansas, 495 U.S. 149, 163–64, 110 S. Ct. 1717, 1727, 109 L. Ed. 2d 135, 150 (1990) (noting that the two prerequisites for next friend standing are (1) providing an adequate explanation, such as mental incompetence or disability as to why the real party in interest cannot appear on his own behalf, and (2) showing that the "next friend" is truly dedicated to the best interests of the person on whose behalf he seeks to litigate and has some significant relationship with the real party in interest).

16. *See* Demosthenes v. Baal, 495 U.S. 731, 735, 110 S. Ct. 2223, 2225, 109 L. Ed. 2d 762, 766 (1990) (*per curiam*) (holding that though the prisoner's parents filed a petition for him, he was competent to represent his own interests); Lonchar v. Thomas, 58 F.3d 588, 588-589 (11th Cir. 1995) (*per curiam*) (denying next friend petition because prisoner was competent and did not want a habeas petition filed, but allowing a next friend petition where prisoner is incompetent).

17. *See In re* Zettlemoyer, 53 F.3d 24, 28 (3d Cir. 1995) (*per curiam*) (denying next friend petition brought by both prisoner's former counsel and his mother because prisoner competently chose to waive right to file habeas petition, but not questioning lawyer's ability to proceed on an incompetent prisoner's behalf).

18. *See* Amerson v. Iowa, 59 F.3d 92, 93 n.3 (8th Cir. 1995) (concluding that although a child was placed with the state department of human services, the child's mother "was, and still is a proper next friend to bring this petition on behalf of [the child], notwithstanding termination of her parental rights ….").

identify the standard the court uses to determine whether the action violated your rights. Section 2 explains both how to find the standard the court uses for your violation and how to show the court that the standard was met. However, just showing that your rights were violated is not enough to get federal habeas relief. You must also show that the violation of your rights harmed you by having a substantial effect on the outcome of your trial. Section 3 therefore explains how to show the court that the violation of your rights was not a "harmless" error, in other words that the error had a "substantial effect" on your trial. If you are a federal prisoner, once you have shown that your rights were violated and that the violation substantially harmed your trial, you will have shown that you deserve habeas relief. However, there are many specific procedures that you must follow to successfully file for habeas corpus. These procedures are discussed in Part D ("Procedures for Filing a Petition for Habeas Corpus").

If you are a state prisoner, showing that your federal rights were violated and that the violation substantially harmed your trial is not enough to be granted habeas relief in federal court. As a state prisoner, you have another very important element of your habeas petition to prove: that the state court was unreasonable in finding that either your rights were not violated or the outcome of the trial was not affected by the violation. This "unreasonableness" requirement is called the "standard of relief," and it is a very hard standard to meet. It is discussed in detail in Section 4 of this Part. To sum up, as a state prisoner, you must show that your rights were violated, the violation was not harmless, and the state court was incorrect according to the high standard of relief in order for you to obtain federal habeas relief.

1. Examples of Constitutional Violations

To obtain a writ of habeas corpus, you must show the court that your custody violates the Constitution or laws of the United States.[19] You cannot claim that your custody violates the state constitution or state laws because federal habeas corpus relief is only granted if your federal rights have been violated. You can satisfy this requirement by showing that the police, prosecutor, defense counsel, or judge acted (or failed to act)—during your arrest, trial, or sentencing—in a way that violated your constitutional rights. Your constitutional rights can be found in the amendments to the Constitution. Habeas claims often state violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Below are two lists. The first is designed to give you a very general idea of what rights these amendments guarantee. The second list gives some examples of habeas claims in violation of these amendments. It is hard to understand what these rights mean in real situations without looking at cases. You should look over this list, and then if you think one of these rights may have been violated in your case, read the cases in the footnotes following the list relating to that amendment to get a better understanding of exactly how the court has interpreted the right in real situations. Also, read the list of examples below to see if you experienced anything similar to the violations listed. Remember, these are just general lists, and the examples provide only a selection of some of the things found to violate the Constitution. You may have experienced a violation that is not mentioned here and still may be able to get habeas corpus relief.

(a) The Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments:

Fourth Amendment: This is the right to be free from unlawful search or seizure. This Amendment is why the police need to have warrants or probable cause to search you or take your property.

Fifth Amendment: This Amendment has a few rights in it. First is the right to be tried before a jury for certain crimes. Second is the right to be tried only once for any specific crime. Being tried more than once for the same crime is called "double jeopardy" and is not legally allowed. Third is the right to be free from self-incrimination. This means that you do not have to disclose evidence that would help the people prosecuting you. This is why you do not have to speak to the police or be a witness in your own trial. Fourth is the right to due process. Due process basically means a fair procedure, but the courts have identified many elements under the right to due process.

Sixth Amendment: This Amendment also has several rights in it. First is the right to a speedy and public trial. Second is the right to an impartial jury. Third is the right to have your trial in the state and district where the crime occurred. Fourth is the right to be informed of the crime you are charged with. Fifth is the right to confront witnesses against you and to be able to obtain witnesses for your side. Sixth is the right to have the assistance of a lawyer.

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19. 28 U.S.C. § 2254(a) (2006). Because there are no *federal* laws that regulate *state* criminal proceedings, as a state prisoner you must prove that your custody violates the U.S. Constitution. Remember, you can raise state constitutional violations in your petition only if they amount to a denial of your rights under the federal Constitution.

Eighth Amendment: This is the right to be free from excessive bail, fines, or cruel and unusual punishment.

Fourteenth Amendment: This Amendment again guarantees the right to due process (see the explanation for the Fifth Amendment above). However, this Amendment applies specifically to states. This amendment is what makes the above rights apply to both federal trials *and* state trials.

If you are a state prisoner, remember that you may only raise violations of the Constitution in your habeas petition. If you are a federal prisoner, you may raise violations of the Constitution or violations of federal criminal law.[20]

(b) Examples of Habeas Claims Based on the Constitution

(1) Investigation and Policing: A witness identified you through a police line-up or photograph in which the police were (impermissibly) suggestive,[21] violating your Fourteenth Amendment right to due process.

(2) Your Confession: Your confession was obtained involuntarily in violation of your Fourteenth Amendment due process rights.[22] In order to prove that your confession was involuntary, you must prove that your will was overborne (overtaken).[23] Some facts that may support a claim that your will was overborne include threats of physical violence,[24] threats against loved ones,[25] repeated coercive questioning after you indicated that you wanted to stop answering questions,[26] fraudulent promises by police,[27] and other forms of ill treatment.[28]

(3) Right to Counsel Violations:

(a) You were denied your Fifth and Sixth Amendment rights to counsel. You would claim this if you were denied counsel that the State should have provided because you were indigent

20. See Title 18 of the United States Code for information on federal criminal law.

21. Suggestiveness is generally determined by five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114–15, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977); *see also* Neil v. Biggers, 409 U.S. 188, 199–200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972) (discussing suggestiveness and the possible danger from police suggestiveness, but ultimately finding that the totality of circumstances showed that the suggestiveness was overcome); Dickerson v. Fogg, 692 F.2d 238, 244 (2d Cir. 1982) (granting habeas relief because the identification was impermissibly suggestive based on the five-factor assessment). *Dickerson* involved both a pretrial and in-court identification. The court thus held that the suggestiveness of the pretrial identification must be weighed against the independent reliability of the in-court identification.

22. *See* Miller v. Fenton, 474 U.S. 104, 110–12, 106 S. Ct. 445, 449–51, 88 L. Ed. 2d 405, 411–12 (1985) (holding that the voluntariness of a confession is not a factual question but a legal question that requires independent consideration in a habeas proceeding, and therefore finding it not subject to the § 2254(d) presumption of correctness for state court findings of fact). In *Miller*, the police got a confession by questioning a suspect with a mental problem and telling him that he would receive medical help rather than punishment if he confessed.

23. *See* Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 2331, 147 L. Ed. 2d 405, 413 (2000) (affirming that when a defendant claims his confession was involuntary, the question is whether his will was overborne by the circumstances surrounding the giving of the confession).

24. *See* Brown v. Mississippi, 297 U.S. 278, 286, 56 S. Ct. 461, 465, 80 L. Ed. 682 (1936) (stating that due process is violated when violence is used to coerce confession).

25. *See* Lynumn v. Illinois, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922, 926 (1963) (finding that defendant's confession was involuntary because her will was overborne when the police threatened to take her young children from her if she did not confess).

26. *See* Kordenbrock v. Scroggy, 919 F.2d 1091, 1100 (6th Cir. 1990) (holding portions of confession invalid when obtained after police ignored defendant's statements that he did not want to talk and threatened to arrest his girlfriend).

27. *See* United States v. Rutledge, 900 F.2d 1127, 1130–31 (7th Cir. 1990) (holding that police are allowed to pressure, cajole, conceal facts, actively mislead, and commit minor acts of fraud, but are not allowed to magnify a suspect's fears, ignorance, anxieties, or uncertainties to the point where rational decision becomes impossible); *see also* Moore v. Czerniak, 534 F.3d 1128, 1138 n.10 (9th Cir. 2008) (noting that petitioner's taped confession given to police was involuntarily given in response to a police officer's false promises of leniency and that petitioner's attorney's failure to seek suppression of this evidence was objectively unreasonable given the possibility of attaining a superior plea bargain).

28. *See* Davis v. North Carolina, 384 U.S. 737, 752, 86 S. Ct. 1761, 1770, 16 L. Ed. 2d 895, 905 (1966) (finding that where police held a prisoner in a cell and questioned him off and on for sixteen days with a meager diet, the prisoner's confession was an involuntary end product of coercive influences and therefore constitutionally inadmissible).

(poor);[29] you were denied the opportunity for new counsel when an irreconcilable difference arose between you and your appointed counsel;[30] you were denied counsel at arraignment;[31] you did not voluntarily, knowingly, and intelligently waive your right to counsel during interrogation or discussions with police officers while in custody;[32] or your lawyer provided such poor representation as to amount to ineffective assistance of counsel.[33]

(b) The trial court unreasonably denied your request to proceed *pro se* (as your own attorney).[34]

(c) You were convicted based on information provided by an informant who was "bugged" or reported jail cell conversations between you and him in violation of the Fifth or Sixth Amendments.[35]

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29. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45, 83 S. Ct. 792, 796–97, 9 L. Ed. 2d 799, 804–06 (1963) (holding that, in a criminal trial, if defendant cannot afford counsel, counsel must be provided); *see also* Swenson v. Bosler, 386 U.S. 258, 259, 87 S. Ct. 996, 997, 18 L. Ed. 2d 33, 35 (1967) (holding that the right to counsel on direct appeal in state courts cannot be denied to a defendant solely because he is unable to afford a lawyer).

30. *See* Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (holding that a trial court may not ignore the timely motion for new counsel by an indigent defendant with appointed counsel). *But see* United States v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972) (holding that defendant must show good cause for rejecting assigned counsel, such as a complete breakdown in communication, a conflict of interest, or irreconcilable conflict with the attorney); United States v. Garey, 540 F.3d 1253, 1270 (11th Cir. 2008) (finding defendant waived the right to counsel when he rejected his appointed counsel three days before trial and his request for substitute counsel was denied); Jones v. Walker, 540 F.3d 1277, 1295 (11th Cir. 2008) (finding there is no violation of the right to counsel if a defendant proceeds *pro se* because he refuses to work with an assigned public defender and is denied his request to have another public defender assigned to him).

31. *See* Rothgery v. Gillespie County, 554 U.S. 191, 198, 128 S. Ct. 2578, 2581, 171 L. Ed. 2d 366, 372 (2008) (holding that the 6th Amendment's guarantee of the right to counsel applies at a defendant's first appearance before a judicial officer where the defendant should be told of the formal accusations against him and the restrictions imposed on his liberty).

32. *See* Brewer v. Williams, 430 U.S. 387, 403, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424 (1977) (placing the burden on the prosecutor to show that the defendant has voluntarily, knowingly, and intelligently waived his right to counsel); Miranda v. Arizona, 384 U.S. 436, 468, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966) (finding that defendant must be informed of his rights before he may be considered to have knowingly and intelligently waived his right to counsel); *see also* Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (finding that defendant must be given *Miranda* warnings if he is in custody and being questioned). *But see* Texas v. Cobb, 532 U.S. 162, 167, 121 S. Ct. 1335, 1340, 149 L. Ed. 2d 321 (2001) (holding that the 6th Amendment right is "offense specific" and that a defendant charged with burglary did not have a right to counsel when being interrogated about a murder from the same incident); Young v. Walls, 311 F.3d 846, 850 (7th Cir. 2002) (finding the purpose of *Miranda* warnings is to protect a suspect from coerced self-incrimination, so police failure to give *Miranda* warnings to a suspect who confessed because he wanted to talk is not unconstitutional).

33. *See* Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471, 486 (2003) (granting defendant's habeas claim for ineffective assistance of counsel when counsel failed to investigate defendant's life history, which included sexual and physical abuse, diminished mental capacities, and severe family problems). See Part B(2) of this Chapter ("Standards and Tests for Claims of Violations") for more information on ineffective assistance of counsel.

34. Faretta v. California, 422 U.S. 806, 818–19, 95 S. Ct. 2525, 2532–33, 45 L. Ed. 2d 562, 572–73 (1975) (finding that the 6th and 14th Amendments provide the right of self-representation); United States v. Hernandez, 203 F.3d 614, 621 (9th Cir. 2000) (finding that a denial of a *pro se* request may be unconstitutional if it was made before jury selection and if the request was not a delay tactic); *see also* Moore v. Haviland, 531 F.3d 393, 404 (6th Cir. 2008) (holding that petitioner's habeas relief was warranted because he was denied the right to proceed *pro se* where petitioner had requested during trial to proceed *pro se* and did not waive this right merely by responding to questions posed by his attorney). *But see* Indiana v. Edwards, 128 S. Ct. 2379, 2386, 171 L. Ed. 2d 345, 355 (2008) (holding that defendant could be denied right to self-representation if he is deemed not competent to defend himself at trial, even if he is competent enough to stand trial). Note that this does not mean that you have a constitutional right to *any* counsel. The court may reject your request to have a non-lawyer, other than yourself, represent you. United States v. Gigax, 605 F.2d 507, 517 (10th Cir. 1979) (finding that the 6th Amendment does not protect the right to be represented by a lay person).

35. *See* Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (finding that evidence from a conversation between defendant on bail and a co-defendant that was radio transmitted without defendant's knowledge violated his 6th Amendment right to assistance of counsel); *see also* Maine v. Moulton, 474 U.S. 159, 177, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481 (1985) (finding that the state violated the 6th Amendment right of the defendant when they recorded conversations between him and a co-defendant who was operating as an undercover agent for the state); United States v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115 (1980) (omitting from trial the defendant's incriminating statements made to a paid informant who was confined in the same cell block as defendant because the government was found to have violated the defendant's 6th Amendment right to counsel by intentionally creating a situation that was likely to induce the defendant to make incriminating statements). *But see* Kuhlmann v. Wilson, 477 U.S. 436, 459, 106 S. Ct. 2616, 2630, 91 L. Ed. 2d 364 (1986) (holding that it is not a constitutional violation if the informant merely listens to the defendant without questioning or inciting him to speak);

(d) You were temporarily banned from consulting with your attorney.[36]

(4) Your Competency: You were denied your Fourteenth Amendment right to an examination to determine whether you were competent to stand trial, whether you were competent to waive counsel, or whether you were competent to plead guilty.[37]

(5) Your Guilty Plea: Your guilty plea was unconstitutional because you pleaded guilty involuntarily.[38]

(a) You pleaded guilty as part of a plea bargain agreement that was broken.[39]

(b) You pleaded guilty without understanding the charges against you,[40] or language difficulties prevented you from understanding the charges against you.[41]

(c) You pleaded guilty without understanding the consequences of pleading guilty.[42]

United States v. Rommy, 506 F.3d 108, 136 (2d Cir. 2007) (holding that it is not a constitutional violation if the informant's questions to the defendant do not stimulate discussion but only seek to clarify information already volunteered).

36. *See* Jones v. Vacco, 126 F.3d 408, 415–17 (2d Cir. 1997) (finding that an overnight ban on petitioner's consultation with his attorney, imposed when the trial judge declared an overnight recess during petitioner's cross-examination, violated petitioner's 6th Amendment right to counsel).

37. The Supreme Court has held that the standard of competency is the same for these three matters. That is, if a defendant is found competent to stand trial, he is necessarily competent to waive counsel and to plead guilty. Godinez v. Moran, 509 U.S. 389, 391, 113 S. Ct. 2680, 2682, 125 L. Ed. 2d 321, 327 (1993). The court identified the test for legal competency as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." Drope v. Missouri, 420 U.S. 162, 171–72, 95 S. Ct. 896, 903–04, 43 L. Ed. 2d 103, 112–13 (1975) (finding that a psychiatric evaluation was also required when, among other indications, defendant had attempted suicide during trial); *see also* Cooper v. Oklahoma, 517 U.S. 348, 369, 116 S. Ct. 1373, 1384, 134 L. Ed. 2d 498, 515 (1996) (finding that a state law presuming defendant is competent unless he proves his incompetence by clear and convincing evidence violates due process); Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815, 822 (1966) (holding that defendant is entitled to a competency hearing when there has been evidence presented in trial showing his insanity, since convicting an incompetent defendant violates the 14th Amendment); Johnson v. Norton, 249 F.3d 20, 22 (1st Cir. 2001) (finding a violation of due process when trial court did not hold a competency hearing when defendant stated that he did not know "what's going on" because he had been hit on the head and lost consciousness just before the start of trial); Bouchillon v. Collins, 907 F.2d 589, 592–94 (5th Cir. 1990) (finding that there was sufficient evidence at trial to establish a reasonable probability that defendant was incompetent at the time of a guilty plea due to post-traumatic stress disorder).

38. *See* Fontaine v. United States, 411 U.S. 213–15, 93 S. Ct. 1461–63, 36 L. Ed. 2d 169 (1973) (holding that defendant is entitled to a hearing to determine whether or not his guilty plea was voluntary even though he had declared in open court that his plea was given voluntarily and knowingly); Machibroda v. United States, 368 U.S. 487, 494, 82 S. Ct. 510, 514, 7 L. Ed. 2d 473 (1962) (holding that petitioner was entitled to a hearing on the issue of whether his guilty plea, which was based on the prosecutor's threats and unkept promises, was made involuntarily); Fair v. Zant, 715 F.2d 1519, 1520–22 (11th Cir. 1983) (holding that defendant's guilty plea was not voluntary where trial judge told defendant he could plead guilty but later withdraw his plea if he did not want to accept the sentence, but then refused to allow withdrawal of plea after sentencing); United States *ex rel.* Hill v. Ternullo, 510 F.2d 844, 846–48 (2d Cir. 1975) (holding that defendant was entitled to a hearing to determine whether his guilty plea was voluntary when his guilty plea was made based on his attorney's assurances that he would receive a lesser sentence than what was allowed under state law).

39. *See* Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) (holding that when pleas rest on an implied promise or on an agreement by a prosecutor that he will make no sentencing recommendations, such promises must be fulfilled); Brown v. Poole, 337 F.3d 1155, 1160–61 (9th Cir. 2003) (granting habeas relief and release of prisoner when state breached oral plea agreement that prisoner would only have to serve half of her 15-year sentence if she maintained a good prison record, even though prosecutor never had authority to make such a promise); Johnson v. Beto, 466 F.2d 478, 479–80 (5th Cir. 1972) (holding that if a prosecutor says he will make a sentencing recommendation in exchange for a guilty plea, but then actually recommends a harsher sentence in court, the plea bargain has been broken and defendant is entitled to resentencing or withdrawal of his guilty plea).

40. *See* Marshall v. Lonberger, 459 U.S. 422, 436, 103 S. Ct. 843, 852, 74 L. Ed. 2d 646, 660 (1983) (ruling that a guilty plea cannot be voluntary unless the accused has "received real notice of the true nature of the charge against him"); Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 103 (1976) (ruling that where neither defense counsel nor the trial court had explained the elements of the offense of second degree murder, the guilty plea was involuntary); United States v. Andrades, 169 F.3d 131 (2d Cir. 1999) (holding that defendant's guilty plea was invalid because he did not understand the nature of the charges against him due to his poor education and drug addiction).

41. The Court Interpreters Act, 28 U.S.C. §§ 1827–1828 (2006), requires the court to supply you with an interpreter if you do not understand English. *See also* United States v. Mosquera, 816 F. Supp. 168, 177 (E.D.N.Y. 1993) (setting requirements for translation in cases in which the defendant does not speak English), *aff'd* 48 F.3d 1214 (2d Cir. 1994).

(6) Timing of Conviction and Trial:

(a) The statute of limitations had already run out when you were charged with the offense,[43] or you were charged with a federal, non-capital crime more than five years after the crime occurred.[44]

(b) You were denied your Sixth Amendment right to a speedy trial.[45]

(7) Right to Be Free from Self-Incrimination:

(a) You were made to testify before a grand jury in violation of your Fifth Amendment right against self-incrimination.[46]

(b) After you were promised immunity in exchange for testimony before a grand jury, the grand jury used your testimony against you in violation of your Fifth Amendment right against self-incrimination.[47]

(c) During trial the prosecutor commented on your post-arrest silence in violation of your Fifth Amendment right against self-incrimination;[48] or the prosecutor made an improper

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42. *See* Marvel v. United States, 380 U.S. 262, 85 S. Ct. 953, 13 L. Ed. 2d 960 (1965) (ordering a rehearing to determine whether the trial judge misled the defendant about maximum possible sentence); United States *ex rel.* Leeson v. Damon, 496 F.2d 718, 722 (2d Cir. 1974) (reversing a conviction because the appellant did not understand that his plea could result in confinement in a reformatory for five years rather than a shorter state prison term); Jones v. United States, 440 F.2d 466, 468 (2d Cir. 1971) (ruling a defendant was entitled to a hearing on whether he was aware of the maximum possible sentence at the time of his guilty plea and, if not, whether he would have pled guilty had he known).

43. A statute of limitations is a period of years, set by state law, after which the government cannot prosecute a suspect. Statutes of limitations vary depending on the crime with which you are charged. The clock starts running on a statute of limitations once the *crime is committed*. The statute of limitations cannot be waived. This time limit is different than the 6th Amendment right to a speedy trial. The right to a speedy trial does not start running until *you are indicted*; you can waive this right, and the court balances this right against other considerations.

44. *See* 18 U.S.C. § 3282 (2006), which requires the federal government to issue an indictment within five years of the commission of a non-capital offense. There is an important new exception to this rule: the government can issue a "DNA profile indictment" that contains a set of DNA identification characteristics but not the identity of the accused. An indictment issued under this rule is not subject to the five-year limitation. *See* 18 U.S.C. § 3282(b) (Supp. 2007). There are many other federal laws that govern the procedure to be followed in federal criminal trials and sentencing.

45. Courts follow the guidelines set out in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether a defendant was denied his right to a speedy trial. Courts balance the conduct of the prosecution and defendant and look at these factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asked for a speedy trial; and (4) whether the delay prejudiced the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972) (ruling that where defendant did not want a speedy trial, and was not seriously prejudiced by the delay, a five-year delay between arrest and trial did not violate defendant's 6th Amendment rights); *see also* Klopfer v. North Carolina, 386 U.S. 213, 221–22, 87 S. Ct. 988, 992–93, 18 L. Ed. 2d 1, 7 (1967) (ruling that a state may not postpone prosecution of any case for an unlimited period even though the accused remains free to go wherever he desires). *But see* Reed v. Farley, 512 U.S. 339, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994) (ruling that violation of a federal statute that limits trial length is not necessarily a violation of the constitutional right to a speedy trial when defendant did not object to delay and showed no prejudice from the delay); United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) (ruling that the right to a speedy trial guaranteed by the 6th Amendment does not apply until you have been accused of a crime, which may not occur until indictment).

46. *See* United States v. Mandujano, 425 U.S. 564, 575, 96 S. Ct. 1768, 1776, 48 L. Ed. 2d 212, 221 (1976) (ruling that a witness cannot be compelled to answer questions that are self-incriminating, a determination that the judge may make if necessary). *But see* Kastigar v. United States, 406 U.S. 441, 459–62, 92 S. Ct. 1653, 1664–66, 32 L. Ed. 2d 212, 225–27 (1972) (finding that a defendant may be forced to testify over a claim of privilege from self-incrimination when defendant has been granted immunity from use of the compelled testimony, or evidence derived from the testimony, in future criminal proceedings).

47. Two types of immunity may be granted to witnesses who testify before grand juries. "Transactional immunity" gives a potential defendant full immunity from prosecution for any offense related to the incident in question. "Use immunity," on the other hand, only guarantees that the government will not use any of the information revealed in your testimony in future proceedings against you. *See* Kastigar v. United States, 406 U.S. 441, 458, 92 S. Ct. 1653, 1664, 32 L. Ed. 2d 212, 225 (1972) (ruling that a court can compel witnesses to testify simply by giving them use immunity and that the court does not also need to give transactional immunity); *see also* United States *ex rel.* Gasparino v. Butler, 398 F. Supp. 127, 129–30 (S.D.N.Y. 1974) (ruling that, in New York, use immunity is the usual kind of immunity intended and that transactional immunity must be expressly authorized by a grand jury vote). Note, however, that habeas petitions are rarely granted on these grounds.

48. *See* Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (holding that due process rights are violated when the prosecutor questions defendant about why he didn't tell his story to police after *Miranda* warnings at time of his arrest); Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (ruling that a defendant's 5th Amendment rights were violated where judge instructed jury that they may take into account failure of defendant to testify about evidence to indicate the truthfulness of that evidence); Gravley v. Mills, 87 F.3d 779 (6th Cir. 1996) (holding

summation.[49] (A summation, or closing argument, is the argument made to the jury at the end of a trial.)

(d) Statements that you made at a court-ordered competency hearing before a state-appointed psychologist or psychiatrist were used against you in violation of your Fifth and Fourteenth Amendment rights against self-incrimination.[50]

(8) Access-to-Evidence Violations:

(a) The prosecution withheld requested[51] evidence that could have helped your case, in violation of the Fourteenth Amendment.[52]

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that a prosecutor violated due process by repeatedly making references to petitioner's post-arrest silence; also finding that defendant had ineffective assistance of counsel because counsel had not objected to prosecutor's comments at trial); Hill v. Turpin, 135 F.3d 1411, 1416 (11th Cir. 1998) (granting habeas corpus where prosecutor's references to petitioner's post-*Miranda* assertions of right to remain silent were "repeated and deliberate"). *But see* Fletcher v. Weir, 455 U.S. 603, 607, 102 S. Ct. 1309, 1371, 71 L. Ed. 2d 490, 494 (1982) (finding that it is not a constitutional violation for prosecutors to use post-arrest silence to impeach a defendant where the defendant had not been told that he had a right to remain silent); Roberts v. United States, 445 U.S. 552, 561, 100 S. Ct. 1358, 1364–65, 63 L. Ed. 2d 622, 631 (1980) (refusing to consider petitioner's 5th Amendment claim when he was given a harsher sentence due to his refusal to answer questions about drug suppliers because his purpose in keeping silent was not to prevent self-incrimination); Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 86 (1980) (finding that it is not a constitutional violation for prosecutors to use a defendant's pre-arrest two-week silence to impeach his testimony that he had acted in self-defense); Splunge v. Parke, 160 F.3d 369 (7th Cir. 1998) (holding that prosecutor's comment on petitioner's post-arrest silence was not a 5th Amendment violation when not used for the purpose of impeaching petitioner at trial). Therefore, the mere fact that the prosecution or judge improperly commented on your silence will not necessarily afford you relief.

49. *See* Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) (announcing that where prosecutor called defendant an animal and made offensive emotional remarks, the comments were improper, but not granting relief because the comments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"); United States v. Elias, 285 F.3d 183, 190 (2d Cir. 2002) (noting that remarks of a prosecutor during summation do not amount to a due process violation unless they constitute egregious misconduct); Moore v. Morton, 255 F.3d 95, 119–20 (3d Cir. 2001) (ruling that habeas relief was appropriate when prosecutor made improper race-based comments and trial judge's curative instructions to the jury were not adequate to ensure a fair trial, and listing in footnotes 15 and 16 cases where habeas relief was granted or denied for improper racial comments).

50. *See* Satterwhite v. Texas, 486 U.S. 249, 260, 108 S. Ct. 1792, 1799, 100 L. Ed. 2d 284, 296 (1988) (ruling that where defendant was not afforded right to consult with counsel before submitting to psychiatric examination, admission of testimony based on examination was a constitutional violation and not harmless error); Estelle v. Smith, 451 U.S. 454, 467–69, 101 S. Ct. 1866, 1875–76, 68 L. Ed. 2d 359, 372 (1981) (finding that defendant's statements in a court-ordered psychiatric examination could not be admitted at a capital trial when the defendant had not been warned of his 5th Amendment privilege against compelled self-incrimination); Buchanan v. Kentucky, 483 U.S. 402, 421–24, 107 S. Ct. 2906, 2916–18, 97 L. Ed. 2d 336, 354–56 (1987) (ruling that the prosecution may use psychologist's report solely to rebut petitioner's psychological evidence).

51. A defendant's failure to request evidence that could have helped his case does not leave the government free of all obligations. *See* United States v. Agurs, 427 U.S. 97, 103–08, 96 S. Ct. 2392, 2397–99, 49 L. Ed. 2d 342, 349–52 (1976) (finding that there are three situations in which a *Brady* claim might arise: (1) where new evidence revealed that the prosecution introduced trial testimony that it knew or should have known was false; (2) where the prosecution failed to obey a defense request for specific exculpatory evidence (evidence that helps to prove defendant's innocence); and (3) where the prosecution failed to volunteer exculpatory evidence that was never requested, or requested only in a general way; and noting the existence of a duty on the part of the government in this last situation when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial"); *see also* United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381–82, 87 L. Ed. 2d 481, 491–92 (1985) (finding that regardless of whether the request for the evidence was specific or general, favorable evidence is material, and the government violates the Constitution by suppressing such evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"); Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490, 507 (1995) (finding that once a court applying *Bagley* has found constitutional error, there is no need for further harmless-error review).

52. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) (holding that the prosecution must turn over evidence to the defense if evidence is exculpatory, impeaching, or material). The *Brady* standard says that the prosecution must disclose evidence that is exculpatory (helps to prove the defendant's innocence) or impeaching (shows one of the prosecution's witnesses might not be believable). Exculpatory or impeaching evidence must also be material, which means that there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985); *see also* Kyles v. Whitley, 514 U.S. 419, 421–22, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) ("[B]ecause the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, [defendant] is entitled to a new trial."); Pennsylvania v. Ritchie, 480 U.S. 39, 59–60, 107 S. Ct. 989, 1002–03, 94 L. Ed. 2d 40, 58–59 (1987) (finding that a

(b) The state failed to preserve important evidence in your investigation.[53]
(c) You were denied needed expert assistance at trial in violation of the Fourteenth Amendment.[54]
(d) The prosecution admitted hearsay, or out-of-court statements against you in violation of the Confrontation Clause of the Sixth Amendment,[55] and the admitted hearsay did not qualify as one of the many exceptions to the hearsay rule.[56]

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defendant has the right to ask the court to review confidential files to see if evidence is material, but the defendant does not have the right to examine the confidential files himself); United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985) (holding that evidence impeaching a witness' credibility falls within the *Brady* rule); United States v. Agurs, 427 U.S. 97, 112–14, 96 S. Ct. 2392, 2401–02 49 L. Ed. 2d 342, 354–56 (1976) (holding that evidence of a murder victim's prior criminal record was not "material" and did not have to be turned over to the defense because it did not change the probability that the result of the trial would have been different); Boyette v. Lefevre, 246 F.3d 76, 93 (2d Cir. 2001) (holding that a state's non-disclosure of information relating to the witness' ability to identify the defendant was a *Brady* violation because the non-disclosure seriously undermined "confidence in the outcome of the trial"); Carriger v. Stewart, 132 F.3d 463, 478–79 (9th Cir. 1997) (*en banc*) (finding a violation of due process when the prosecutor failed to disclose that the man whom the defendant claimed had committed the murder and who was also the prosecutor's main witness had a long history of prior crimes, of lying to police, and of shifting blame to others, and there was evidence that he had boasted about committing the murder).

53. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution"); Killian v. Poole, 282 F.3d 1204, 1209–10 (9th Cir. 2002) (holding that the prosecution's failure to turn over letters in which the prosecution's witness admitted to perjury in order to gain sentencing concessions amounted to a constitutional violation and, with other violations at trial, amounted to reversible error). *But see* Arizona v. Youngblood, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that to show a denial of due process, defendant must show that the prosecution acted in bad faith in failing to preserve evidence if the evidence is only *potentially* exculpatory); California v. Trombetta, 467 U.S. 479, 490–91, 104 S. Ct. 2528, 2534–35, 81 L. Ed. 2d 413, 423 (1984) (finding that the state's failure to retain breath samples for defendants was not a violation of procedural due process when defendants had alternative means of demonstrating their innocence); United States v. Garza, 435 F.3d 73, 75–76 (1st Cir. 2006) (ruling that the destruction of evidence is a violation of due process if the exculpatory value of the evidence was apparent before its destruction and if the evidence is of such a nature that the defendant cannot obtain comparable evidence, but finding in this situation that the violation was harmless). The case law establishing that destruction of evidence can be a constitutional violation is based on the case law that withholding evidence is a constitutional violation.

54. *See* Ake v. Oklahoma, 470 U.S. 68, 82–83, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53, 66 (1985) (noting that when an indigent defendant shows that his sanity will be a significant factor in his defense, due process entitles the defendant to the services of a court-appointed expert to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense"); Schultz v. Page, 313 F.3d 1010, 1017–18 (7th Cir. 2002) (finding that the competency evaluation ordered by the court and conducted at the time of trial was insufficient to establish defendant's sanity at the time of the crime and that denial of defendant's request for an evaluation of his sanity at the time of the crime violated due process where defendant had shown sanity was a significant factor at trial); Starr v. Lockhart, 23 F.3d 1280, 1287 (8th Cir. 1994) (holding that the denial of petitioner's request for appointment of a mental health expert to develop evidence of diminished capacity and mitigating circumstances violated his due process rights).

55. The "Confrontation Clause" of the 6th Amendment, which protects your right to confront witnesses who testify against you, generally prohibits the prosecution from using hearsay as evidence against you at trial. Hearsay is testimony, or comments, presented at trial by someone other than the person who originally spoke. The rules on hearsay are found in the Federal Rules of Evidence, at Fed. R. Evid. 801–07, in Title 28 of the United States Code. For more information on the hearsay rules and their exceptions, see an evidence textbook or evidence treatise. *See*, *e.g.*, Charles T. McCormick, McCormick on Evidence (John W. Strong et al. eds., 6th ed. 2006); Christopher B. Mueller & Laird C. Kirkpatrick, Evidence (3d ed. 2003). *See also* Murillo v. Frank, 402 F.3d 786, 791 (4th Cir. 2005) (admitting that hearsay statements made by another suspect during interrogation violated the 6th Amendment); Brown v. Keane, 355 F.3d 82, 87–88 (2d Cir. 2004) (finding that the admission of an anonymous 911 call was unconstitutional, despite prosecution's argument that the call fell within the "present sense impression" exception to the 6th Amendment's hearsay prohibition).

56. The Federal Rules of Evidence list exceptions to the hearsay rule. Fed. R. Evid. 803, 804, 807. When out-of-court statements fall within a category listed in the Federal Rules of Evidence, it is admissible as evidence despite the Confrontation Clause of the 6th Amendment. Some of the exceptions include "excited utterances" and statements for medical diagnosis. Fed. R. Evid. 803. Some out-of-court statements are *not* defined as hearsay and are not protected by the hearsay rule. For example, courts do not consider as hearsay any statements that are made by a co-conspirator in furtherance of a conspiracy; since such statements are not considered hearsay, they may generally be admitted as evidence. Fed. R. Evid. 801. The Supreme Court may make exceptions to the hearsay rule in addition to those listed in the Federal Rules. Fed. R. Evid. 802. *See also* United States v. Inadi, 475 U.S. 387, 399–400, 106 S. Ct. 1121, 1128–29, 89 L. Ed. 2d 390, 401–02 (1986) (finding that the prosecution does not need to show that a person is unavailable to appear in court for his or her out-of-court statements to be used in a trial if the person was a co-conspirator).

(9) Witness Violations:

(a) You were denied the right to cross-examine a witness who testified against you.[57]

(b) A witness lied on the stand about having been granted leniency from the police in exchange for testifying against you.[58]

(10) The Jury:

(a) You were denied your Sixth Amendment right to a trial by a fair and impartial jury because you were denied a trial by jury.[59]

(b) You were tried by a jury of fewer than six members,[60] or you were convicted by a non-unanimous jury vote.[61]

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57. *See* Crawford v. Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1373, 158 L. Ed. 2d 177, 203 (2004) (ruling that a defendant must have the opportunity to confront a person giving testimonial evidence against the defendant either before or during trial, unless that person is unavailable; noting that the reliability of the person testifying is irrelevant); *see also* Giles v. California, 554 U.S. 353, 377, 128 S. Ct. 2678, 2693, 171 L. Ed. 2d 288 (2008) (holding that the unconfronted testimony of a murder victim cannot be admitted under a theory that defendant forfeited his 6th Amendment right to confront the victim/witness because he murdered her and thereby made her unavailable to testify); Lilly v. Virginia, 527 U.S. 116, 139, 119 S. Ct. 1887, 1901, 144 L. Ed. 2d 117, 136 (1999) (finding that a defendant has a 6th Amendment right to confront an accomplice whose confession is offered as evidence against that defendant); Davis v. Alaska, 415 U.S. 308, 320, 94 S. Ct. 1105, 1112, 39 L. Ed. 2d 347, 356 (1974) (ruling that a defendant was denied his 6th Amendment right to confront and to cross-examine a witness when the state prevented the defendant from questioning a juvenile witness about the juvenile's probationary status); Howard v. Walker, 406 F.3d 114, 132–33 (2d Cir. 2005) (finding that limiting a defendant's cross-examination of the state's expert witness and impeding the defendant's presentation of a counter expert witness violated the Confrontation Clause); Hill v. Hofbauer, 337 F.3d 706, 717 (6th Cir. 2003) (ruling that it is a violation of the Confrontation Clause to admit a non-testifying co-defendant's confession that implicates the defendant); Lewis v. Wilkinson, 307 F.3d 413, 420–21 (6th Cir. 2002) (finding a violation of the Confrontation Clause in a rape case when defendant was barred from cross-examining complainant about diary passages that supported a consent defense); United States *ex rel.* Negron v. New York, 434 F.2d 386, 389–90 (2d Cir. 1970) (holding that an inadequate translation during trial violated non-English-speaking petitioner's right to confront witnesses). *But see* United States v. Hendricks, 395 F.3d 173, 179 (3d Cir. 2005) (finding that defendant does not always have the right to cross-examine hearsay evidence that is not "testimonial").

58. Giglio v. United States, 405 U.S. 150, 154–55, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) (holding that the government has a due process duty to disclose impeachment evidence, including promises that the prosecution makes to key witnesses in exchange for their testimony); *see* Brown v. Wainwright, 785 F.2d 1457, 1464–65 (11th Cir. 1986) (finding prosecutors had deliberately withheld fact that the main witness against defendant lied on the stand by saying he had not received leniency from prosecution in exchange for his testimony against defendant); *see also* DuBose v. Lefevre, 619 F.2d 973, 979 (2d Cir. 1980) (finding that the prosecution cannot make agreements in general terms to a witness and therefore escape the fact that it gave the witness reason to believe that his testimony would lead to favorable treatment by the State). *But see* Shabazz v. Artuz, 336 F.3d 154, 162–66 (2d Cir. 2003) (finding that evidence that prosecution witnesses ultimately received favorable sentencing treatment in their own cases did not alone show that prosecutor failed to disclose promises of leniency because there was no evidence that anything was promised before the witnesses' testimony).

59. *See* Duncan v. Louisiana, 391 U.S. 145, 162, 88 S. Ct. 1444, 1453, 20 L. Ed. 2d 491 (1968) (holding defendants charged with non-petty criminal offenses have a right to trial by jury); *see also* Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356, 147 L. Ed. 2d 435, 447 (2000) (holding that the Due Process Clause and the 6th Amendment "entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"). *But see* Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35, 51 (1999) (finding the failure to submit an element of a crime to a jury is an error that is subject to harmless error analysis).

60. Ballew v. Georgia, 435 U.S. 223, 228, 98 S. Ct. 1029, 1033, 55 L. Ed. 2d 234 (1978) (holding that juries must consist of at least six people or else there is a 6th Amendment violation); *see* Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446 (1970) (holding that refusal to impanel more than six members for the jury does not violate the defendant's 6th Amendment rights). *But see* People v. Dean, 80 A.D.2d 695, 696, 436 N.Y.S.2d 455 (2d Dept. 1981) (granting that a defendant is denied due process of law when he is tried before a jury of six rather than 12 people if the state constitution says that "crimes prosecuted by indictment shall be tried by a jury composed of twelve persons").

61. *See* United States v. Gipson, 553 F.2d 453, 456 (5th Cir. 1977) (holding that a federal criminal defendant has a constitutional right to a unanimous jury verdict); *see also* Richardson v. United States, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985 (1999) (finding that the jury in a federal criminal case cannot convict unless it unanimously finds that the government has proven each element of the crime). Fed. R. Crim. P. 31(a) requires a unanimous verdict in all federal jury cases. *But see* McKoy v. North Carolina, 494 U.S. 433, 450, 110 S. Ct. 1227, 1237, 108 L. Ed. 2d 369, 385 (1990) (finding that the constitutional requirement for a unanimous verdict requires only a "substantial agreement as to the principal factual elements underlying a specified offense"). *See also* Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d

(c) The community where members of the jury work or live was exposed to inflammatory media accounts about your case.[62]
(d) Members of certain racial, religious, gender, or age-based (the elderly) groups were excluded from the jury pool,[63] or the prosecutor intentionally used his or her peremptory challenges (peremptory challenges are when the prosecutor or defendant eliminates potential jurors without a reason) to remove members of a particular racial group or gender from the jury.[64]
(e) Members of a distinct class or group, such as blacks or women, were systematically excluded from the grand jury in violation of the Fourteenth Amendment.[65]

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152 (1972). Note that both *Apodaca* and *Johnson*, which allow convictions in state court with jury majorities of 10–2 and 9–3 respectively, apply only to certain non-capital cases.

62. *See* Irvin v. Dowd, 366 U.S. 717, 724–25, 81 S. Ct. 1639, 1643–44, 6 L. Ed. 2d 751, 757–58 (1961) (holding that failure to grant change of venue, despite build-up of prejudice and a jury that was not impartial, is unconstitutional); Woods v. Dugger, 923 F.2d 1454, 1460 (11th Cir. 1991) (finding deprivation of a fair trial after extensive pretrial publicity and presence of uniformed prison guards in audience at trial when victim was a prison guard).

63. *See* Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 82–83 (1986) (holding that use of peremptory challenges to exclude African-Americans from a jury when the defendant was African-American violates the 14th Amendment's equal protection guarantee); Taylor v. Louisiana, 419 U.S. 522, 531, 95 S. Ct. 692, 698, 42 L. Ed. 2d 690, 698 (1975) (holding that sex discrimination in selection of jury violates the 6th Amendment); Smith v. Texas, 311 U.S. 128, 130, 61 S. Ct. 164, 165, 85 L. Ed. 84, 86 (1940) (holding that the 14th Amendment prohibits racial discrimination in selection of grand jury); *see also* Snyder v. Louisiana, 552 U.S. 472, 474, 128 S. Ct. 1203, 1206, 170 L. Ed. 2d 175 (2008) (holding that the Supreme Court of Louisiana's rejection of a *Batson* claim was erroneous and that the prosecutor at trial improperly excluded blacks from a jury that convicted defendant of capital murder); United States v. Barnes, 520 F. Supp. 2d 510, 514 (2d Cir. 2007) (finding that in order to establish a prima facie case of a violation of the fair cross-section requirement of the 6th Amendment, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process); People v. Snow, 44 Cal.3d 216, 225–26 (Cal. 1987) (generally upholding principle against excluding members of a certain race from a jury); State v. Gilmore, 103 N.J. 508, 543 (N.J. 1986) (finding a violation where prosecutor excluded members of a cognizable group—in this case, black jurors—from a jury because of prosecutor's presumption that those jurors had a group bias). Although the Supreme Court has never expressly held that religious discrimination in jury selection is unconstitutional, many lower courts have. *See*, *e.g.*, United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (stating that *Batson* applies to religious discrimination and "only if the religion of the jurors is directly relevant to the crimes at issue" can the strike based on religion of a juror be proper); State v. Hodge, 248 Conn. 207, 240 (Conn. 1999) (stating peremptory challenges based on religious affiliation are unconstitutional).

64. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89, 107 (1994) (holding that the use of peremptory challenges to exclude members of a particular gender violates the Equal Protection Clause); Amadeo v. Zant, 486 U.S. 214, 228–29, 108 S. Ct. 1771, 1781, 100 L. Ed. 2d 249, 264 (1988) (finding prosecutor's jury selection scheme to limit number of African-Americans and women on the jury constituted serious error); Batson v. Kentucky, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69, 79 (1986) (holding that the use of peremptory challenge to exclude members of a racial group violates the Equal Protection Clause); Galarza v. Keane, 252 F.3d 630, 640 (2d Cir. 2001) (vacating denial of habeas petition since the state trial court failed to resolve the factual issue of whether it credited the prosecution's race-neutral explanations for striking potential jurors); Jordan v. Lefevre, 206 F.3d 196, 202 (2d Cir. 2000) (reversing denial of habeas petition because of lack of meaningful inquiry into the question of discrimination); Turner v. Marshall, 121 F.3d 1248, 1250 (9th Cir. 1997) (holding prosecutor's use of peremptory challenges to strike African-Americans from jury venire not justified by stated reasons). *But see* Smulls v. Roper, 535 F.3d 853, 859 (8th Cir. 2008) (finding that since prosecution's reasons for the strike were "credible," which was the standard—as opposed to giving "persuasive" reasons or "plausible" reasons—he was not motivated by race discrimination).

65. *See* Campbell v. Louisiana, 523 U.S. 392, 398, 118 S. Ct. 1419, 1423, 140 L. Ed. 2d 551 (1998) (holding that a white defendant, convicted by an all-white jury and alleging discriminatory selection of jurors, has standing to challenge whether he was convicted by means that violate due process, even though the claim is based upon exclusion of blacks from the grand jury); Vasquez v. Hillery, 474 U.S. 254, 264, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598 (1986) (holding that habeas relief is appropriate where blacks were systemically excluded from the grand jury that indicted petitioner); Johnson v. Puckett, 929 F.2d 1067, 1068–69 (5th Cir. 1991) (granting black prisoner's habeas corpus petition where his grand jury foreman was white because petitioner had shown a *prima facie* claim of racial discrimination by showing that for 20 years every grand jury foreman in the county had been white, despite a 43% black population in the county). *But see* Hobby v. United States, 468 U.S. 339, 345–46, 104 S. Ct. 3093, 3096–97, 82 L. Ed. 2d 260, 266–67 (1984) (holding that discrimination in grand jury foreman selection, as distinguished from discrimination in the selection of the grand jury itself, does not threaten defendant's due process rights); United States v. Taylor, 154 F.3d 675, 681 (7th Cir. 1988) (holding that *Vasquez* is a limited ruling).

(f) The jury instructions[66] were unconstitutional because they did not tell the jury the prosecution must prove all crucial elements of guilt beyond a reasonable doubt,[67] or the instructions did not tell the jury the prosecution must overcome a presumption of innocence to convict you.[68]

(g) Evidence was insufficient to sustain the jury's verdict of guilty beyond a reasonable doubt.[69]

(11) The Judge: The judge was biased against you because he was corrupt and you did not bribe him.[70]

(12) Your Lawyer:

(a) Your lawyer did not represent you effectively at trial.[71]

(b) Your lawyer did not file an appeal although you would have wanted to file one.[72]

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66. Jury instructions are read by the judge to the jury to inform the jury of the elements of the crime and to explain the legal standards by which the jury must weigh the evidence against you. An example of a jury instruction is to find guilt "beyond a reasonable doubt."

67. *See* Sandstrom v. Montana, 442 U.S. 510, 524, 99 S. Ct. 2450, 2459, 61 L. Ed. 2d 39, 51 (1979) (holding that the prosecution must prove every element of a crime beyond a reasonable doubt; therefore, trial court may not shift the burden of proof to defendant by instructing jury to presume intent in jury instructions); Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 2329, 53 L. Ed. 2d 281, 295 (1977) (holding that the state must prove every element of an offense beyond a reasonable doubt); *see also* Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316, 329 (1990) (holding that in an ambiguous case the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"); Patterson v. Gomez, 223 F.3d 959, 961 (9th Cir. 2000) (holding that jury instructions that assumed the defendant was sane at the time of offense constituted an unconstitutional shifting of the prosecution's burden of proof).

68. *See* Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 2090, 60 L. Ed. 2d 640, 643 (1979) (holding that a judge's refusal to instruct the jury that a defendant is innocent until proven guilty may violate the Constitution if the "totality of the circumstances" indicates that the trial was constitutionally unfair); Taylor v. Kentucky, 436 U.S. 478, 490, 98 S. Ct. 1930, 1937, 56 L. Ed. 2d 468, 478 (1978) (finding that judge's refusal to give jury instructions that defendant is presumed to be innocent was a violation of due process).

69. *See* Jackson v. Virginia, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979) (ruling that a reviewing court will determine whether any rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt). However, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") applies a stronger standard to this determination, so a federal reviewing court must give strong deference to the state court's findings. 28 U.S.C. § 2254(d) (2006). See Part B(4) of this Chapter ("Standard for Getting Relief") for more information on how the AEDPA standard is applied. *See also* Juan H. v. Allen, 408 F.3d 1262, 1276 (9th Cir. 2005) (finding that evidence was insufficient to establish defendant's guilt beyond a reasonable doubt); United States v. Desena, 260 F.3d 150, 154–56 (2d Cir. 2001) (reversing a conviction where no evidence linked the defendant to the general conspiracy charge).

70. Usually, a judge's qualifications are not considered to be a constitutional issue. However, the Due Process Clause requires "a fair trial in a fair tribunal" before a judge with no actual bias against the defendant. *See* Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97, 104 (1997) (finding a due process violation where the judge imposed excessively harsh treatment on petitioner in order to hide or to compensate for the fact that he was taking bribes and giving light sentences in other cases). Note that this is a serious charge. You must have proof that the judge was corrupt and that your sentence was unusually harsh. The Supreme Court has made it clear that there is a presumption of legitimacy to public officers' actions, and clear evidence to the contrary must be presented in order to contradict that presumption. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174–75, 124 S. Ct. 1570, 1581–82, 158 L. Ed. 3d 319, 336 (2004) (holding that a privacy interest against the government's release of public information—photographs—is only overcome by clear evidence showing that the government engaged in some wrongdoing).

71. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (confirming that the proper standard for judging attorney performance is "reasonably effective assistance," considering all the circumstances). Ineffective assistance of counsel is among the most promising habeas claims. The standard for determination of ineffective assistance of counsel is discussed in Part B(2) of this Chapter ("Standards and Tests for Claims of Violations"). Your trial counsel may have been ineffective for any number of reasons. *See*, *e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (finding ineffective assistance of counsel where counsel conducted no pretrial discovery and failed to file a timely suppression motion against prosecution's evidence); Cossel v. Miller, 229 F.3d 649 (7th Cir. 2000) (holding that the victim's in-court identification of petitioner lacked sufficient independent reliability to be admissible, that petitioner's counsel was ineffective for failing to object to its admission, and that the state court's rejection of petitioner's ineffective assistance claim was an unreasonable application of clearly established federal law); Brown v. Myers, 137 F.3d 1154, 1156–57 (9th Cir. 1998) (ruling counsel was ineffective in failing to investigate and present available testimony supporting petitioner's alibi); Alston v. Garrison, 720 F.2d 812, 815–16 (4th Cir. 1983) (holding defendant was denied effective assistance of counsel where counsel failed to object to evidence that defendant exercised right to remain silent); *but see* Wilson v. Vaughn, 533 F.3d 208 (3d Cir. 2008) (holding that defendant was not prejudiced by failure to object to evidence because the court concluded that such evidence would have been admitted even without the racketeering charge).

(c) Your lawyer did not represent you effectively in your direct appeal (also known as a "first appeal as of right").[73]

(13) The Law and Statutes:

(a) You were convicted under a statute that is unconstitutional.[74]
(b) You received a certain type of punishment, and the law now forbids this type of punishment.[75]
(c) You were convicted for an act that is no longer a crime under the new law.[76]
(d) A state statute cancels your provisional early release credits after you have already earned them.[77]

(14) Double Jeopardy:

(a) You were convicted for an act that is no longer a crime under the new law.[78]
(b) A state statute cancels your provisional early release credits after you have already earned them.[79]
(c) Your conviction violates your Fifth Amendment right against "double jeopardy" because you were convicted of a crime for which you had already been tried in the same state.[80]

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72. This claim is a subset of an ineffective assistance of counsel claim that was decided by the Supreme Court in Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). The Supreme Court held that there is a constitutionally imposed duty on an attorney to consult with a defendant about an appeal if there is reason to believe that a rational defendant would want an appeal or that the particular defendant has reasonably demonstrated that he was interested in appealing. Additionally, the defendant must show that had he been consulted about an appeal he would have made a timely appeal. *See* Nnebe v. United States, 534 F.3d 87, 91–92 (2d Cir. 2008) (finding a violation of the right to effective assistance of counsel where lawyer who is appointed under statute that requires pursuing appeals to the Supreme Court fails to file petition despite requests by defendant); Restrepo v. Kelly, 178 F.3d 634, 640–41 (2d Cir. 1999) (finding that failure of petitioner's counsel to file timely notice of appeal despite repeated requests by petitioner and reassurances by counsel constituted a denial of constitutional right to effective assistance); Alston v. Garrison, 720 F.2d 812, 816 (4th Cir. 1983) (holding that "the content of an appeal is heavily controlled by counsel, and where … the defendant's trial lawyer also prosecuted the appeal, it is obvious that ineffective assistance of counsel is not likely to be raised at trial or to appear among the assignments of constitutional error" on appeal).

73. *See* Cannon v. Berry, 727 F.2d 1020, 1022 (11th Cir. 1984) (affirming writ of habeas corpus where counsel failed to file a brief on direct appeal of defendant's murder conviction, which thus constituted ineffective assistance of counsel). Defective counsel is a ground for habeas relief only if counsel was constitutionally required. Therefore, the defective representation must have been at the trial or on direct appeal because there is no constitutional right to counsel in post-conviction proceedings. *See* Coleman v. Thompson, 501 U.S. 722, 755–57, 111 S. Ct. 2546, 2567–68, 115 L. Ed. 2d 640, 672–74 (1991) (refusing to grant federal habeas relief for counsel errors in state habeas proceedings because there was no constitutional right to counsel). Still, an indigent criminal defendant is constitutionally entitled to an effective attorney in his "one and only appeal as of right," which usually occurs in a state court of appeals. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985) ("[A] first appeal as of right therefore is not adjudicated in accord with due process of law if appellant does not have the effective assistance of an attorney."); Douglas v. California, 372 U.S. 353, 357–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d 811, 814–15 (1963); Mason v. Hanks, 97 F.3d 887, 902 (7th Cir. 1996) ("[W]hen we are convinced that a petitioner might well have won his appeal on a significant and obvious question of state law that his counsel omitted to pursue, we are compelled to conclude … that the appeal was not fundamentally fair and that the resulting affirmation of his conviction is not reliable."). For more information on ineffective assistance of counsel claims, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," and Part H in *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

74. Yick Wo v. Hopkins, 118 U.S. 356, 373–74, 6 S. Ct. 1064, 1073, 30 L. Ed. 220, 227–28 (1886) (finding imprisonment illegal because the ordinance upon which conviction was based violated the equal protection clause of the 14th Amendment as applied); *Ex parte* Siebold, 100 U.S. 371, 376–77, 25 L. Ed. 717, 719 (1879) (finding that the question of the constitutionality of the laws involved was a proper ground for considering a writ of habeas corpus); Vuitch v. Hardy, 473 F.2d 1370, 1370 (4th Cir. 1973) (finding defendant doctor entitled to habeas corpus because the state abortion statute was unconstitutional).

75. See Part C(3)(a)(i) ("Prohibited Punishments") of this Chapter.

76. See Part C(3)(a)(ii) ("Decriminalized Behavior") of this Chapter for further explanation.

77. *See* Lynce v. Mathis, 519 U.S. 433, 447, 117 S. Ct. 891, 899, 137 L. Ed. 2d 63, 75–76 (1997) (holding retroactive cancellation, which actually increased the prisoner's punishment through re-arrest, violated the *Ex Post Facto* Clause).

78. See Part C(3)(a)(ii) ("Decriminalized Behavior") of this Chapter for further explanation.

79. *See* Lynce v. Mathis, 519 U.S. 433, 447, 117 S. Ct. 891, 899, 137 L. Ed. 2d 63, 75–76 (1997) (holding retroactive cancellation, which actually increased the prisoner's punishment through re-arrest, violated the *Ex Post Facto* Clause).

80. *See* Green v. United States, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199, 205 (1957) (determining that where jury had been instructed on first and second degree murder and convicted defendant of second degree murder with no comment on first degree charge, defendant may not be tried again for first degree murder); Dye v. Frank, 355 F.3d 1102, 1104 (7th Cir. 2004) (barring a criminal drug charge because defendant had previously been sanctioned under

(d) You were convicted in a second trial after your first trial was declared a mistrial in violation of the Fifth Amendment.[81]

(e) You were tried a second time for the same offense after a reviewing court had reversed your earlier conviction on the grounds that the evidence at your first trial was insufficient to support a conviction.[82]

(15) Other Procedural Problems at Trial:

(a) You were denied the right to be present at your trial.[83]

(b) You were prohibited from testifying on your own behalf.[84]

(c) The court in which you were convicted did not have the power to convict you because it did not have jurisdiction.[85]

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a state civil penalty "so punitive in purpose and effect that it constituted a criminal punishment"); Terry v. Potter, 111 F.3d 454, 459–60 (6th Cir. 1997) (holding that where petitioner's wanton murder conviction was reversed, and where the first jury was discharged without convicting him of intentional murder, petitioner could not be retried for intentional murder). Footnote 81 below describes when jeopardy attaches in a criminal trial.

81. Generally, once jeopardy "attaches" to a charge in a trial the state may not try you for that charge in another trial without violating the 5th Amendment. If there is a mistrial declared after jeopardy has attached, you may not be tried again for that charge unless you consented to the mistrial declaration or there was a "manifest necessity" for declaring the mistrial. Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L. Ed. 2d 717, 728 (1978) (explaining that the prosecutor has the burden of showing this "manifest necessity"); *see also* United States v. Razmilovic, 507 F.3d 130, 141–42 (2d Cir. 2007) (finding that double jeopardy bars a second trial where defendant initially joined in a co-defendant's motion for mistrial but almost immediately changed his position after mistrial was to be finalized); Love v. Morton, 112 F.3d 131, 137 (3d Cir. 1997) (affirming grant of habeas relief from conviction on retrial after first trial court judge declared a mistrial soon after jury was sworn due to the judge's inability to complete the trial and without consent from counsel). Jeopardy "attaches" to your jury trial when the jury is sworn and empanelled. *See* Crist v. Bretz, 437 U.S. 28, 38, 98 S. Ct. 2156, 2162, 57 L. Ed. 2d 24, 33 (1978) (holding federal double jeopardy rule, which states that jeopardy attaches after jury is sworn and empaneled, overrides a Montana state rule that jeopardy attaches after the first witness is sworn).

82. *See* Burks v. United States, 437 U.S. 1, 18, 91 S. Ct. 2141, 2151, 57 L. Ed. 2d 1, 14 (1978) (holding that double jeopardy prohibits a second trial after a reviewing court has found the evidence legally insufficient to justify conviction); Hudson v. Louisiana, 450 U.S. 40, 44–45, 101 S. Ct. 970, 973, 67 L. Ed. 2d 30, 34–35 (1981) (holding double jeopardy protection was violated when petitioner was prosecuted after trial judge had already granted petitioner's motion for new trial based on insufficiency of evidence supporting guilty verdict).

83. *See* McKaskle v. Wiggins, 465 U.S. 168, 178, 104 S. Ct. 944, 951, 79 L. Ed. 2d 122, 133 (1984) (stating that a defendant has a right to be present at all important stages of trial); Drope v. Missouri, 420 U.S. 162, 182–83, 95 S. Ct. 896, 909, 43 L. Ed. 2d 103, 119–20 (1975) (finding that trial court erred in going forward with a trial when defendant was absent due to his attempted suicide); Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990) (holding that defendant's absence from the courtroom at critical junctures in his trial violated his due process rights because he was unable to provide assistance to his counsel or have a psychological impact on the jury). However, you will likely only be granted habeas relief for denial of this right if it resulted in "substantial and injurious effect." Rice v. Wood, 77 F.3d 1138, 1144 (9th Cir. 1996) (holding that a writ should not be granted for petitioner's absence during the jury's announcement of a death sentence if his absence did not have a "substantial and injurious effect" on him because his absence was not a structural error); *see also* Sturgis v. Goldsmith, 796 F.2d 1103, 1108–09 (9th Cir. 1986) (holding that petitioner's absence from his competency hearing warrants habeas relief if the absence was not harmless error).

84. *See* Rock v. Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708, 97 L. Ed. 2d 37, 44–45 (1987) (holding that defendants have a fundamental constitutional right to testify on their own behalf); People v. Allen, 187 P.3d 1018, 44 Cal. 4th 843, 80 Cal. Rptr. 3d 183 (Cal. 2008) (holding that a defendant who was found to be a sexually violent predator had a right to testify under the California and federal constitutions even though his lawyer told him not to testify). *But see* Taylor v. United States, 287 F.3d 658, 661–62 (7th Cir. 2002) (holding defense counsel does not have a duty to tell defendant about his constitutional right to testify).

85. S*ee* Sunal v. Large, 332 U.S. 174, 178–79, 67 S. Ct. 1588, 1591, 91 L. Ed. 1982, 1987 (1947) (finding habeas relief appropriate where (1) conviction was under a federal statute alleged to be unconstitutional, (2) federal court's jurisdiction was challenged, or (3) specific constitutional guarantees were violated); Butler v. King, 781 F.2d 486, 490 (5th Cir. 1986) (finding that defendant was entitled to federal writ of habeas corpus because state district court lacked jurisdiction over him at time of trial); Lowery v. Estelle, 696 F.2d 333, 336–38 (5th Cir. 1983). "Jurisdiction" means that the court has the power to hear your case. If a court holds a trial without jurisdiction, it violates the Due Process Clause of the 5th or 14th Amendments. In *Lowery*, a Texas trial court dismissed an indictment for firearm use, then convicted the defendant on other charges. The court violated a Texas state law that strips a court of jurisdiction over a case if it dismisses an indictment. The prisoner filed a habeas petition claiming that the trial court lacked jurisdiction to hold his trial. The federal court would not consider this claim for habeas corpus, however, because the petitioner had not exhausted state procedures, which means he had not raised the claim in the state courts before petitioning federal court.

(d) You were convicted without using a certain procedure that the law now says is necessary to ensure the fundamental fairness of a trial.[86]

(e) An error occurred during trial that made the trial fundamentally unfair in violation of the Fourteenth Amendment.[87]

Remember that the above list does not include every possible example. If you think you experienced a violation of your rights not listed above, try to identify what kind of right may have been violated. Look carefully through a criminal procedure handbook in your prison library. Read the amendments to the Constitution carefully. Read many cases, especially cases dealing with a situation like yours. For example, if you were convicted of drug trafficking, read other cases involving drug trafficking. Start by looking at Supreme Court cases because the Supreme Court is the strongest authority on Constitutional rights and how those rights should apply to actual cases. The Supreme Court's decisions are what all the other courts look to when they make their own decisions. If you find a case that deals with something similar to the situation you experienced, then read the cases the court relies on to determine whether something was a violation or not. Shepardize[88] the case to find lower court decisions in your district that may give you more information on how violations are interpreted in your district. You should look out for a rule or standard used to review your violation. Then, you will develop your case around how the standard or rule was violated in your arrest, trial, or sentence. (This process is explained further in Section 2 below.)

Another approach is to start by getting an idea of what a constitutional violation looks like, and then examining what happened at your arrest, trial, and sentence to determine if there was a similar error. If you can, look at a transcript of your trial and pay close attention to where your lawyer raised an objection. You should look at any records relating to your case, including pretrial proceedings. Also, speak to family members, your trial attorney, and investigators to help discover violations. If you are unable to identify a violation, federal habeas will not be able to help you.

If you can identify violations, you should list every possible violation and every instance of each violation.

2. Standards and Tests for Claims of Violations

Once you have identified at least one possible violation that you think occurred, you will need to identify the standard the court uses to determine whether or not that violation happened. A standard is a rule or a test that sets out the requirements a defendant must prove in order to convince the court that a violation occurred. Most courts use a standard that is "well-established," and some may have multiple standards.

After you have identified the applicable standard, you will need to show the court that this standard was met in your case in order to convince the court that a violation of your rights has occurred. You do this by demonstrating to the court that the facts of your case match the requirements set out in the standard. This Section will explain how you find the standard and how to show the court that the standard was satisfied.

After you have proven that the standard was met (that you have suffered a violation), you will still need to show that the violation harmed you. To show harm, you will need to convince the court that the violation may have negatively affected the outcome of your trial (discussed in Part B(3) of this Chapter). Also, if you are a state prisoner, you will need to show that the state court was incorrect in failing to find that the violation occurred. If the state court ruled there was a violation but it did not harm you, you will need to show that its finding of "no harm" was unreasonable or contrary to federal law (discussed in Part B(4) of this Chapter).

(a) Finding the Standard the Court Uses for Your Violation

To find out the standard the court will use to judge your claim, you have to look at past cases in which the same claim was raised. If you are complaining about a violation from the list above, you should check the

86. See Part C(3)(b) ("Fundamental Fairness at Trial") of this Chapter.

87. *See* Riggins v. Nevada, 504 U.S. 127, 137–38, 112 S. Ct. 1810, 1816–17, 118 L. Ed. 2d 479, 490–91 (1992) (finding that the forced administration of an antipsychotic drug to defendant may have impermissibly violated his constitutional right to receive a fair trial by compromising the substance of his testimony, interaction with counsel, and comprehension); Young v. Callahan, 700 F.2d 32, 37 (1st Cir. 1983) (finding that a trial court committed a constitutional error by requiring petitioner to sit in prisoner's block rather than at counsel's table even though there was no finding that restraint was necessary and petitioner objected). *But see* Moore v. Ponte, 186 F.3d 26, 36 (1st Cir. 1999) (finding no constitutional error when it appeared the court had considered security concerns in deciding to make defendant sit in prisoner's block).

88. By *Shepardizing*, you can make sure that the law has not changed over time. See Chapter 2 of the *JLM* for an explanation of how to *Shepardize* a case.

cases referred to in the relevant footnotes. When you read these cases, you will be able to get an idea of which test the court will use to judge whether a violation has occurred. The court will usually say something like: "To prove a violation, the court should look to the following," "To prove a violation has occurred, the petitioner needs to satisfy the following requirements," or "In order to show the right was violated, petitioner has to meet the following test." This is not the exact language in every case, but it gives you an idea of what to look for to find the standard. Once you find the test courts use for the claim you are pursuing, the next step is to figure out if there is any way to present your claim to meet the test.

Here is an example of a violation and the standard for that particular violation: At your trial, you have a constitutional right to an attorney. If your trial lawyer was bad, you might have a claim that she did not represent you effectively at trial (called "ineffective assistance of counsel") in violation of the Sixth Amendment. The case that sets out the standard for this type of violation is *Strickland v. Washington*.[89] In *Strickland*, the court established a two-part test (now referred to as the *Strickland* test) to determine whether your right to effective counsel was violated. Under the first part, a court evaluates whether your lawyer's representation fell below an objective standard of reasonableness considering all the circumstances under prevailing (current) professional norms.[90] This means that the court will determine the reasonableness of what you are claiming that your attorney did, or failed to do, while representing you.[91]

Under the second part of the *Strickland* test, the court will determine whether you were prejudiced as a result of your lawyer's unreasonable representation.[92] *Prejudice* is an important concept in habeas. It means that there is a "reasonable probability"[93] that the result of your trial would have been different and more favorable to you if not for the violation (in this example, your lawyer's ineffective representation).[94]

To meet the standard required to show ineffective assistance of counsel, you must satisfy both parts of the *Strickland* test.[95] To summarize, the standard for ineffective assistance of counsel is: (1) that your lawyer acted unreasonably and (2) that these actions prejudiced you.

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89. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (affirming the denial of defendant's claim that his lawyer's advice at and before his death sentencing hearing constituted ineffective assistance of counsel requiring reversal of conviction or sentencing).

90. Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65, 80 L. Ed. 2d 674, 693–94 (1984).

91. Note that it is possible that even if your lawyer made mistakes or failed to provide you the best representation, the court may still find you have received *reasonable* representation because the representation was still above the standard the court uses to determine what is reasonable. In other words, you need to show that your attorney's actions were not reasonable in order to be successful in your habeas petition. *See, e.g.*, Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 1854, 152 L. Ed. 2d 914, 931 (2002) (holding that when counsel is faced with a tough choice, even if his or her decision was arguably mistaken, the court would start with "a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance" (quoting Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984))). Note that a habeas corpus appeal involving the same parties was heard by the Supreme Court in 2009. The holding of that decision does not affect the holding of this one.

92. Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65, 80 L. Ed. 2d 674, 693–94 (1984).

93. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984) (holding that the appropriate test for prejudice is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and defining "reasonable probability" as "a probability sufficient to undermine confidence in the outcome").

94. United States v. Lilly, 536 F.3d 190, 197 (3d Cir. 2008) (affirming the denial of a prisoner's habeas petition based upon ineffective assistance of counsel where the prisoner was not prejudiced by heeding his attorney's advice to waive a jury trial because the court found that there was sufficient evidence offered, including evidence of drug sales and the prisoner's own incriminating statements, for a jury to convict the prisoner even if he had a jury trial).

95. Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65, 80 L. Ed. 2d 674, 693–94 (1984). Though many prisoners may claim ineffective assistance of counsel, proving it is difficult. In Lockhart v. Fretwell, 506 U.S. 364, 369–70, 113 S. Ct. 838, 842–43, 122 L. Ed. 2d 180, 188–89 (1993), where trial counsel failed to raise an objection at sentencing, the Supreme Court held that to meet the *Strickland* "prejudice" test the defendant must show that the outcome would have been different *and* that the defendant was deprived of a fundamentally fair trial with a "reliable result." However, in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Supreme Court limited the effect of *Lockhart* on the *Strickland* test. In this case, the Supreme Court held that failure to develop mitigating evidence during a capital sentencing hearing, which included severe childhood neglect and abuse, borderline mental retardation, and a favorable prison record, violated the standard of *Strickland v. Washington*. Additionally, the court held that by applying the standard in *Lockhart* to this claim, the Virginia Supreme Court had erred by expanding the scope of when *Lockhart* applies. The Court stated that *Lockhart* applies in situations where the ineffectiveness of counsel does not deprive the defendant of a substantive or procedural right the defendant is entitled to by law. Williams v. Taylor, 529 U.S. 362, 391–93, 120 S. Ct. 1495, 1512–13, 146 L. Ed. 2d 389, 416–18 (2000); *see also* Stallings v. United States, 536 F.3d 624, 628 (7th Cir. 2008) (vacating and remanding to the district court a claim of ineffective assistance of

Other constitutional violations will have different standards that must be met to persuade the court that a violation occurred. There are so many different tests that the *JLM* cannot explain all of the standards; however, you can begin to learn about the standards that matter to you by reading and *Shepardizing*[96] the cases cited in the footnotes.

(b) Showing the Court Your Rights Have Been Violated

Once you have identified the standard that must be satisfied for your violation, you will need to show the court that your situation meets the standard. You must clearly explain how your federal rights were violated in the court proceedings being challenged. To get federal habeas relief, the facts must support each violation you claim. For example, if you claim that your right to counsel was violated, you should use the *Strickland*[97] standard. Under the *Strickland* standard, you must show (1) that you had a right to counsel at the time,[98] and (2) that adequate counsel was not provided. If you do not properly tell the court about the facts[99] of the violation and how they relate to the relevant standard, your allegations will not entitle you to relief and your claim may be dismissed.[100] Remember to give as many details about the violation as you can, but make sure that the facts that you choose to include are relevant to the violation. If a statement relevant to the violation you have claimed was made during your trial, find those exact words in the trial transcript and include them as supporting evidence in your habeas petition. Note in your petition the line and page in the transcript where the words can be found.

You may need to obtain additional information through public records and other means in order to support the facts of your case. This process is called *discovery* and is generally described in Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery." While a non-capital habeas petitioner is usually not entitled to discovery, you may obtain discovery under the Federal Rules of Civil Procedure[101] by showing "good reason" that it is needed. You can show good reason when the facts you are alleging, if correct, would entitle you to habeas relief. [102]

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counsel to determine whether there was "prejudice" as defined by *Strickland*—that is, whether the outcome at the district court level would have been different had counsel raised those claims).

96. By *Shepardizing*, you can make sure that the law has not changed. See Chapter 2 of the *JLM* for an explanation of how to Shepardize a case.

97. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). For a discussion of habeas petitions based on a violation of your right to counsel, see Part B(2)(a) of this Chapter.

98. If, for example, a statement you gave to an agent of the prosecution (police, marshals, jailers, bailiffs, etc.) was used against you at trial and you are claiming that the statement was illegal because you did not have counsel present, you must first show that you had a right to counsel at the time the information was given to that agent. *See* United States v. Henry, 447 U.S. 264, 274–75, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 124–25 (1980) (holding that the prosecution's use of a statement made by defendant to an undercover informant after the defendant was indicted violated his 6th Amendment right to counsel); Massiah v. United States, 377 U.S. 201, 205–06, 84 S. Ct. 1199, 1202–03, 12 L. Ed. 2d 246, 250 (1964) (ruling that a prisoner's statements to a government informant, where situation was intentionally created to induce incriminating statements after the prisoner's indictment and without counsel, should not be admitted at trial because it violated his right to counsel). *But see* Illinois v. Perkins, 496 U.S. 292, 299, 110 S. Ct. 2394, 2399, 110 L. Ed. 2d 243, 253 (1990) (ruling that a defendant's 6th Amendment rights are not violated by admission of confession he made to undercover agent while in jail because no charges had been filed on the subject of the confession and there was no right to counsel).

99. Courts refer to these facts as "elements" of the violation.

100. *See* McFarland v. Scott, 512 U.S. 849, 860, 114 S. Ct. 2568, 2574, 129 L. Ed. 2d 666, 676 (1994) (O'Connor, J., concurring in part and dissenting in part) ("[T]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claim."). Note that a *dissenting* opinion is an opinion disagreeing with the majority opinion. To the extent it disagrees with the opinion of the court, it does not have the force of law. It can be influential, however, and provide you some ideas on how to distinguish your case from the law and facts in the majority opinion. A *concurring* opinion agrees with the basic holding of the majority opinion, but may decide the case on different grounds, or provide alternative explanations for the basis of the holding. Again, concurring opinions can sometimes be very influential and provide different arguments that might help your case, but they do not have as much weight or persuasive force as majority opinions.

101. Rules Governing § 2254 Cases, Rule 6, 28 U.S.C. § 2254 and Rules Governing § 2255 Cases Rule 6, 28 U.S.C. § 2255 discuss discovery.

102. *See* Bracy v. Gramley, 520 U.S. 899, 908–09, 117 S. Ct. 1793, 1799, 138 L. Ed. 2d 97, 106 (1997) (finding that it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry if petitioner's allegations when fully developed may demonstrate that the petitioner is entitled to relief); United States v. Armstrong, 517 U.S. 456, 468–70, 116 S. Ct. 1480, 1488–89, 134 L. Ed. 2d 687, 701–02 (1996) (explaining what a defendant alleging racially discriminatory prosecutorial practices must do to establish entitlement to discovery); United States v. Bass, 536 U.S. 862, 863–64, 122 S. Ct. 2389, 2391–92, 153 L. Ed. 2d 769, 771–72 (2002) (reaffirming the *Armstrong* requirements

3. The Harmless Error Rule

Once you have established that a violation occurred, the next requirement is to show that you were harmed by the violation.[103] This is necessary because of the "harmless error rule," which says that even if your rights were violated, a court cannot grant you habeas unless you show that you were actually harmed by that violation (that is, the violation substantially affected the outcome of trial).

The standard for determining what counts as a "harmless error" in federal habeas petitions was established in *Brecht v. Abrahamson*.[104] In *Brecht*, the Supreme Court held that errors are not harmless unless they have a "substantial and injurious effect or influence in determining the jury's verdict."[105] The circuit courts are divided on how *Brecht* applies after the AEDPA amendment to 20 U.S.C. § 2245(d)(1).[106] The alternative standard for "harmless error" analysis was developed in *Chapman v. California*.[107] In *Chapman*, the Supreme Court held that a violation of a constitutional right is not harmless unless the court believes the error is harmless "beyond a reasonable doubt."[108] Some courts have interpreted AEDPA to require courts to first evaluate the violation under the *Chapman* reasonable doubt standard and then also evaluate the violation under the *Brecht* standard,[109] some circuits hold *Brecht* to be the relevant standard,[110] and others circuits hold that AEDPA supersedes the *Brecht* standard.[111] You will therefore have to show "what *effect* the error had or reasonably may … have had upon the jury's decision."[112] To put it another way, the success of your argument will depend on your being able to demonstrate that the error played a serious role in (or had a "substantial and injurious effect" on) the jury's decision-making process. Judges will likely consider the context when making a harmless error determination. Among the factors that might be considered are:

(1) The nature of the right at issue;
(2) How severely violations of that right are likely to affect the jury's deliberations;
(3) The character of the proceedings;
(4) What is at stake;
(5) The seriousness of the violation; and
(6) The frequency of the violation during trial.[113]

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to show entitlement to discovery and adding that raw statistics about overall arrest and charge patterns say nothing about charges brought against similarly situated defendants).

103. There are some constitutional violations that automatically survive the harmless error threshold. For these violations, you only need to show that the constitutional violation occurred, and the court will accept that you were harmed by the violation. You must do further research on the violation you are alleging in order to find out if you must show harmless error or only that the violation occurred. However, for any other constitutional violation, you need to show both that the constitutional violation occurred and also that it harmed you.

104. Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353, 363 (1993). This test is sometimes referred to as the *Kotteakos* test. Before *Brecht*, the *Kotteakos* test had been the test used in federal habeas proceedings of federal prisoners to determine whether a non-constitutional error was harmless. In *Brecht*, the court applied the *Kotteakos* test to all violations including constitutional violations. *See* Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

105. Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353, 373 (1993).

106. Gutierrez v. McGinnis, 389 F.3d 300, 304 n.3. (2d Cir. 2004).

107. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

108. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 711 (1967). In *Brecht*, the Supreme Court limited the application of the *Chapman* standard to cases on direct review and established the *Brecht* standard for habeas review.

109. *See* Allen v. Lee, 366 F.3d 319, 336–37, 342–44 (4th Cir. 2004); Aleman v. Sternes, 320 F.3d 687, 690–91 (7th Cir. 2003).

110. *See* Nevers v. Killinger, 169 F.3d 352, 371 (6th Cir. 1999); Robertson v. Cain, 324 F.3d 297, 306–07 (5th Cir. 2003); Herrera v. Lemaster, 301 F.3d 1192, 1200 (10th Cir. 2002); Sanna v. DiPaolo, 265 F.3d 1, 14 (1st Cir. 2001).

111. *See* Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000); Gutierrez v. McGinnis, 389 F.3d 300, 306 (2d Cir. 2004) (holding that when a state court has explicitly conducted a review of a constitutional violation for harmless error, 28 U.S.C. § 2254(d)(1) requires the habeas court to apply the *Chapman* standard).

112. Brecht v. Abrahamson, 507 U.S. 619, 643, 113 S. Ct. 1710, 1724, 123 L. Ed. 2d 353, 376 (1993) (Stevens, J., concurring) (internal citation omitted).

113. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). *Brecht* also included an exception, stating that a deliberate and especially serious error, or one combined with a pattern of prosecutorial misconduct, might warrant habeas relief even if it did not "substantially influence" the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 1722 n.9, 123 L. Ed. 2d 353, 373 n.9 (1993); *see also* Duckett v.

Judges in different districts or circuits may come to different conclusions about whether certain errors meet the "substantial and injurious effect" standard. But at least one standard applies to all judges: if the federal judge reviewing your case is in "grave doubt," meaning he or she cannot decide whether or not an error had a "substantial and injurious effect," he or she must find that the error was not harmless.[114] In other words, you get the benefit of the doubt, as long as the judge has a strong doubt about the effect of the error. Therefore if the judge cannot determine the effect of the error, your habeas petition has satisfied the requirement of showing that you were harmed and that the harm might have affected the outcome of the case.

The *Brecht* "harmless error" standard does not always apply in federal courts when the court is reviewing a state court's determination that an error was harmless. One of the most important changes AEDPA[115] made to habeas corpus law is that it created a more deferential standard of review for federal courts hearing challenges to state court decisions.[116] Specifically, AEDPA provides that when a federal court is determining how the state court applied the law in your state collateral attack, it must only hold the state court's decision to a standard of unreasonableness.[117] This means that if the state court held that the constitutional error in your case was harmless, your habeas petition will have to convince the federal court that the state court's decision that the violation was harmless was *unreasonable*.[118] This is more difficult than just convincing a court that the error caused harm. To learn more about the standard that AEDPA imposes for federal habeas review of state court decisions, see Part B(4) of this Chapter.

The harmless error rule is a defense that the prosecutor can raise to defeat your petition for habeas relief. This means that once you have shown that a violation occurred, it is the prosecution's responsibility to raise the issue of a harmless error (or, in other words, claim that you were not actually harmed).[119] If the prosecution fails to raise the harmless error issue, it is waived, and the court will assume that the violation caused harm. The prosecution will probably raise this defense; therefore, you should explain in your petition how the error harmed you and carefully show how it most likely affected the jury's decision-making. If you do so successfully, your habeas petition will survive the harmless error test.

To have a better idea of when you should argue that the error was not harmless, it might help to see a list of examples that courts have found to be *harmless* errors:

(1) Where the defendant's right to cross-examine the victim was limited, but not completely denied, the error was harmless.[120]

Mullin, 306 F.3d 982, 993 n.3 (10th Cir. 2002) (finding that misconduct of the prosecutor does not put error into *Brecht*'s "footnote nine exemption"); Hardnett v. Marshall, 25 F.3d 875, 879–80 (9th Cir. 1994) (holding that the key consideration to whether the *Brecht* "footnote nine exemption" will be applicable is whether the integrity of the proceeding was so infected that the entire trial was unfair). As of 2004, however, no court has found for a defendant based on these details.

114. O'Neal v. McAninch, 513 U.S. 432, 435, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947, 951 (1995). However, the federal judge does not need to be convinced beyond a reasonable doubt that the error was harmless. *See* Fry v. Piller, 551 U.S. 112, 121–22, 127 S. Ct. 2321, 2328, 168 L. Ed. 2d 16, 24 (2007).

115. *See* footnote 8.

116. The state court's decision must have "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law." 28 U.S.C. § 2254(d)(1) (2006); *see* Gutierrez v. McGinnis, 389 F.3d 300, 304 (2d Cir. 2004) ("[F]ederal courts sitting in habeas review of state conditions must grant a measure of deference to claims 'adjudicated on the merits' by state courts").

117. An unreasonableness standard means that the court will only look at whether the lower court's decision was *unreasonable*. This means that if the lower court did not find a constitutional error, but the reviewing court does find a constitutional error, the reviewing court cannot reverse the lower court's decision unless the lower court was unreasonable in not finding a violation.

118. *See* Mitchell v. Esparza, 540 U.S. 12, 18, 124 S. Ct. 7, 12, 157 L. Ed. 2d 263, 271 (2003) ("[The federal court] may not grant [a] habeas petition … if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless error review in an 'objectively unreasonable' manner." (quoting Lockyer v. Andrade, 538 U.S. 63, 75, 123 S. Ct. 1166, 1174, 155 L. Ed. 2d 144, 158 (2003))).

119. *See* United States v. Dominquez Benitez, 542 U.S. 74, 82 n.7, 124 S. Ct. 2333, 2339 n.7, 159 L. Ed. 2d 157, 167 n.7 (2004) (holding that using the *Brecht* standard means that the government has "the burden of showing that constitutional trial error is harmless"); Sanders v. Cotton, 398 F.3d 572, 582 (7th Cir. 2005) (holding that the harmless error rule was waived because the state did not raise it in district court); Holland v. McGinnis, 963 F.2d 1044, 1057–58 (7th Cir. 1992) (holding that the state waived the harmless error defense by waiting until oral argument before the Court of Appeals to present the defense).

120. Pettiway v. Vose, 100 F.3d 198, 202 (1st Cir. 1996) (finding that a trial judge's limitation of the defendant's right to cross-examine the victim in a child molestation sexual assault case did not have a "substantial and injurious" effect because other evidence in the case was so overpowering).

(2) The trial court's failure to issue a jury instruction on the lesser included offense of kidnapping in a felony murder case did not have a "substantial and injurious" effect on the jury's verdict.[121]
(3) Where the federal trial court failed to inform the defendant of his right to appeal his conviction, but the defendant was already aware of this right, the error was harmless.[122]
(4) It was harmless error when the trial court admitted evidence that was obtained in violation of the defendant's Fifth Amendment rights because the evidence was unrelated to the charges he was appealing.[123]

The following are some situations where courts have found errors to be *not* harmless (harmful):

(1) The defense attorney represented two defendants charged with possession of drugs. Both defendants wanted to assert that someone else owned the drugs. The two defendants had conflicting interests because they each may have implicated the other defendant as part of their defense strategy. The error was not harmless because the attorney represented the habeas petitioner with a conflict of interest.[124]
(2) It was not harmless error when a juror lied about his background to get on the jury and made numerous comments that called into doubt his impartiality.[125]
(3) The trial court allowed testimony from a co-defendant about his interpretation of the defendant's knowledge of fraudulent behavior. The appellate court reversed, finding the admission of this testimony was not harmless error because the testimony related to the case's "central disputed issue" and because of the government's relatively weak case. Since the government's case was weak, mostly circumstantial, and the government's opening and closing statements relied heavily on the co-defendant, the testimony of the co-defendant was found to be "vitally important."[126]

In a few situations, the court will make an exception to the harmless error rule and will assume that you were harmed because of the nature of the violation. These violations are called "*per se* prejudicial."[127] *Per se* prejudicial violations (sometimes called structural errors) are errors that the court will always consider to have violated your right to a fair trial. Therefore, they are not subject to the harmless error rule, and you do not have to prove to the court that you were harmed.[128] *Per se* prejudicial violations include[129] "the total deprivation of the right to counsel, the denial of the right to an impartial judge,[130] unlawful discrimination in the grand-jury selection process,[131] the denial of the right to self-representation at trial,[132]

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121. Villafuerte v. Stewart, 111 F.3d 616, 624–25 (9th Cir. 1997) (stating that the lower court's error did not have a "substantial or injurious" effect on the verdict, and adding that the error "was at most harmless and more likely irrelevant").

122. Peguero v. United States, 526 U.S. 23, 24, 119 S. Ct. 961, 963, 143 L. Ed. 2d 18, 22 (1999) (holding that no harm is caused when a district court fails to advise a defendant of his right to appeal if the defendant knew of his right, and ruling that the court's error did not entitle defendant to habeas relief).

123. United States v. Suarez, 263 F.3d 468, 484 (6th Cir. 2001).

124. McFarland v. Yukins, 356 F.3d 688, 705–14 (6th Cir. 2004) (holding that the court's error was prejudicial where the defendant "was forced, over her objection, to go to trial with counsel who was actively representing a co-defendant").

125. Green v. White, 232 F.3d 671, 677–78 (9th Cir. 2000).

126. United States v. Kaplan, 490 F.3d 110, 123–24 (2d Cir. 2007).

127. A court rarely finds a violation *per se* prejudicial. If you find a case where a court described the violation you are claiming as a *per se* prejudicial violation, a structural violation, or an automatic reversal violation, you should cite the case and show the court how your violation is similar and why it deserves the same treatment as the violation described in that case. Here are some examples of when courts have found violations *per se* prejudicial: Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985, 999 (2000) (when the petitioner is effectively denied the right to an appeal due to ineffective assistance of counsel); Edwards v. Balisok, 520 U.S. 641, 647, 117 S. Ct. 1584, 1588, 137 L. Ed. 2d 906, 914 (1997) (when the trial judge is not impartial); Bell v. Cone, 535 U.S. 685, 695–96, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914, 927 (2002) (when petitioner is denied counsel at a "critical stage" of the proceedings).

128. *See* Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 332 (1991) ("[S]tructural defect[s] affect[] the framework within which the trial proceeds, rather than simply … error[s] in the trial process.").

129. This list is not complete. There are other instances where the court will find the error *per se* prejudicial (a structural error), and your federal appeals court may include more instances than the Supreme Court.

130. Richardson v. Quarterman, 537 F.3d 466, 470–79 (5th Cir. 2008) (denying a habeas petition alleging that a judge had to remove himself from a murder prosecution because the appearance of bias arising from his wife's acquaintance with the victim was only a harmless error and not a structural error requiring automatic reversal).

131. Vasquez v. Hillery, 474 U.S. 254, 262–64, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598, 609 (1986).

… the denial of the right to a public trial, [and] … the giving of defective jury instructions on reasonable doubt."[133] However, you should always show the court how you were harmed by a violation, even if it was a *per se* prejudicial violation, to help you in your petition. You should only use the argument that a violation was *per se* prejudicial to strengthen your argument that you were harmed by the violation.[134]

In the vast majority of cases, the court will not assume that you were harmed by the violation (will not find that it was a *per se* prejudicial violation), and you will be responsible for showing the harm that you suffered. This element of your habeas petition is just as important as showing that a violation occurred because if the court finds that the violation was harmless, the court will not grant habeas relief. Thus, it is very important that you establish in your pleading how the error in your case negatively affected the outcome of your trial and caused you harm.

4. AEDPA Standard of Relief: Showing the Federal Court that the State Court Was Incorrect in Refusing to Grant You Relief[135]

Once you have shown the court that your rights were violated and the violation was harmful, state prisoners will also need to convince the federal court that the state court was incorrect in failing to find that your rights were violated and that you were harmed by the violation. In some cases where the state court ruled on both of these elements, you will have to show the federal court that the state court was incorrect on both counts. (Remember, you must present your claims to a state court first, so you will only be filing a federal habeas petition if the state court has denied you relief.)

In 1996, AEDPA altered 28 U.S.C. § 2254 and set a new "standard of review" for habeas relief for state court prisoners. A standard of review is the test that the federal court will use to decide whether to overrule the state court's decision denying you relief. Under AEDPA, you must prove that the state court decision rejecting your claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[136] or that it was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[137] *This is a very high standard* and one that is not easily met. The federal courts are hesitant to overturn state court decisions. This means that to get federal habeas relief you cannot just show the federal court that the state court was wrong—you must show that the state court was "unreasonable" or "contrary" to the Supreme Court's interpretation of federal law.

How the federal court will apply the AEDPA standard of review will depend on how the state court handled your state collateral attack.[138] If the state court made a determination about certain issues, then the federal court will apply the AEDPA standard of review to the state court's decision-making process. The federal court will look to see if the state court's decision was "unreasonable" or "contrary" to the Supreme Court's interpretation of the law. In addition to demonstrating that the state court's decision-making process was incorrect, you still need to show that the state court's ultimate determination was incorrect using facts.

For example, if the state court rejected your collateral attack because it found that a constitutional violation did not occur, and it did not discuss the issue of harmless error, then the AEDPA standard of

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132. McKaskle v. Wiggins, 465 U.S. 168, 177–178, n.8, 104 S. Ct. 944, 950–51, n.8, 79 L. Ed. 2d 122, 133 n.8 (1984); *See also* Johnstone v. Kelly, 808. F.2d 214, 218 (2d Cir. 1986) ("[V]iolation of a defendant's right to proceed *pro se* requires automatic reversal of a criminal conviction.").

133. United States v. Allen, 406 F.3d 940, 944 (8th Cir. 2005) (citing Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 1264, 113 L. Ed. 2d 302, 331 (1991)); *see also* Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 45 (1999) (noting structural errors subject to automatic reversal are (1) a complete denial of counsel, (2) biased trial judge, (3) racial discrimination in selection of grand jury, (4) denial of self-representation at trial, (5) denial of public trial, and (6) defective reasonable-doubt instruction).

134. For example, after you show the court that the error was harmful, you might say "even if this error were harmless, I would still be entitled to relief because the error was a *per se* prejudicial violation that affected my substantial rights." *See*, *e.g.*, Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35, 46 (1999) (stating that there is a "limited class of fundamental constitutional errors that … are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome").

135. The standard of review discussed in this Section only applies to state prisoners. For federal prisoners, appellate courts review questions of law *de novo*, and questions of fact for clear error. This means that reviewing courts will apply their own judgments to question of law, but "the factual findings of the courts are presumed to be correct." Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999); *see*, *e.g.*, Dorsey v. Chapman, 262 F.3d 1181, 1185 (11th Cir. 2001) (ineffective assistance of counsel claim).

136. 28 U.S.C. § 2254(d)(1) (2006).

137. 28 U.S.C. § 2254(d)(2) (2006).

138. See Part A(1) (of this Chapter) for an explanation of "collateral attack."

review will only apply to establishing the constitutional violation. Showing that the state court was incorrect will be subject to the AEDPA standard of review, so you will have to prove that the state court was "unreasonable" or "contrary" to the Supreme Court's interpretation of federal law. This means that you will have to show the federal court that the state court was incorrect in failing to find that the violation occurred, in addition to showing that the constitutional violation occurred (by showing that the action met the appropriate standard, as discussed in Part B(2)). If the state court did not rule on the next element of the habeas petition, harmless error, then you will not need to apply the AEDPA standard of review to the harmless error issue. In this example, because the state court never ruled on the harmless error issue, the federal court will look at the harmless error issue *de novo*, which means that the federal court will look at the issue as if for the first time. If the state court found that a violation occurred, but that it was harmless, the federal court will apply AEDPA's unreasonableness standard of review to the harmless error issue. Also, the state court may have found that there was no constitutional violation but may have ruled on the harmless error issue anyway. Because in such a situation the state court ruled on both elements of the habeas petition, the federal court has to apply the AEDPA standard of review to both elements.

Occasionally state prisoners present habeas claims to federal courts that have not been previously presented to state courts. This happens when the claim falls under one of the exceptions to the exhaustion rule. You should see Part D(2) of this Chapter below for a detailed discussion of the state exhaustion rule. In these very rare circumstances, the AEDPA standard of review will not be used at all. If your claim falls under one of the exceptions to the exhaustion rule, you only need to show the federal court that your rights were violated and that the violation affected the outcome of the trial. Once you have shown this, you will have completed the substantive part of your habeas claim. However, there are still many procedural issues you will have to address to be granted habeas relief. These procedural issues are discussed below in Part D ("Procedures for Filing a Petition for Habeas Corpus") of this Chapter.

Assuming the state court has ruled on your claim, it will be subject, at least in part, to the AEDPA standard of review. This Section discusses this standard in more detail. Subsection (a) of this Section will discuss how to use the first test—"contrary to, [or an] unreasonable application of, clearly established Federal law as determined by the Supreme Court." Subsection (b) will discuss the second test—"unreasonable determination of facts in light of the evidence presented."

(a) "Contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"[139]

The Supreme Court explained this test in *Williams v. Taylor*.[140] In *Williams*, the petitioner claimed his attorney had provided ineffective assistance of counsel. The Court held that Mr. Williams had shown his counsel's performance was ineffective and went on to consider whether habeas relief should be granted under this standard.[141] The Court first held that in order to be successful, a petitioner must show that the claimed violation was based on federal law that was clearly established by the Supreme Court *at the time* the state court decided these claims. This means that before the court will consider your claim, you must show that the law you are relying on is not new and that the Supreme Court itself has interpreted the law at some point in the past.[142] Most of the examples of constitutional violations listed above are not new laws and would qualify for relief. There are some very limited exceptions that allow new law to be used. To learn more about these exceptions read Part C(3) ("Exceptions to the New Laws Rule") of this Chapter.

If you can show that you are relying on clearly established federal law, the next step is to show either that the state or trial court's decision was contrary to that federal law, or that the state or trial court applied the law in an unreasonable manner. Remember, the point of the federal habeas petition is to give the federal court a chance to correct a wrong decision by the state or trial court.

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139. Williams v. Taylor, 529 U.S. 362, 402–03, 120 S. Ct. 1495, 1518, 146 L. Ed. 2d 389, 424 (2000).

140. Williams v. Taylor, 529 U.S. 362, 384–90, 120 S. Ct. 1495, 1508–11, 146 L. Ed. 2d 389, 412–16 (2000).

141. In determining that Mr. Williams' counsel was ineffective, the Court found that Mr. Williams had met the *Strickland* standard. Mr. Williams showed a violation of clearly established federal law and/or the Constitution, found the right standard, and showed the Court that he had suffered harm from this violation. To learn more about the *Strickland* standard, see Part B(2) of this Chapter. For a discussion of the "clearly established" standard, see Part B(1) of this Chapter. To learn how to find the correct standard, see Part B(2) of this Chapter, and for an explanation of how to establish that a violation caused harm, see Part B(3) of this Chapter.

142. For an explanation of how to establish that the law you are relying on is not new, see Part C(2) ("New Laws: The *Teague* Rule") of this Chapter.

(i) "Contrary" Standard

The first way to show that the decision was wrong is to show that the court's decision was contrary to clearly established federal law.[143] This is a very difficult standard to meet. In *Williams*, the Court held that this clause meant that habeas relief is warranted if the court "applies a rule that contradicts the governing law set forth in our cases."[144] This means that the court must have applied the wrong standard in a case or interpreted that standard incorrectly. For example, in an ineffective assistance of counsel case, the governing standard is the *Strickland* standard.[145] If the court applied a standard that was different than the *Strickland* standard, then it has applied a standard "contrary" to clearly established law, and relief may be warranted. Also, if the court interpreted *Strickland* incorrectly, then the decision would be contrary to federal law, and relief could be granted.[146] That said, it is difficult to persuade an appeals court that a state court applied the law in a contrary way.[147]

The other way to show that your state court's decision was contrary to federal law is to show that the Supreme Court considered a case very similar to yours, and it reached a different conclusion than your state court.[148] This means that if you can find a Supreme Court case with very similar facts to your case, and the state court did not rule in the same way as the Supreme Court, you might be entitled to relief.[149] In *Williams*, however, the Court stressed that if the correct legal standard is applied to a claim and there is no Supreme Court case with similar facts, then the state court decision rejecting the claim is not "contrary" to federal law.[150]

So, under this part of the test, in order to show that the decision rejecting your claim was contrary to federal law, you must do one of three things: (1) show that the court relied on the wrong standard in

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143. It is important to note that *dicta* (plural of *dictum*) are not considered clearly established federal law. Only Supreme Court holdings are considered law clearly established by the Supreme Court. Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 429 (2000).

144. Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389, 425 (2000) (O'Connor, J., concurring).

145. Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984) (declaring that the standard for establishing ineffective assistance of counsel is whether the attorney's performance was objectively reasonable and whether deficient performance prejudiced the defense).

146. In *Williams*, the Court found that the state court decision was contrary to federal law because the court used the test for ineffective assistance of counsel found in Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), instead of the *Strickland* standard, which should have been used. Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416–17 (2000) (O'Connor, J., concurring).

147. *See*, *e.g.*, Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 1849, 152 L. Ed. 2d 914, 926 (2002) (observing that AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law").

148. Williams v. Taylor, 529 U.S. 362, 406, 120 S. Ct. 1495, 1519–20, 146 L. Ed. 2d 389, 426 (2000) ("A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."); *see also* Ramdass v. Angelone, 530 U.S. 156, 165–66, 120 S. Ct. 2113, 2119–20, L. Ed. 2d 125, 135–36 (2000) (reiterating that "a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts").

149. *See* Lockyer v. Andrade, 538 U.S. 63, 73, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144, 156 (2003) (explaining that if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result than the Supreme Court, the state court's decision is "contrary" to federal law); *see also* Cockerham v. Cain, 283 F.3d 657, 663 (5th Cir. 2002) (finding jury instructions were contrary to federal law because the same instructions had been found to be unconstitutional by the Supreme Court in Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)).

150. Williams v. Taylor, 529 U.S. 362, 385–86, 120 S. Ct. 1495, 1508–09, 146 L. Ed. 2d 389, 412–13 (2000); Ellis v. Norris, 232 F.3d 619, 623 (8th Cir. 2000) (concluding that the state court's decision was not contrary to clearly established federal law because the facts involved "materially distinguish[ed] it from any relevant Supreme Court precedent"); Jones v. Stinson, 229 F.3d 112, 119 (2d Cir. 2000) (holding that a state court decision was not contrary to Supreme Court precedent because it did not apply a rule of law contradicting precedents and did not contain "materially indistinguishable" facts from a Supreme Court case that reached a contrary result); Sanders v. Easley, 230 F.3d 679, 686 (4th Cir. 2000) (holding that a state court decision was not "contrary to" established Supreme Court precedent when the state court correctly identified the governing standard and "articulated specific considerations similar to those recognized by the Supreme Court"). *But see* Lockyer v. Andrade, 538 U.S. 63, 73, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144, 156 (2003) (explaining that if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result than the Supreme Court, the state court's decision is "contrary" to federal law).

determining whether a violation had occurred;[151] (2) show that the court chose the right standard, but then applied it incorrectly to your case; or (3) point to a Supreme Court case with similar facts and claims to your case, in which the Supreme Court ruled differently than the state court in your case. Put simply, to prove that you deserve relief, you must point to a violation of a federal right,[152] identify the standard that applies to that violation,[153] show the court that the violation in your case meets that standard,[154] and then argue that the state court used the wrong standard or applied the standard incorrectly to the facts in your case.

(ii) Unreasonable Application Standard

If the state court used the correct standard and the decision rejecting your claim of a violation of a federal right is not contrary to federal law, you may still be able to get relief under the second part of the test. This part of the test applies either if the state court used the right standard for the violation you are claiming but applied it to the facts of your case in an unreasonable way, or if the state court did not use the correct standard for your violation.[155] There are times when this standard will overlap with the "contrary to" standard,[156] and *you should always argue that your case meets both standards*. To show that the state court decision was an unreasonable application of federal law, you have to show that the state court was "objectively unreasonable" in the way it applied the standard.[157]

You should show that there is specific Supreme Court precedent that required the state court to reach a result that it did not reach. The more specific the Supreme Court precedent is, the more recent it is, and the more similar it is to your case, the more closely the state court will have to follow the precedent.[158] Therefore, you will strengthen your argument that the state court was unreasonable by showing the federal court that the Supreme Court precedent was specific and required a specific outcome in your case. The Court has said that an "unreasonable" application of federal law is more than just an "incorrect" application of federal law.[159] State courts can go so far as to be "imprecise" and yet still apply the law reasonably.[160] Therefore, you cannot just show the federal court that the state court was wrong—you must show them something more.[161]

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151. To find out what standard the court should have applied, see Part (B)2 ("Standards and Tests for Claims of Violations") of this Chapter.

152. See Part B(1) ("Examples of Constitutional Violations") of this Chapter.

153. See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter.

154. See Part B(4) ("Standards for Getting Relief") of this Chapter.

155. Williams v. Taylor, 529 U.S. 362, 409, 120 S. Ct. 1495, 1521, 146 L. Ed. 2d 389, 427 (2000) (explaining that the "unreasonable application" standard is met when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case"); *see* Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 2534–35, 156 L. Ed. 2d 471, 484 (2003) (stating that unreasonable application of federal law is when a state court "has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced'" (quoting Lockyer v. Andrade, 538 U.S. 63, 76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144, 158 (2003)); Ramdass v. Angelone, 530 U.S. 156, 166, 120 S. Ct. 2113, 2120, 147 L. Ed. 2d 125, 136 (2000) ("The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.").

156. Williams v. Taylor, 529 U.S. 362, 384–86, 120 S. Ct. 1495, 1508–09, 146 L. Ed. 2d 389, 412–13 (2000) (explaining that the two standards are not mutually exclusive and anticipating that claims will be brought under both).

157. Williams v. Taylor, 529 U.S. 362, 409–10, 120 S. Ct. 1495, 1521–22, 146 L. Ed. 2d 389, 428 (2000) (explaining that a showing of "objective unreasonableness" is not defeated by the fact that one jurist has applied the law in the same manner as the state court); *see also* Woodford v. Visciotti, 537 U.S. 19, 24–25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279, 286 (2002) (holding that it is not enough for a federal court to find a state court applied federal law incorrectly; rather, the prisoner must show that the state court applied federal law in an *objectively unreasonable* manner).

158. *See* Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 938, 951 (2004) (concluding the more general the rule being applied, the more leeway the state courts have in making their decisions).

159. Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389, 428 (2000).

160. *See* Woodford v. Visciotti, 537 U.S. 19, 23–24, 123 S. Ct. 357, 359, 154 L. Ed. 2d 279, 285–86 (2002) (holding that while the California Supreme Court was imprecise in how it applied the *Strickland* test, it was not unreasonable).

161. *See* Hameen v. Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (stating that a federal court may not grant habeas relief simply because the state court applied federal law erroneously or incorrectly); Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) ("We cannot say that [the state court's] finding was objectively unreasonable, even if we might have found differently."); Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) (stating that "some increment of incorrectness beyond error is required" but "the increment need not be great"); *see also* Middleton v. McNeil, 541 U.S. 433, 437–38, 124 S. Ct. 1830, 1832–33, 158 L. Ed. 2d 701, 707, 72 U.S.L.W. 3687, 17 Fla. L. Weekly Fed. S 265 (2004) (holding that the

It is hard to define what more you would need to show. You should try to show that the state court's analysis and reasoning were flawed, as well as its conclusion. One way to think of it is that you should show that the court's point of view is different from how most people would see the situation, and that it would be hard for a reasonable person to understand how the state court came to its decision. If you can show a significant error in the court's reasoning, you may be able to show that its actions were unreasonable.[162]

Circuits have different interpretations as to what this "unreasonable" standard means. You should check how your circuit defines "unreasonable" in this context by Shepardizing the main Supreme Court case on this point, *Williams v. Taylor*,[163] and finding a case in your circuit interpreting *Williams.*

(b) "Unreasonable determination of facts in light of the evidence presented in the State court proceeding"

This Subsection discusses a different standard for getting habeas relief. As you will recall, Part B(4)(a) of this Chapter reviews how to get habeas relief if the state court determination of your claim rested on incorrect law or law that was unreasonably applied. This Subsection is not for when the state court gets the *law* wrong, but rather when the state court gets the *facts* of your case wrong. This means that the state court determined the right standard for your case, but (1) did not believe some of the evidence that was presented;

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state court was not unreasonable when it upheld jury instructions, even though an incorrect instruction was given, because the jury was given the correct instructions at least three other times).

162. *See* Wiggins v. Smith, 539 U.S. 510, 528, 123 S. Ct. 2527, 2538, 156 L. Ed. 2d 471, 489 (2003) (finding that a "clear factual error" in a state court's analysis "highlight[ed] the unreasonableness" of the court's decision); *see also* Rompilla v. Beard, 545 U.S. 374, 389, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d 360, 376 (2005) (finding that the state court's "fail[ure] to answer the considerations [the Supreme Court] ha[s] set out" amounted to an unreasonable decision on a claim of ineffective assistance of counsel); Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir. 2000) (concluding that the state court's decision was a "unreasonable application" of the test in *Strickland*, because it required petitioner to meet a higher standard—certainty that the results of the proceeding would have been different—to establish an ineffective assistance of counsel claim, rather than the preponderance of the evidence standard required under *Strickland*); Washington v. Hofbauer, 228 F.3d 689, 707 (6th Cir. 2000) (concluding that the state court's application of *Strickland* was objectively unreasonable where, among other things, the state court incorrectly cited Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 144, 158 (1986), to support its incorrect conclusion that counsel was not ineffective in failing to object to prosecutorial misconduct in the closing argument).

163. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The following is a list of sample cases, by circuit, interpreting the unreasonable application standard. *See* Jackson v. Edwards, 404 F.3d 612, 628 (2d Cir. 2005) (holding that a trial court applied the law unreasonably by not instructing the jury about a justification defense); Kibbe v. Dubois, 269 F.3d 26, 37, 39 (1st Cir. 2001) (finding that the state court's decision was objectively reasonable because it fell within "the universe of plausible, credible outcomes," and stating that multiple contradictory, reasonable interpretations are likely when there are unresolved legal issues); Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001) (finding that the Appellate Division's decision was "egregiously at odds with the standards of due process propounded by the Supreme Court" and fit within the "unreasonable application" clause); Hameen v. Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (following *Williams* by requiring more than error to find unreasonableness); Jermyn v. Horn, 266 F.3d 257, 312 (3d Cir. 2001) (finding that defendant's counsel had been ineffective for failing to conduct adequate investigation and that the state court's decision to the contrary was objectively unreasonable); Bell v. Jarvis, 236 F.3d 149, 162 n.9 (4th Cir. 2000) (holding that the state court's rejection of the plaintiff's ineffective counsel claim was not objectively unreasonable, and explicitly stating that the "unreasonable" standard should not be equated with the "clearly erroneous" standard); Martinez v. Johnson, 255 F.3d 229, 243–44 (5th Cir. 2001) (distinguishing the objective standard of unreasonableness from the "debatable among reasonable jurists" standard, and holding that the court's decision was not objectively unreasonable because a rational trier of fact could come to the same conclusion); McFarland v. Yukins, 356 F.3d 688, 714 (6th Cir. 2004) (finding that requiring the defendant to go to trial with an attorney with a conflict of interest was contrary to clearly established federal law); Boss v. Pierce, 263 F.3d 734, 742 (7th Cir. 2001) (holding that the appellate court's decision was unreasonable and noting that to determine unreasonableness, the court asks "whether the decision is at least minimally consistent with the facts and circumstances of the case or if it is one of several equally plausible outcomes … [and only granting habeas] if the determination is at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary as to be unreasonable" (internal quotations omitted)); Miller v. Dormire, 310 F.3d 600, 604 (8th Cir. 2002) (finding that state court's application of the harmless error rule to defense attorney's waiver of jury trial without defendant's consent was contrary to clearly established federal law because federal law holds that denial of a jury trial is a "structural" error and always harmful); Byrd v. Lewis, 566 F.3d 855, 866 (9th Cir. 2009) (finding that an error in jury instructions is not "structural" when it "affects only an element of the offense, a permissible evidentiary inference, or a potential theory of conviction," rather than "the overarching reasonable doubt standard of proof"); Thomas v. Gibson, 218 F.3d 1213, 1220 (10th Cir. 2000) (applying the Supreme Court's distinction between erroneous and unreasonable); Brown v. Head, 272 F.3d 1308, 1313 (11th Cir. 2001) (holding that the lower court decision was not objectively unreasonable and noting that it is the "objective reasonableness, not the correctness *per se*, of the state court decision that we are to decide").

(2) interpreted some of that evidence incorrectly and based a ruling on this misinterpreted evidence; or (3) ignored legally relevant facts that it needed to consider in order to reach the correct result.

If the federal court determines that the state court unreasonably interpreted the facts of your case and based its decision on unreasonably interpreted facts, then it can grant habeas relief.[164] On the other hand, if it determines that the state court was reasonable in its determination of the facts, it cannot grant relief. A reviewing court will defer to the trial court and start with the assumption that the state court based its decision on a correct reading of the facts.[165] It is up to you to prove that the court did not read the facts correctly because it either ignored some evidence or interpreted some evidence incorrectly. You must then prove that the state court decision would have been different if the court had properly considered and applied all of the relevant facts.

The first step is to show the federal court that there *was* a determination of facts—for example, at an evidentiary hearing or at credibility determinations where the court chose to believe one witness over another. You cannot rely on this standard for relief if no facts were determined by the state court. However, if the state court did not determine any facts, but should have, you might be entitled to relief by arguing that a failure to find facts at all is actually an unreasonable determination of facts.[166]

The second step is to prove that the state court determinations of fact were unreasonable. One way to do this is to show that the fact-finding procedure the court used was inadequate.[167] This means that the court made conclusions without looking at the evidence you presented, or did not take into consideration some of the important evidence you presented. This part of the inquiry deals with how the state court went about making factual determinations, not what those determinations were.

The third step in proving that the state court determinations of fact were unreasonable is to show that the determinations the state court made were substantively unreasonable. This means you have to show that the state court's determination of facts was unreasonable and not at all supported by the evidentiary record.[168] The standard for doing this is "clear and convincing" evidence.[169] This means you cannot just make

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164. *See* Torres v. Prunty, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (finding that "the state courts' factual determinations were unreasonable" and that the defendant "rebutted the presumption of correctness of [the state courts'] findings by clear and convincing evidence").

165. 28 U.S.C. § 2254(e)(1) (2006) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."); *see also* Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000) (holding that the presumption of correctness applies to the state court's implicit factual findings as well as express findings); Bottoson v. Moore, 234 F.3d 526, 534 (11th Cir. 2000) (finding that "[w]hen there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact" to which the presumption of correctness is applied).

166. *See* Taylor v. Maddox, 366 F.3d 992, 1000–01 (9th Cir. 2004) (finding that a state court's determination of facts is unreasonable if no finding was made and the court "should have made a finding of fact but neglected to do so"); Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003) (finding that the state court's "factual" findings were unreasonable when the court made the findings without holding an evidentiary hearing); Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir. 2000) (refusing to give the state court's "factual findings" a presumption of correctness because they were not factual findings but only conclusions).

167. *See* Caliendo v. Warden of Cal. Men's Colony, 365 F.3d 691, 698 (9th Cir. 2004) (deciding that there is no deference given to a state court's fact findings when those findings were "arrived at through the use of erroneous legal standards"); Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003) (finding lack of an evidentiary hearing inadequate to find "facts"); Bottoson v. Moore, 234 F.3d 526, 533–36 (11th Cir. 2000) (determining that 10 days of evidentiary hearings and contradicting expert witnesses are adequate to support findings of fact); Francis S. v. Stone, 221 F.3d 100, 116 (2d Cir. 2000) (finding an "extensive" record adequate to credit one expert witness over another).

168. *See* Miller-El v. Dretke, 545 U.S. 231, 240–65, 125 S. Ct. 2317, 2325–40, 162 L. Ed. 2d 196, 214–30 (2005) (finding that the state court's finding on racial discrimination in jury selection was an unreasonable determination of facts "in light of the evidence presented"); Miller v. Dormire, 310 F.3d 600, 603–04 (8th Cir. 2002) (determining that the state court's finding that defendant had waived his right to a jury was unreasonable when the record was "devoid of any direct testimony from [defendant] regarding his consent to waive trial by jury"); Torres v. Prunty, 223 F.3d 1103, 1109 (9th Cir. 2000) (concluding that state court's factual determination of competency was unreasonable because it was "conclusionary and not fairly supported by evidence on the record"); Thomas v. Gibson, 218 F.3d 1213, 1228–29 (10th Cir. 2000) (determining that the court's assumption that "a murderer would not continue to inflict blows after a victim fell unconscious" to support a finding that defendant had inflicted the blows while the victim was conscious was an unreasonable factual finding because other uncontradicted evidence in the record indicated that the victim had been stabbed after death).

169. 28 U.S.C. § 2254(e)(1) (2006) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

conclusions and assertions that the state court determined the facts unreasonably—you actually have to demonstrate to the court, with specific examples, why the state's determination of facts was unreasonable.[170]

C. What You Cannot Complain About

Federal law is very particular about what you can complain about in your federal habeas petition. As stated in Parts A and B of this Chapter, you must show that your imprisonment violates the Constitution, the laws, or the treaties of the United States. Remember, this means that you cannot discuss violations of state constitutions, state laws, or prison conditions, unless your prison condition or sentence amounts to cruel and unusual punishment.[171] You generally may not raise habeas complaints based on illegal search and seizure or based on new law. This section discusses these two situations, as well as the exceptions to these restrictions.

1. Illegal Search and Seizure

The Fourth Amendment addresses searches and seizures. Evidence that is obtained in violation of the Fourth Amendment is not allowed to be introduced at trial.[172] Even though introducing illegally obtained evidence into trial violates federal law, the habeas court will rarely listen to complaints about this problem. The Supreme Court has created a different standard of review for this particular kind of federal violation. In *Stone v. Powell*, the Supreme Court held that you cannot complain about the introduction of illegally obtained evidence in a habeas petition if the state provided you with a "full and fair opportunity" to raise this error at trial and on appeal.[173] All courts have procedures for determining whether there has been a "full and fair opportunity" to litigate a claim. Because different states may have different standards, you should check the law of the state where you stood trial.

In some lower courts, the "full and fair opportunity" standard is not met when: (1) the state's procedures do not allow any petitioner in your situation to raise a claim; or (2) the procedures were used incorrectly in your case.[174] You should focus your claims on the ways the procedures failed to let you contest the use of illegally obtained evidence in your trial.[175] If the state court never considered this claim "on the merits" (i.e., your claim was dismissed for procedural reasons before the court heard or considered your evidence), most courts will find you were denied your "full and fair opportunity." In other words, you can complain about an

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170. *See* Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000) (holding that petitioner failed to demonstrate to the court that the state's factual findings were unreasonable); Torres v. Prunty, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (finding that the state courts' factual determinations were unreasonable and defendant rebutted the "presumption of correctness" of the state courts' findings "by clear and convincing evidence"); Hooks v. Ward, 184 F.3d 1206, 1231 (10th Cir. 1999) (holding that petitioner rebutted the presumption of correctness by demonstrating, through clear and convincing evidence, that the state court's conclusion, that the evidence admitted at trial was insufficient to raise a reasonable doubt as to defendant's intent to kill, was incorrect).

171. The 8th Amendment of the Constitution prohibits cruel and unusual punishment. The Supreme Court defines "cruel and unusual punishment" as the "unnecessary and wanton infliction of pain" that is "grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976).

172. The 4th Amendment of the Constitution bars illegal searches and seizure. The "exclusionary rule" says that evidence seized by the police illegally may not be introduced in the criminal trial of the victim of the unreasonable search and seizure. Weeks v. United States, 232 U.S. 383, 394–95, 34 S. Ct. 341, 345, 58 L. Ed. 652, 656 (1914) (applying the exclusionary rule only to a federal officer in a federal court); *see also* Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961) (applying the exclusionary rule to states through the 14th Amendment).

173. Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067, 1088 (1976).

174. *See* Capellan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992) ("Review of fourth amendment claims in habeas petitions [is] undertaken … : (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process."). This standard has been adopted in other circuits. *See* Willett v. Lockhart, 37 F.3d 1265, 1271–72 (8th Cir. 1994) (adopting the standard in *Capellan*); Palmer v. Clarke, 408 F.3d 423, 437 (8th Cir. 2005) (applying *Willett* and therefore the *Capellan* standard); *see also* Machacek v. Hofbauer, 213 F.3d 947, 952 (6th Cir. 2000) (finding that if a state has adequate procedural mechanisms for reviewing illegally seized evidence, but if those mechanisms failed and the prisoner was prevented from litigating his claim, the federal court may review an illegal search and seizure claim); United States *ex. rel.* Bostick v. Peters, 3 F.3d 1023, 1027–29 (7th Cir. 1993) (finding that state review of 4th Amendment claims was deficient where defendant was denied the opportunity to testify at a suppression hearing about his version of an encounter with drug enforcement officers).

175. *See* Capellan v. Riley, 975 F.2d 67, 71 (2d Cir. 1992) (explaining that the focus as to whether a federal court may review a 4th Amendment claim in a habeas petition is the "existence and application of the [state's] corrective procedures," not the outcome of those procedures).

illegal search and seizure problem in your habeas petition if the court: (1) never considered *whether* your factual arguments were right or wrong; or (2) never considered *why* your factual arguments were right or wrong.[176]

Defendants in New York generally have the opportunity to raise illegal search and seizure claims at several different stages during a trial. For example, the defendant may notify the judge of this problem during pretrial hearings and during the trial.[177] The defendant may also raise this type of claim on appeal as long as the claim was properly preserved[178] during the trial.[179] Full and fair opportunity to raise claims concerning illegally obtained evidence is almost always provided. Therefore, in New York, unless something very unusual occurred at your trial, you probably cannot complain about illegal search and seizure in your habeas petition.

Stone's full and fair opportunity test applies only to Fourth Amendment exclusionary rule claims. So far, this standard has not been applied to other constitutional claims.[180] The *Stone* rule is a defense that the state can raise to your petition for habeas relief. This means that it is the state's responsibility to raise it in

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176. Here are three examples of cases where the federal habeas court decided that the state court failed to provide a full and fair opportunity to litigate an illegally seized evidence claim:

(1) In *United States ex rel. Bostick v. Peters*, the petitioner sought habeas relief from a conviction of drug possession. The police had searched his bags without a warrant or probable cause. The petitioner raised this issue in a pretrial hearing, but the judge told him he did not have to testify in order to make his claim. The court then admitted the evidence, and the petitioner was convicted. The petitioner raised the illegal evidence claim again on appeal, but the appellate court affirmed the conviction without considering the petitioner's claim. The petitioner then filed a federal habeas petition raising the same claim. The appeals court held that the petitioner was not at fault because he reasonably relied on the trial court's ruling that his testimony was not necessary. United States *ex rel.* Bostick v. Peters, 3 F.3d 1023 (7th Cir. 1993).

(2) In *Agee v. White*, the petitioner sought habeas relief from a murder conviction. The police had brought him to the station twice, first under illegal arrest and then voluntarily a week later. During the second visit, the petitioner made incriminating statements that were later admitted as evidence. At his trial and on state appeal, the petitioner argued that the information given in the second interrogation was "tainted." Both courts, however, ignored the claims. Petitioner argued in his habeas petition that he had not had a "full and fair opportunity" to present the illegal evidence claim because the appellate court ignored his argument. The habeas court agreed that the petitioner did not have a full and fair opportunity to bring this claim earlier, and therefore agreed that the claim was properly before the court in the habeas petition. But after considering the petitioner's argument, the habeas court decided that the second interrogation was not illegal because it occurred a week after the first illegal arrest and was itself voluntary. Agee v. White, 809 F.2d 1487 (11th Cir. 1987).

(3) In *Riley v. Gray*, the petitioner raised his claim of illegally seized evidence on appeal. The evidence had been taken under a warrant that was based on other evidence obtained in a warrantless search. The appellate court affirmed the conviction on the basis of a procedural rule without considering the facts of the illegal evidence claim. The appeals court granted habeas relief based on the same claim because an "unforeseeable application of a procedural rule" had prevented the petitioner from fully presenting his claim earlier. Riley v. Gray, 674 F.2d 522 (6th Cir. 1982).

177. N.Y. Crim. Proc. Law § 710.40 (McKinney 1995) allows a defendant to raise this claim in a pretrial motion or at trial if the defendant was unaware of the illegal seizure.

178. To preserve your claim, you must make a motion to suppress the evidence and object to its inclusion if your motion does not succeed. See Chapter 9 of the *JLM* for more information on properly preserved claims.

179. O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1, 9 (1999) (holding that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"); *see also* 28 U.S.C. § 2254(d)(1-2) (1996). See Section B(2) ("New Laws: The *Teague* Rule") of this Chapter for more information on 28 USC § 2254 and its effect on procedural default; *see also* Fay v. Noia, 372 U.S. 391, 439, 83 S. Ct. 822, 849, 9 L. Ed. 2d 837, 869 (1963) (stating that a habeas applicant who understandingly had an opportunity to appeal but knowingly waived his right to appeal his federal claims in the state court may fairly be denied relief by the federal court considering his habeas petition, and acknowledging that there *are* exceptions to this rule).

180. *See* Kimmelman v. Morrison, 477 U.S. 365, 373–75, 106 S. Ct. 2574, 2582–83, 91 L. Ed. 2d 305, 318–19 (1986) (refusing to extend the *Stone* rule to claims of ineffective assistance of counsel based on counsel's failure to file a timely suppression motion); Rose v. Mitchell, 443 U.S. 545, 560–61, 99 S. Ct. 2993, 3002–03, 61 L. Ed. 2d 739, 752–53 (1979) (refusing to extend the *Stone* rule to an equal protection claim of racial discrimination in the selection of a state grand jury foreman); Jackson v. Virginia, 443 U.S. 307, 320–24, 99 S. Ct. 2781, 2790–92, 61 L. Ed. 2d 560, 574–77 (1979) (refusing to extend the *Stone* rule to claims of due process violations alleging insufficiency of evidence supporting conviction); Withrow v. Williams, 507 U.S. 680, 682–83, 113 S. Ct. 1745, 1748, 123 L. Ed. 2d 407, 413 (1993) (refusing to extend the *Stone* rule to a claim of *Miranda* violations). *Miranda* requires police to take certain precautions when interrogating suspects in their custody, such as informing the suspect that he has a right to remain silent. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

your habeas proceedings. If the state does not raise the issue, the rule will not apply. Once *Stone* has been raised, it is your burden to prove that you did not have a full and fair opportunity to litigate your Fourth Amendment claim. However, it is highly unlikely that the state will fail to raise the *Stone* rule, so you should always be sure to show that you did not have a full and fair opportunity to raise the claim in state court. Remember that your lawyer's failure to raise a Fourth Amendment issue might also be grounds for an ineffective assistance of counsel claim.[181]

2. New Laws: The *Teague* Rule[182]

You also cannot raise a federal habeas claim based on new law.[183] This means that if the Supreme Court decides a rule, test, or standard in a case that is decided *after* your direct review was complete, you generally may not rely on this new law as a basis for habeas relief. This rule comes from the case *Teague v. Lane*[184] and is therefore called the *Teague* Rule. It is applicable to federal and state prisoners. However, state prisoners have an additional requirement that they must meet. State prisoners are subject to AEDPA, which says that state decisions can only be reversed if they were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[185] This section discusses the requirement for state prisoners that the law be "clearly established,"[186] in addition to the requirement from *Teague* that habeas petitioners cannot rely on new law.[187]

These two standards (that the law is clearly established and that the law may not be new) mean almost the same thing. The one difference is that federal prisoners can use cases from the federal district in which they were convicted to show that the law they are relying on is "not new" (even if the Supreme Court has not dealt with the law), while state prisoners can only uses cases from the U.S. Supreme Court since they need to show that the law is "not new" by showing that it is "clearly established" by the Supreme Court.[188] This Section will address both standards at the same time.

(a) What Is New Law?

"New law" is a rule of law that was not in force at the time of your trial and direct appeals, according to *Teague*.[189] New law is law that was not "clearly established," according to the requirement of AEDPA.[190] State prisoners are subject to the requirement in Section 2254(d)(1) of AEDPA that any law used in a habeas petition must be "clearly established." This requirement was established by AEDPA and changed the way that federal habeas law is applied to state prisoners. AEDPA took the *Teague* rule from *Teague v. Lane* and turned it into a law passed by Congress.

The triggering date for what counts as "new law" differs under the *Teague* standard and the "clearly established" requirement of AEDPA. For the *Teague* standard, the law you rely on must have been established by the time your conviction becomes final. The date of finality is usually the date when the

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181. Failure to raise 4th Amendment claims of illegally obtained evidence may amount to ineffective assistance of counsel if the claim of illegal evidence is meritorious and there is a reasonable probability that the defendant would not have been convicted if his 4th Amendment rights had been respected. Kimmelman v. Morrison 477 U.S. 365, 375, 106 S. Ct. 2574, 2582–83, 91 L. Ed. 2d 305, 319 (1986). See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter for more information on ineffective assistance of counsel claims.

182. Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); 28 U.S.C. § 2254(d)(1) (2006).

183. Although a habeas petitioner cannot use a new rule as grounds for his petition, the courts can use a new rule to deny a habeas petition. Courts support this because it helps them in having the final word on how laws work. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180, 191 (1993) (holding that the retroactivity rule in *Teague* does not apply to the federal government).

184. Teague v. Lane, 489 U.S. 288, 308–10, 109 S. Ct. 1060, 1074–75, 103 L. Ed. 2d 334, 354–56 (1989).

185. 28 U.S.C. § 2254(d)(1) (2006).

186. For more information on the "contrary to or involving an unreasonable application" requirement of 28 U.S.C. § 2254(d)(1) (2006), see Part B(4)(a) of this Chapter.

187. Teague v. Lane, 489 U.S. 288, 308–10, 109 S. Ct. 1060, 1074–75, 103 L. Ed. 2d 334, 354–56 (1989).

188. *See* Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389, 430 (2000) ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law.'"). The one "caveat," or exception, is § 2254(d)(1), which restricts the source of clearly established law to the Supreme Court's jurisprudence. You may be able to use non-Supreme Court federal court precedent to support your claim that the Supreme Court law was clearly established when your case was tried or to show whether the state court applied the law reasonably. *See* Musladin v. LaMarque, 403 F.3d 1072, 1074 (9th Cir. 2005).

189. Teague v. Lane, 489 U.S. 288, 308–10, 109 S. Ct. 1060, 1074–75, 103 L. Ed. 2d 334, 354–56 (1989).

190. 28 U.S.C. § 2254(d)(1) (2006).

Supreme Court refuses to hear your appeal (the date the Supreme Court denies your writ of certiorari).[191] However, for the "clearly established" requirement in Section 2254, the courts use a different standard: the law must have been clearly established by the date that the state court's conviction became final in your case.[192]

There is no specific formula that the courts use to determine what is new law; instead, the courts look at many factors. The courts use similar factors to determine whether law is clearly established. If the law you are relying on had not been clearly stated in another court case when your conviction became final, the courts may still find that the law was clearly established if it was *dictated* by previously decided cases, known as "precedent." That means if previously decided cases require a certain outcome in your case, even if a case exactly like yours has not yet been decided, the courts will not consider the rule you are relying on to be new law. For a rule of law to be dictated by precedent, and therefore not new law, the precedent does not have to *explicitly* state the rule of law. If precedent *implies* the rule of law, and a case that was decided after your conviction became final simply articulates the previously implied rule, that rule is already clearly established.[193] Although dictum (the part of a judge's opinion that does not count as a decision about the particular case that the judge is deciding) is not considered law, it may be used as support that an implied rule of law had been clearly established before it was articulated.[194]

For example, in *Teague*, the prosecutor had used peremptory challenges to keep all African-Americans off the jury (peremptory challenges are used by lawyers to disqualify potential jurors without giving any reason), and subsequently, the all-white jury convicted the black defendant of murder. Two and a half years after this defendant's conviction, the Supreme Court, in *Batson v. Kentucky*, ruled that a defendant can establish a *prima facie* case of racial discrimination just by showing that he is a member of a racial group and that the prosecutor used peremptory challenges to remove jury members of that racial group at the trial in question.[195] The *Teague* defendant asked the habeas court to apply *Batson* to his trial. The Supreme Court ruled that the petitioner could not apply *Batson* because it was a "new rule of law." That is, the decision in *Batson* was not required by any prior cases.

A rule of law is considered "new" even if it was based *in part* on earlier cases. The Supreme Court has found that a rule was "new" when there had been disagreement between lower courts about the question before the Supreme Court ruling.[196] Unfortunately for the habeas petitioner in this situation, the benefit of the doubt tends to go toward calling law "new." If there could have been "debate among reasonable minds"[197] as to whether the law was clearly established, it is considered new law.

Consider the following four examples of the Supreme Court rejecting habeas relief because the petitioner's habeas claim was based on new law:

(1) In *Saffle v. Parks*,[198] the petitioner sought habeas relief because, at his trial, the judge had instructed the jury to "avoid any influence of sympathy."[199] The petitioner argued that this instruction was unconstitutional because it made the jury ignore evidence that mitigated the

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191. *See* Stringer v. Black, 503 U.S. 222, 227, 112 S. Ct. 1130, 1135, 117 L. Ed. 2d 367, 376–77 (1992) ("Subject to two exceptions, a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment in question became final."). If you do not file for *certiorari* from the Supreme Court, your conviction becomes final when your time for filing a petition for *certiorari* has elapsed. Lambrix v. Singletary, 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).

192. Williams v. Taylor, 529 U.S. 362, 380, 120 S. Ct. 1495, 1506, 146 L. Ed. 2d 389, 410 (2000) (finding that the defendant's constitutionally guaranteed right to effective assistance of counsel was "clearly established" by the time the state court heard his case).

193. *See* Roe v. Flores-Ortega, 528 U.S. 470, 484–85, 120 S. Ct. 1029, 1038–39 145 L. Ed. 2d 985, 999–1001 (2000) (finding that a newly articulated rule "breaks no new ground" because the court's earlier decisions implicitly established the rule); Ryan v. Miller, 303 F.3d 231, 248 (2d Cir. 2002) (explaining that for a right to be clearly established, the Supreme Court must have acknowledged it, but "it need not have considered the exact incarnation of that right or approved the specific theory").

194. *See* Gibbs v. Frank, 387 F.3d 268, 277 n.6 (3d Cir. 2004) (noting that because Supreme Court dictum "offers guidance about how the Supreme Court reasonably interprets its … decision" it is "relevant to determining whether a state court decision reasonably applies Supreme Court precedent").

195. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

196. *See* Butler v. McKellar, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990) (explaining that a rule is new if there is a "significant difference of opinion on the part of several lower courts that had considered the question previously").

197. Butler v. McKellar, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347, 356 (1990).

198. Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

199. Saffle v. Parks, 494 U.S. 484, 484, 110 S. Ct. 1257, 1257, 108 L. Ed. 2d 415, 415 (1990).

petitioner's guilt (to mitigate means to make the petitioner less culpable or less guilty). The district and appellate courts disagreed over whether this instruction violated a previously established rule or a new rule of law. The Supreme Court settled the dispute by calling it a new rule of law. The Court reasoned that even though it was based on earlier cases, the earlier cases did not say *how* the court should ask the jury to listen to mitigating evidence. Thus, the Court denied habeas relief.

(2) In *Butler v. McKellar*,[200] four years after petitioner's murder conviction was finalized, he asked the habeas court for relief. Relying on *Arizona v. Roberson*,[201] he claimed a violation of his Fifth Amendment rights because the police had interrogated him about a murder after he had requested a lawyer on a separate assault charge. The Supreme Court rejected his habeas petition on the ground that the *Roberson* case announced a "new" rule of law a couple of years after his conviction. His lawyer argued that the *Roberson* rule was not a new rule because it was dictated by an earlier case, *Edwards v. Arizona*,[202] which existed before his conviction became final. The Supreme Court did not agree that *Roberson* was dictated by *Edwards* because the *Edwards* rule covered interrogations on the same charge while the *Roberson* rule covered interrogations on separate charges. The Court concluded no one could have predicted the *Edwards* rule would extend to the situation in *Roberson*. Thus, *Roberson* announced a new rule of law that could not be relied upon in the habeas petition.

(3) In *Sawyer v. Smith*, the petitioner had been convicted of murder and sentenced to death. At his trial, the prosecutor had told the jury that if they sentenced him to death "you yourself will not be sentencing [the petitioner] to the electric chair."[203] A year after the petitioner's conviction was final, the Supreme Court ruled in *Caldwell v. Mississippi*[204] that a prosecutor may not make remarks that diminish the jury's sense of responsibility for the capital sentencing decision. The *Sawyer* petitioner asked the habeas court to apply the *Caldwell* rule to his conviction. He argued that earlier cases made the *Caldwell* case so predictable that it was not a "new rule" of law. The Supreme Court disagreed and ruled that the *Caldwell* rule was a "new rule of law" because it was not foreseeable based on earlier cases.[205]

(4) In *Caspari v. Bohlen*,[206] the Supreme Court explained the three steps the habeas court must take to see if the *Teague* rule applies. First, the court must find out the date on which the petitioner's conviction and sentence became final. Second, it must decide whether the trial court would have discovered the rule from earlier cases. Third, if the rule is "new," meaning the trial court would not have taken it from earlier cases, then the habeas court must decide if the defendant falls into one of the exceptions to the *Teague* rule. (For a discussion of those exceptions, see Part C(3) ("Exceptions to the New Law Rules") below).

It is the rule of law—not the way it is being applied—that needs to be "clearly established." Some rules will apply to many different fact situations. It is not necessary that the court has looked at your exact fact situation and applied a rule of law to it; it is only necessary that the legal principle has been established for dealing with your fact situation.[207] Although you should show the court that the law you are relying on is not new law, you should not actually mention the *Teague* standard in your habeas petition, even if you are making a claim based on an exception to the *Teague* standard. The *Teague* standard is an affirmative defense, which means it is the government's responsibility to raise it in response to your habeas claim to try to prevent your petition from going forward by arguing that your claim is based on "new law." However,

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200. Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990).

201. Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

202. Edwards v. Arizona, 451 U.S. 477, 484, 101 S. Ct. 1880, 1884–85, 68 L. Ed. 2d 378, 386 (1981) (holding that a defendant who had requested counsel during an interrogation but confessed the next day during another interrogation for the same offence had *not* waived his right to counsel).

203. Sawyer v. Smith, 497 U.S. 227, 230, 110 S. Ct. 2822, 2825, 111 L. Ed. 2d 193, 203 (1990) (holding that the *Caldwell* rule that prosecutors may not make remarks that diminish the jury's sense of responsibility in capital cases was a new rule and did not apply retroactively).

204. Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231, 239 (1985) (finding that where, in a capital case, a prosecutor makes statements to the sentencing jury that diminish the jury's sense of responsibility, the heightened requirements of the 8th Amendment are not met and the sentence of death cannot stand).

205. Sawyer v. Smith, 497 U.S. 227, 237, 110 S. Ct. 2822, 2829 111 L. Ed. 2d 193, 208 (1990).

206. Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236, 246 (1994) (holding that, at the time of petitioner's conviction, a rule barring evidence of prior convictions for sentencing purposes did not yet exist).

207. *See* Hart v. Attorney General, 323 F.3d 884, 892 n.16 (11th Cir. 2003) (holding that, when confronting issues such as the voluntariness of a confession, where the rule of law will have to be applied on a case-by-case approach, it is "acceptable to derive clearly established federal law from … general principles").

because the government is highly likely to raise the *Teague* rule, you should be well prepared to show the court the rule of law in question was "clearly established" in precedent at the time your conviction became final.

3. Exceptions to the New Law Rule

Although you should avoid basing your habeas petition on new law, there are some exceptions that allow you to use new law. (Remember, only if the government raises the issue that your claims are based on new law do you need to defend your petition as based on "not new" law or show that your claims fit into an exception.)

The first exception to the new law rule is as follows. If the Supreme Court makes a new law and explicitly states that the law applies retroactively, which means it applies to cases that have already been decided, the law will apply to your case regardless of whether the law was established after your conviction and regardless of whether you are a federal or state prisoner. However, it is rare for the Supreme Court to declare a new law retroactive.

The Court in *Teague v. Lane* also mentions some specific exceptions to the *Teague* rule that allow you to bring a habeas petition based on new law.[208] It is not yet clear if these exceptions necessarily apply to state prisoners. Although AEDPA does not explicitly mention the exceptions to the "clearly established" requirement that *Teague* sets out, the Supreme Court has suggested that Section 2254 of AEDPA implicitly contains the *Teague* exceptions.[209] If you are a state prisoner, you should research whether your district has ruled that Section 2254 of AEDPA contains exceptions and whether they are the same exceptions as in *Teague*. If you are a prisoner in a state that has not recognized the *Teague* exceptions, you most likely will *not* be eligible to use the exceptions below.

There are two exceptions to the *Teague* rule. The first exception includes two kinds of new law: (1) new laws prohibiting certain types of punishment, and (2) new laws decriminalizing certain behavior. The second exception is for new laws that ensure fundamental fairness at trial. If the law you are relying on is new law, *and* the new law fits within one of these exceptions, then you may base your habeas claim on the new law.

(a) Exception: Prohibited Punishments and Decriminalized Behavior

(i) Prohibited Punishments

You may raise a new rule of law if it bars a certain type of punishment for a certain crime or for certain defendants.[210] For example, in *Ford v. Wainwright*, the Supreme Court prohibited states from imposing the death penalty on defendants who are insane.[211] In *Roper v. Simmons*, the Supreme Court held that prisoners who were under eighteen years old when their crimes were committed must not receive the death penalty.[212] If a court decision declares that the punishment you received is unconstitutional, you should raise this decision in your petition for federal habeas corpus. Because this is one of the exceptions to the "new law" rule, you can use the decision even if it is a new rule of law. (In other words, even if the decision that changed the law is handed down after your conviction, you can use it.)

(ii) Decriminalized Behavior

Another exception allows you to use a new rule of law if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[213] What this quotation means is that if your conviction was based on behavior that is no longer considered criminal under the new rule of law, you can use this new law to petition for habeas relief. For example, in *Griswold v. Connecticut*, the Supreme Court ruled that the Connecticut law against using contraception violated the

208. Teague v. Lane, 489 U.S. 288, 310–12, 109 S. Ct. 1060, 1075–76, 103 L. Ed. 2d 334, 355–57 (1989).

209. *See* Whorton v. Bockting, 549 U.S. 406, 416–18, 127 S. Ct. 1173, 1181–82, 167 L. Ed. 2d 1, 11–12 (2007) (explicitly considering whether the facts of the case fell under either of the *Teague* exceptions in a claim under § 2254).

210. *See* Penry v. Lynaugh, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953, 106 L. Ed. 2d 256, 285 (1989) (abrogated on other grounds); *see also* Sawyer v. Smith, 497 U.S. 227, 241, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193, 211 (1990) (the first *Teague* exception applies to new laws that decriminalize an entire category of conduct and to new laws that prohibit a certain kind of punishment for a class of defendants because of their status or offense).

211. Ford v. Wainwright, 477 U.S. 399, 409–10, 106 S. Ct. 2595, 2602, 91 L. Ed. 2d 335, 346 (1986).

212. Roper v. Simmons, 543 U.S. 551, 568, 125 S. Ct. 1183, 1194, 161 L. Ed. 2d 1, 21 (2005).

213. Teague v. Lane, 489 U.S. 288, 307, 109 S. Ct. 1060, 1073, 103 L. Ed. 2d 334, 353 (1989) (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165, 28 L. Ed. 2d 404, 420 (1971)).

constitutional right to marital privacy.[214] Therefore, the Court reversed the conviction of a Connecticut doctor who was convicted of the crime, as an accessory, for giving advice about birth control to a married couple.[215] Like the other *Teague* exceptions, this exception only applies in rare circumstances. For this reason, you should avoid using new rules whenever possible.

(b) Exception: Fundamental Fairness at Trial

You can also raise a new rule of law that requires the police, prosecutor, or judge to follow a procedure in order to ensure the "fundamental fairness" of your trial,[216] and "without which the likelihood of an accurate conviction is seriously diminished."[217] To fit into this new exception, the new rule has to involve a "bedrock procedural element."[218] For example, in *Gideon v. Wainwright*, the Court ruled, on due process grounds, that the state needed to appoint counsel for poor defendants facing criminal charges.[219] This rule might fall under the fundamental fairness exception. By contrast, in *Crawford v. Washington*, the Supreme Court changed the standard for when out-of-court testimony may be admitted in trial.[220] However, the Supreme Court recently decided that the *Crawford* rule may not be applied retroactively because the rule does not impose an "impermissibly large risk of an inaccurate conviction"[221] and does not "constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding."[222]

Keep in mind that it is very rare that a new rule of law comes within the fundamental fairness exception. The Supreme Court has indicated that it believes that courts have already discovered most of the procedures essential to a fair trial and conviction.[223] For instance, in 1981, in *Arizona v. Roberson*, the Supreme Court held that police interrogation after a prisoner had requested a lawyer during interrogation for a separate charge violated the Constitution.[224] In 1990, however, the Supreme Court decided that forbidding such interrogations was not essential to the fairness of the trial or to obtaining an accurate conviction.[225] Since this "new rule" did not involve any "bedrock" procedural element, the Court concluded it could not be a basis for habeas relief for any prisoner whose conviction became final before *Roberson* was decided. As another example, in 2005, the Supreme Court held in *United States v. Booker* that the federal mandatory sentencing guidelines were unconstitutional.[226] However, several circuit courts have held that this new rule does not fit under the fundamental fairness exception and may not be applied retroactively.[227]

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214. Griswold v. Connecticut, 381 U.S. 479, 485–86, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–16 (1965).

215. Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 516 (1965); *see also* Richardson v. United States, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985, 991 (1999) (requiring the jury to unanimously agree not only that the accused committed a continuing series of violations but also which specific violations made up the continuing series for conviction under 18 U.S.C. § 848 (2006), and therefore vacating a conviction in which the jury was not unanimous in deciding which specific violations were committed).

216. Teague v. Lane, 489 U.S. 288, 312, 109 S. Ct. 1060, 1076, 103 L. Ed. 2d 334, 357 (1989).

217. Teague v. Lane, 489 U.S. 288, 313, 109 S. Ct. 1060, 1077, 103 L. Ed. 2d 334, 358 (1989).

218. Teague v. Lane, 489 U.S. 288, 315, 109 S. Ct. 1060, 1078, 103 L. Ed. 2d 334, 359 (1989).

219. Gideon v. Wainwright, 372 U.S. 335, 342, 83 S. Ct. 792, 795, 9 L. Ed. 2d 799, 804 (1963).

220. Crawford v. Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004).

221. Whorton v. Bockting, 549 U.S. 406, 418, 127 S. Ct. 1173, 1182, 167 L. Ed. 2d 1, 12 (2007).

222. Whorton v. Bockting, 549 U.S. 406, 420, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 13–14 (2007).

223. *See*, *e.g.*, Beard v. Banks, 542 U.S. 406, 417, 124 S. Ct. 2504, 2513–14, 159 L. Ed. 2d 494, 506 (2004) (noting that the Court has "yet to find a new rule that falls under the second *Teague* exception"); Saffle v. Parks, 494 U.S. 484, 495, 110 S. Ct. 1257, 1264, 108 L. Ed. 2d 415, 429 (1990) (deciding that habeas petitioner's contention, that the 8th Amendment required that the jury be allowed to base its sentencing decision in a capital case upon the sympathy it felt for the defendant after hearing his mitigating evidence, did not constitute a watershed right or rule).

224. Arizona v. Roberson, 486 U.S. 675, 677, 108 S. Ct. 2093, 2096, 100 L. Ed. 2d 704, 710 (1981).

225. Butler v. McKellar, 494 U.S. 407, 416, 110 S. Ct. 1212, 1218, 108 L. Ed. 2d 347, 357 (1990) (noting that interrogating a prisoner despite his request for counsel during interrogation for a separate charge might in fact increase the likelihood of an accurate conviction).

226. United States v. Booker, 543 U.S. 220, 245–46, 125 S. Ct. 738, 756–57, 160 L. Ed. 2d 621, 651 (2005) (holding that federal sentencing guidelines are recommendations and that the sentencing court can take into account a variety of factors when deciding whether to depart from the guidelines).

227. *See* Lloyd v. United States, 407 F.3d 608, 611–16 (3d Cir. 2005) (determining that the rule announced in *United States v. Booker* was a new law and not subject to either *Teague* exception); *see also* Never Misses A Shot v. United States, 413 F.3d 781, 783–84 (8th Cir. 2005); United States v. Bellamy, 411 F.3d 1182, 1186–87 (10th Cir. 2005); Guzman v. United States, 404 F.3d 139, 143–44 (2d Cir. 2005); Varela v. United States, 400 F.3d 864, 867–68 (11th Cir. 2005); Humphress v. United States, 398 F.3d 855, 863 (6th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005).

As you have seen, the *Teague* exceptions are very hard to meet. You should always try to base your habeas claim on old and clearly established law. If you make your claim on new law with a *Teague* exception, remember that even when you are basing your claim on an exception to the *Teague* rule, the *Teague* rule itself is an affirmative defense that the government must assert. You should not raise the *Teague* rule in your petition. Instead, you should wait to defend the government's claim that your habeas petition is based on new law. Once the government has argued your petition is based on new law, you should defend your claim by showing the law is either not new law or qualifies for one of the *Teague* exceptions just described.

D. Procedures for Filing a Petition for Habeas Corpus

If you experienced a violation of the Constitution, a federal statute, or a federal treaty in your arrest, trial, or sentence, you may file a federal habeas corpus claim. A successful claim will allow the court to vacate, set aside, or correct your present sentence. However, there are very strict procedural requirements you must meet in order to be successful in a habeas petition. This Part explains these procedural requirements.

Although this Part explains the federal habeas corpus procedures for both state and federal prisoners, it concentrates on the process for New York State prisoners. When the procedure differs for federal prisoners, this Section will explain the different procedure. State prisoners in other states will need to research further their state's procedures. However, you should still read and understand this Section, as many of the procedures will be the same in every state. State prisoners will use 28 U.S.C. § 2254 to file a habeas claim. Federal prisoners will use 28 U.S.C. § 2255[228] to file a habeas claim.

You must prove some important conditions in your petition. These conditions are complicated and require a great deal of attention. The conditions are (1) you must be in custody; (2) you must have exhausted all state procedures before petitioning to a federal court if you are a state prisoner, or you must have given the direct appeals court a chance to hear your petition if you are a federal prisoner; (3) you must follow all state rules and procedures correctly before petitioning to a federal court if you are a state prisoner; and (4) the petition must be filed in federal court within a specific time frame. These conditions are explained in detail in this Part. Section 5 of this Part will also discuss when you can file a second (successive) petition.

1. In Custody

When you file your petition for a writ of habeas corpus, you must be "in custody" for the conviction or sentence that you are attacking.[229] The purpose of this requirement is to ensure that you have sufficient interest in the habeas relief.[230] This is not a difficult condition to fulfill. Courts have interpreted "in custody" liberally. Actual physical custody is not necessary. You are "in custody" as long as you are presently restrained in ways that are not shared by the general public.[231] You are "in custody" if you are in prison, on parole, or on probation.[232]

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228. Occasionally, a federal prisoner will file under 28 U.S.C. § 2241, instead of § 2255. See Part A(4) ("Which Laws Apply to Federal Habeas Corpus?") for information on when a federal prisoner would file under § 2241.

229. 28 U.S.C. §§ 2241(c)(1)–(3), 2254(a)–(b) (2006). *See* Carafas v. LaVallee, 391 U.S. 234, 238, 88 S. Ct. 1556, 1560, 20 L. Ed. 2d 554, 559 (1968) (noting that the federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed); Finkelstein v. Spitzer, 455 F.3d 131, 133 (2d Cir. 2006) (finding that federal courts will consider a habeas corpus petition from a state court judgment only when the petitioner's custody is in violation of the Constitution or laws or treaties of the United States at the time his petition is filed).

230. Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S. Ct. 1571, 1574, 36 L. Ed. 2d 294, 300 (1973) ("The custody requirement of the habeas corpus statute makes the writ of habeas corpus a remedy only for severe restraints on individual liberty.").

231. Jones v. Cunningham, 371 U.S. 236, 242–43, 83 S. Ct. 373, 377, 9 L. Ed. 2d 285, 290–91 (1963) (holding that petitioner, as a parolee, was in custody within the meaning of the habeas corpus statute); Harvey v. People, 435 F. Supp. 2d 175, 177 (E.D.N.Y. 2006) (finding that a petitioner who is on parole or serving a term of supervised release is "in custody" for purposes of federal habeas corpus statutes).

232. *See* Rumsfeld v. Padilla, 542 U.S. 426, 437, 124 S. Ct. 2711, 2719, 159 L. Ed. 2d 513, 529 (2004) ("[W]e no longer require physical detention as a prerequisite to habeas relief."); Garlotte v. Fordice, 515 U.S. 39, 45, 115 S. Ct. 1948, 1952, 132 L. Ed. 2d 36, 43 (1995) ("[A] prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of the habeas statute."); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 498–99, 93 S. Ct. 1123, 1131–32, 35 L. Ed. 2d 443, 454–55 (1973) (discussing "custody" in one state when prisoner is held in another); Jones v. Cunningham, 371 U.S. 236, 239–40, 83 S. Ct. 373, 375, 9 L. Ed. 2d 285, 289 (1963) (finding that aliens seeking entry, persons subject to enlistment in the military, and paroled prisoners are all "in custody"); Jackson v. Coalter, 337 F.3d 74, 78–79 (1st Cir. 2003) (holding that custody includes supervised probation).

If you are claiming that your sentence is illegal, you do not have to be currently serving that sentence in order to fulfill the "in custody" requirement. You are also considered "in custody" if: (1) you are contesting a consecutive sentence that you have not yet begun to serve;[233] (2) you are contesting a sentence that has been temporarily postponed because you have been released on your own recognizance;[234] or (3) you are out on bail pending trial or appeal.[235] In fact, you may have already served the sentence imposed for the conviction being challenged. You are still "in custody" as long as you are serving a sentence that is ordered to run consecutively to your challenged sentence.[236] In addition, you are restrained, and thus "in custody," if you are required to appear in court for trial and cannot leave without permission.[237] At least one court has been willing to extend the definition of "in custody" to minors who may suffer some future collateral consequences.[238]

2. Exhaustion of State Remedies and Direct Appeal

Before filing a habeas petition, if you are a state prisoner, you must "exhaust" all available state procedures that can correct your unconstitutional conviction or sentence.[239] To "exhaust state remedies" means you must do all that you can to get the state courts to change your conviction or sentence before you can petition a federal court. The purpose of this exhaustion requirement is to give the state courts a chance to correct any mistakes of federal law and to respect the state court's ability to conduct judicial proceedings.[240] Federal habeas petitions are based on federal law. This exhaustion requirement allows the state court to correctly apply federal law before the federal court steps in.

To meet the exhaustion requirement, you must do two things: (1) give the highest court of the state an opportunity to hear your federal claims; and (2) present these claims to the highest court of the state fairly (called fair presentation). The following two sections discuss these two exhaustion requirements. Remember, there are very few exceptions to exhaustion, and these will be discussed below only as a brief outline. It is not safe to rely on these exceptions to exhaustion; you must exhaust state remedies for all your federal claims or you risk forfeiting them!

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233. Peyton v. Rowe, 391 U.S. 54, 67, 88 S. Ct. 1549, 1556, 20 L. Ed. 2d 426, 435 (1968) (holding that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of the federal habeas corpus statute, even where he is scheduled to serve one of them); Frazier v. Wilkinson, 842 F.2d 42 (2d Cir. 1988) (finding that habeas corpus may be used to challenge a sentence that is consecutive to a sentence currently being served where there is reason to believe that the jurisdiction that obtained the consecutive sentence will seek its enforcement).

234. *See* Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S. Ct. 1571, 1575, 36 L. Ed. 2d 294, 300 (1973) (holding that a person is "in custody" for habeas purposes when subject to restraints and rules not shared by the general public); Eltayeb v. Ingham, 950 F. Supp. 95, 99 (S.D.N.Y. 1997) (finding that the "in custody" requirement for habeas review includes actual, physical custody and release on bail or personal recognizance following actual, physical custody).

235. Lefkowitz v. Newsome, 420 U.S. 283, 286 n.2, 95 S. Ct. 886, 888 n.2, 43 L. Ed. 2d 196, 200 n.2 (1975) (noting that petitioner was recognized as "in custody" when he was released on bail pending final disposition of his case); United States v. Arthur, 367 F.3d 119, 121–22 (2d Cir. 2004) (finding that defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

236. Garlotte v. Fordice, 515 U.S. 39, 45–46, 115 S. Ct. 1948, 1952, 132 L. Ed. 2d 36, 43 (1995) (deciding that petitioner who is serving consecutive state sentences is "in custody" and may attack the sentence scheduled to run first, even after it has expired, until all sentences have been served); *see also* United States v. Arthur, 367 F.3d 119 (2d Cir. 2004) (finding that defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

237. Hensley v. Municipal Court, 411 U.S. 345, 348–49, 93 S. Ct. 1571, 1573–74, 36 L. Ed. 2d 294, 298–99 (1973); *see also* United States v. Arthur, 367 F.3d 119 (2d Cir. 2004) (finding that defendant who was free on bail awaiting surrender date on sentence for federal convictions for mail fraud was in custody and therefore able to seek habeas relief).

238. *See* A.M. v. Butler 360 F.3d 787, 790 (7th Cir. 2004) (finding that a declaration of juvenile delinquency without any further restrictions does not bar a habeas petition when the juvenile will continue to face adverse consequences stemming from the declaration); D.S.A. v. Circuit Court, 942 F.2d 1143, 1150 (7th Cir. 1991) (holding that minor's release from custody did not bar consideration of habeas petition even though the sentence had already been served where underlying conviction had sufficient collateral consequences such as consideration of the conviction in future juvenile proceedings). *But see* Spencer v. Kemna, 523 U.S. 1, 14, 118 S. Ct. 978, 986, 140 L. Ed. 2d 43, 54 (1998) (determining that a revocation of parole, where defendant has since been released, does not have sufficient collateral consequences to warrant consideration of habeas petition).

239. 28 U.S.C. § 2254(b)–(c) (2006).

240. Rose v. Lundy, 455 U.S. 509, 518–19, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379 (1982) (granting that a petitioner seeking release from state custody on account of a wrongful conviction must first exhaust state judicial remedies before filing a habeas petition).

While exhausting your claims in state court, it is important to keep in mind the one-year time limit for bringing federal habeas claims.[241] Your state may allow you more than one year to file the state procedures necessary to exhaust a claim, but a longer state time limit does not affect the federal time limit. You will still only have one year to file your federal petition.[242] You must exhaust *all* of the claims in your habeas petition in state court first. If you fail to exhaust the process for just one of the claims in state court, and then proceed to federal court, the law requires the federal court to dismiss your *entire* habeas petition.[243] But if your petition is dismissed, it will be dismissed without prejudice. This means that you can leave the federal court to exhaust your claims in state court. Then, once your claims are exhausted, you may resubmit your petition in federal court, and you will not be prejudiced for filing a second or successive petition.[244] But most often, such a dismissal still affects your one-year time limit.

Most courts have found that a state court challenge on a specific claim will toll[245] the time limit for your entire habeas petition.[246] This means that, in most cases, the time limit will temporarily be stopped on your entire habeas petition, not just for the claims you are making in your present case. In addition, in rare circumstances, the court may issue a "stay and abeyance" order for your dismissed petition,[247] which means you will have a short amount of time to present your unexhausted claims to the state court while your time limit is tolled for your entire petition.[248] If the district court says that your petition contains exhausted and unexhausted claims, you should request a stay and abeyance and explain to the district court that you are concerned that your one-year time limit will expire before you are able to resubmit your fully exhausted petition. In some circumstances you may also be able to delete the unexhausted claims from your petition and proceed only with the exhausted claims.[249] You will need to determine whether proceeding in federal court immediately without the unexhausted claims is a better option than leaving to exhaust the claims in state court and risking the time limit expiring for all your claims in federal court.

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241. For more information about time limits for bringing federal habeas claims, see Part D(4) ("Time Limit") of this Chapter.

242. The Supreme Court has been strict in enforcing time limits on federal habeas petitions. Bowles v. Russell, 551 U.S. 205, 213, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96, 104 (2007) (declining a prisoner's habeas claim because it was filed too late, even though it was filed within the time limit specified by the district court).

243. A petition that contains both exhausted and unexhausted claims is dismissed without prejudice. This means that the court will allow you to resubmit your petition when every claim has been exhausted. *See* Rhines v. Weber, 544 U.S. 269, 273–74, 125 S. Ct. 1528, 1532–33, 161 L. Ed. 2d 440, 449 (2005) (holding that petitioners who present habeas petitions with exhausted and unexhausted claims should be allowed to submit the unexhausted claims to state court and then return to federal court without prejudice to present "perfected petitions"); Rose v. Lundy, 455 U.S. 509, 518–19, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379, 387 (1982) (requiring "total exhaustion" of claims in state courts).

244. See Part D(5) ("Successive Petitions") of this Chapter for more information on successive petitions.

245. "Tolling" means that the running of the time period is paused. Time that is tolled does not count toward the one-year time limit. See Part D(4) ("Time Limits") for more information on time limits and tolling.

246. *See* Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002) (holding that "a properly filed state post-conviction proceeding challenging the judgment tolls the AEDPA statute of limitations during the pendency of the state proceeding"); Carter v. Litscher, 275 F.3d 663, 665 (7th Cir. 2001) ("Any properly filed collateral challenge to the judgment tolls the time to seek federal collateral review.").

247. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (holding that federal courts should issue a stay and abeyance for a mixed petition if petitioner had "good cause" for failing to exhaust the unexhausted claims, the unexhausted claims are "potentially meritorious," and there is no indication that the petitioner has engaged in tactics with the purpose of delaying the proceedings).

248. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (determining that if a stay and abeyance is issued, district courts should "place reasonable time limits on a petitioner's trip to state court and back"). See Part D(4) for more information on tolling and time limits.

249. *See* Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) ("[I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief.").

(a) Opportunity for Highest State Court to Hear Your Federal Claims[250]

Before you can petition for federal habeas corpus in federal court, you must first present each claim you want to present in your petition to the highest court in your state, either through the state appellate process (often called "direct appeal") or through a state post-conviction procedure (often called "collateral attack").[251] The difference between a direct appeal and a collateral attack is explained more fully in Part A(1) ("What Is Habeas Corpus?") of this Chapter. A key point is that you must provide the state court with the opportunity to rule on each of your claims before you submit them to federal court. It is not enough that you presented each claim to just the intermediate appellate court in your state. This process, in which you pursue all state remedies available before you can have access to federal court, is called "exhaustion." You only have to present your federal claims to the highest state court once—you do not have to do it both on direct appeal and in state post-conviction procedures. Most states call their highest court the "State Supreme Court." However, in New York, the "New York Supreme Court" is actually a lower court, and the "New York Court of Appeals" is the highest state court.[252]

You can present your claim to the highest state court in one of two ways. First, if you have not appealed your conviction yet and still have time to do so, you can contest your conviction through the state appellate process.[253] You have a right to appeal to an intermediate appellate court.[254] If the appellate court rejects your claim, you should then "request leave"[255] to appeal to the state's highest court. Whether the highest state court grants your leave to appeal and then rejects your claim, or simply denies your leave to appeal, you have satisfied the exhaustion requirement by allowing the state court a chance to rule on your claim. You do not need to petition the U.S. Supreme Court for certiorari. In other words, your petition can be reviewed by a lower federal court without having to petition the Supreme Court on direct review first,[256] and you do not need to pursue your claim through a state post-conviction remedy as long as that claim was raised on direct appeal.[257]

If you missed the deadline for a direct appeal, or if you simply neglected to raise a claim in your direct appeal, you must pursue your claim through a state post-conviction procedure to satisfy the exhaustion requirement.[258] In New York, you can choose between two post-conviction remedies: an Article 440 motion[259]

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250. The Supreme Court held that, even when a state's appellate rules do not automatically give you the right to a hearing in your state's highest court, you must still present all of your claims to that court in order to exhaust your state remedies. In Illinois, for example, a party must petition the Illinois Supreme Court for leave to appeal a decision of the intermediate appellate court. Even though the granting of such a petition for review is not guaranteed, the Supreme Court held that petitioner had not exhausted his claims because the Illinois Supreme Court had not been able to review them. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 848, 119 S. Ct. 1728, 1734, 144 L. Ed. 2d 1, 11 (1999) (holding that claims not submitted to the state's court of last resort in a petition for discretionary review are deemed to be procedurally defaulted).

251. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 848, 119 S. Ct. 1728, 1734, 144 L. Ed. 2d 1, 11 (1999) (holding that claims not submitted to the state's court of last resort in a petition for discretionary review are deemed to be procedurally defaulted); Roberts v. LaVallee, 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 2d 41 (1967) (determining that repetitious appeals applications to state courts are not required when defendant has already exhausted his remedies to the state courts); *see also* Grey v. Hoke, 933 F.2d 117, 119–20 (2d Cir. 1991) (holding that petitioner's failure to specifically raise his sentencing and prosecutorial misconduct claims in state court appeals barred him from making these claims in federal habeas proceedings).

252. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on the court system.

253. See Part C of Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for an explanation of the time limits for appealing your conviction.

254. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a discussion of state appeals.

255. To "request leave" means to ask for permission.

256. *See*, *e.g.*, Ulster County Court v. Allen, 442 U.S. 140, 149 n.7, 99 S. Ct. 2213, 2220 n.7, 60 L. Ed. 2d 777, 787 n.7 (1979) (determining that petitioner did not lose federal power of review by failing to seek *certiorari* from the Supreme Court); Smaldone v. Senkowski, 273 F.3d 133, 138 (2d Cir. 2001) (granting that the exhaustion requirement does not require petitioner to seek *certiorari* from the United States Supreme Court before pursuing a habeas remedy).

257. Castille v. People, 489 U.S. 346, 350, 109 S. Ct. 1056, 1059, 103 L. Ed. 2d 380, 385 (1989); *see also* Daye v. Attorney General, 696 F.2d 186, 191 n.3 (2d Cir. 1982) ("A petitioner need not give the state court system more than one full opportunity to rule on his claims; if he has presented his claims to the highest state court on direct appeal he need not also seek state collateral relief.").

258. *See*, *e.g.*, Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 386 (1989) (stating that a claim must be "fairly presented" to the state courts to meet the exhaustion requirement, and finding that petitioner's claim was not exhausted because he had raised it for the first time in the state's highest court on a discretionary review).

or a petition for state habeas corpus.[260] You should generally use an Article 440 motion because it is the most modern and has the best-developed state post-conviction procedure.[261] If a New York Supreme Court (the state trial court) denies the claim presented in your Article 440 motion, you should ask for leave to appeal to an intermediate appellate division. Then, if the appellate division does not allow you to appeal, or grants leave to appeal but then rejects your claim, you still have given the highest state court an opportunity to decide your claim. You have fulfilled this part of the exhaustion requirement.

(b) Fair Presentation

In order to exhaust your state remedies, you must "reasonably inform" the state court about your federal claim and thus provide the court with "fair presentation" of the federal claim. This means you must reasonably present your claim as a federal one to the highest state court before you can raise it in federal habeas proceedings. You must explicitly say that you are raising a federal claim or alleged violation of the Constitution.[262] When you file a direct appeal or collateral attack in state court, your appeal/attack must mention the same relevant facts and legal theory that you will later include in your petition for federal habeas corpus.[263] While it is important to provide both the factual basis and legal principles on which your claim relies, some courts have been flexible in the factual requirement.[264] It is not enough to discuss a state claim that is similar to a federal claim. The Supreme Court has held that you must make specific references to the federal law that forms the basis of each of your claims.[265] Thus, the Court has held that a petitioner does not fairly present a claim if the petition or brief does not alert the state court that the claim is federal in nature.[266]

These facts and legal principles must show the court that your claim rests, either entirely or partially, on the Constitution.[267] This puts the state court on notice that you are raising a federal claim. You may satisfy this requirement by:

(1) Citing a specific provision of the Constitution;[268]
(2) Relying on federal constitutional precedents;[269]

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259. Article 440 motions are discussed in Chapter 20 of the *JLM.*

260. New York State habeas corpus procedure is explained in Chapter 21 of the *JLM.*

261. The New York legislature designed the Article 440 motion to simplify and to combine all of the previously existing post-conviction remedies, including state habeas corpus. See Chapter 20, Part B, of the *JLM* for a discussion of why New York courts prefer Article 440 motions over petitions for state habeas corpus. See also Chapter 14, "The Prison Litigation Reform Act," for a discussion of exhausting your administrative remedies.

262. *See* Duncan v. Henry, 513 U.S. 364, 365–66, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865, 868 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."); *see also* Schneider v. Delo, 85 F.3d 335, 339 (8th Cir. 1996) (determining that a federal claim must be stated in state court).

263. *See* Pappageorge v. Sumner, 688 F.2d 1294, 1295 (9th Cir. 1982) (holding that petitioner had not exhausted his state remedies because the claim presented to the federal court was not substantially similar to the claim presented in state court due to a new key factual allegation that was not part of the record before the state court or raised before it).

264. *See* Davis v. Silva, 511 F.3d 1005, 1010–11 (9th Cir. 2008) (holding that a claim was fairly presented when the factual basis of the petitioner's claim could be determined from the legal materials provided, including citations to relevant cases, statutes, and regulations and a basic factual description).

265. Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004) (rejecting the idea that judges, on appeal, can find for themselves the claims based on federal law, and stating that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim).

266. Baldwin v. Reese, 541 U.S. 27, 32, 124 S. Ct. 1347, 1351, 158 L. Ed. 2d 64, 71 (2004).

267. *See* Picard v. Connor, 404 U.S. 270, 277–78, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 444–45 (1971) (dismissing habeas claim because petitioner failed to name a constitutional claim, even though he raised all the facts of his claim in state court). You must clearly tell the state court of the federal nature of the claim and permit the state court to decide the federal issue squarely. *See* Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992); *see also* Aparicio v. Artuz, 269 F.3d 78. 89 (2d Cir. 2001) (finding that petitioner must present the same federal constitutional claims that he will urge upon the federal courts in his habeas petition to the highest court in that state in order to exhaust the claims).

268. *See* Scarpa v. DuBois, 38 F.3d 1, 6–7 (1st Cir. 1994) (citing Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987) (finding that state court was sufficiently alerted because the defendant cited the 6th Amendment by name); *see also* Daye v. Attorney General, 696 F.2d 186, 192 (2d Cir. 1982) ("Obviously if petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis.").

269. *See* Scarpa v. DuBois, 38 F.3d 1, 6 (1st Cir. 1994) (quoting Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987)); *see also* Abdurrahman v. Henderson, 897 F.2d 71, 73 (2d Cir. 1990) (finding that defendant's citation to *Strickland v.*

(3) Alerting the state court of the claim's federal nature through your claim's substance;[270] or
(4) Claiming a particular right guaranteed by the Constitution.[271]

To provide a fair presentation to the state, you must clearly indicate you are claiming that the Constitution has been violated.[272] For example, one petitioner claimed in state court that the admission of certain evidence "infringed on his right to present a defense and receive a fair trial" but made reference to a state evidentiary law without mentioning any federal constitutional rights.[273] While the petitioner's federal due process rights may have been implicated, the court held that the federal law part of his claim was not "fairly presented" to the state court.[274] While you do not need to cite "book and verse on the federal [C]onstitution,"[275] some degree of specificity in describing the federal relevance is required.[276] You should be specific in explaining the violation of a federal law to the state court.

Federal courts generally consider remedies to be exhausted when you have "fairly presented" a claim one time to the highest state court.[277] For example, if you raised a particular claim on direct appeal to the highest state court, you do not have to raise it again in state post-conviction proceedings.[278] The state court does not need to fully consider your claim in order to be reasonably informed that the claim relies on federal law. In short, just be sure that you present the same factual arguments and legal theories regarding a federal claim in both your state claims and federal habeas claims.

So, what do you do if you discover new evidence about your claim or become better acquainted with the law concerning your claim after presenting your claim to the state court? You can, and should, strengthen your claim by adding this new factual and legal material in your federal petition. Explain to the court that you are simply *supplementing* your pending claim, not adding a new claim. This may also give you an additional benefit by giving you more time to file your habeas petition.[279] However, be aware that supplementing a federal petition with new information may lead to the dismissal of your original habeas claim. If the new information that you wish to include in your habeas petition was not presented to the state courts, and state relief is now available to you, then the federal courts will probably dismiss your federal claim.[280]

It is important to remember to go to state court first in order to exhaust all claims before filing in federal court. Any petitioner who files first in federal court, goes back to exhaust, and then tries to amend the federal petition runs a great risk of having the petition dismissed as untimely. Remember, you have a one-

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Washington in a brief to the Appellate Division was sufficient to alert the court that defendant was raising a federal claim regarding ineffective assistance of counsel, since *Strickland* is the leading Supreme Court case on that issue).

270. *See* Scarpa v. DuBois, 38 F.3d 1, 6 (1st Cir. 1994) (quoting Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987)); *see also* Jackson v. Edwards, 404 F.3d 612, 619 (2d Cir. 2005) (finding petitioner had fairly presented his claim to the state court because "the substance of the federal habeas corpus claim [was] clearly raised and ruled on in state court" even though petitioner had failed to explicitly name it as a federal claim). *But see* Baldwin v. Reese, 541 U.S. 27, 32–34, 124 S. Ct. 1347, 1351–52, 158 L. Ed. 2d 64, 71–72 (2004) (holding that the federal nature of the claim must be apparent in the brief or petition, not in the opinion of a lower court).

271. *See* Scarpa v. DuBois, 38 F.3d 1, 6 (1st Cir. 1994) (quoting Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987)).

272. *See* Duncan v. Henry, 513 U.S. 364, 365–66, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865, 868 (1995) (noting that "[i]f state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution").

273. Johnson v. Zenon, 88 F.3d 828, 831 (9th Cir. 1996).

274. Johnson v. Zenon, 88 F.3d 828, 831 (9th Cir. 1996).

275. Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 513, 30 L. Ed. 2d 438, 445 (1971) (quoting Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)).

276. *See* Beauchamp v. Murphy, 37 F.3d 700, 704 (1st Cir. 1994) (finding that petitioner did raise a federal claim even though the claim was not contained in the paragraph heading and that the court should look to "substance rather than form").

277. Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438, 443 (1971) ("[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.").

278. However, if you raise a claim for the first and only time in a petition for discretionary review to a state appellate court, you will not meet the exhaustion requirement. *See* Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 386 (1989) (stating that presentation of a new claim to a state's highest court on discretionary review does not constitute "fair representation" for purposes of determining that claim's exhaustion).

279. *See* 28 U.S.C. § 2244(d)(1)(D) (2006). See Part (D)(4) ("Time Limit") of this Chapter for more information on the one-year time limit in which you must file your federal habeas corpus petition. The time limit may also run from the time that new facts could have been discovered through due diligence.

280. *See*, *e.g.*, Graham v. Johnson, 94 F.3d 958, 970–71 (5th Cir. 1996) (determining that, even though the state waived the exhaustion requirement, the petitioner's extensive new evidence was mostly factual and needed to be presented to state courts).

year time limit to file your federal habeas petition. Furthermore, your state petition could be your only opportunity to have a judge thoroughly review your claims on the merits. AEDPA gives federal courts very little room to disagree with state court rulings on your claims. AEDPA forbids federal courts from granting a writ of habeas corpus unless the state court's consideration of your claims was "contrary to, or involved an unreasonable application of, clearly established Federal law" or if the decision was based on an "unreasonable determination of the facts."[281]

(c) Exceptions to Exhaustion

There are a few narrow exceptions to the exhaustion requirement. First, you do not need to seek relief in state court if state remedies are "unavailable" or "ineffective."[282] For example, in North Carolina, a state statute did not allow a defendant who had already been convicted to raise an issue in a post-conviction proceeding if he could have raised the issue earlier. Since he could no longer raise the issue, there was no state remedy available to him. The Fourth Circuit Court of Appeals thus held that the defendant was not barred from seeking habeas corpus relief.[283] In another case, a court found that state remedies were ineffective to protect the rights of a prisoner because he would be raising the same exact constitutional issue to the state supreme court that a fellow prisoner had already litigated and lost. In this situation, bringing the same issue before the court would most likely be unsuccessful and would have wasted the resources of the state system. So the court ruled that he did not need to raise the issue again in a post-conviction proceeding and exhaust his state court remedies.[284]

Another exception to the exhaustion requirement may occur after an unusually long delay in receiving a ruling on an appeal.[285] Some federal courts do not require exhaustion when the state courts have unconstitutionally delayed hearing the prisoner's appeal for a few years or more.[286] In at least one case, exhaustion of state remedies was not required because the prisoner's jury misconduct claim hinged on the testimony of a juror who was elderly, marginally incompetent, and in poor health.[287]

In spite of these exceptions, federal courts do not usually excuse the exhaustion requirement; they trust the state courts to be able to address all of your claims sufficiently. And even if a court excuses your failure to exhaust state remedies, you will likely end up with another problem, known as "procedural default."[288] In one case, a New York prisoner was found to have exhausted state remedies even though he did not explicitly raise the issue on direct appeal.[289] The court went on to say that state remedies would also have been unavailable to him under the New York State law, which did not allow the prisoner to raise a claim in a collateral attack (Article 440 motion) when he failed to raise the claim on direct appeal in state court.[290]

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281. The standard that federal courts use to review habeas petitions is contained in 28 U.S.C. § 2254(d)(1) –(2) (2006). For more information about this standard, see Part B(4) ("Standard for Getting Relief") of this Chapter.

282. 28 U.S.C. § 2254(b)(1)(B) (2006).

283. Stem v. Turner, 370 F.2d 895, 897 (4th Cir. 1966).

284. Evans v. Cunningham, 335 F.2d 491, 493–94 (4th Cir. 1964).

285. *See* Montgomery v. Meloy, 90 F.3d 1200, 1205–06 (7th Cir. 1996) (citing Lane v. Richards, 957 F.2d 363, 365 (7th Cir. 1992), for the idea that an excessive delay in receiving a ruling on a state post-conviction application satisfies the exhaustion requirement, but finding that this was *not* the case here).

286. Federal courts have not required exhaustion when the prisoner argues that the state courts have unconstitutionally delayed hearing the prisoner's appeal. The delay must be unusually long in order to fit within this exception. It is unlikely that a one-year delay would be enough to waive the exhaustion requirement, but a two-year delay might be. *See* Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994) (determining that a "delay in adjudicating a direct criminal appeal beyond two years from the filing of the notice of appeal gives rise to a presumption that the state appellate process is ineffective"); Calhoun v. Farley, 913 F. Supp. 1218, 1221 (N.D. Ind. 1995) (holding that sufficient time had passed to excuse the need for exhausting state remedies where no action had been taken by the state or by the prisoner for almost two years on prisoner's petition for post-conviction relief); Geames v. Henderson, 725 F. Supp. 681, 685 (E.D.N.Y. 1989) (finding that a delay of three and a half years is excessive when the "[c]ourt views the issues on appeal as no more complex than in most criminal appeals").

287. Simmons v. Blodgett, 910 F. Supp. 1519, 1524 (W.D. Wash. 1996) ("Because petitioner's ability to prove his claim continues to diminish rapidly over time, and is at risk of being lost, justice requires that his habeas petition be heard expeditiously.").

288. Procedural default is explained in Part D(3) ("Procedural Default") of this Chapter.

289. The prisoner filed a petition for federal habeas corpus on the ground that his confession was involuntary, even though he had not raised the issue of voluntariness on direct appeal. However, he was found to have adequately exhausted his state remedies because the judge had indirectly ruled on that issue through an evidentiary determination. Quartararo v. Mantello, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989).

290. *See* Quartararo v. Mantello, 715 F. Supp. 449, 464 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989). See Chapter 20 of the *JLM* for a discussion of N.Y. Crim. Proc. Law § 440.10(2)(c).

Since the prisoner could not raise the claim in a collateral attack, it would be useless for him to return to the state court, and so the federal court could excuse his failure to exhaust the claim. However, the federal court will probably still bar his habeas petition because he committed procedural default by failing to raise the claim on direct appeal as state law required him to do.[291] So even though this failure helped the prisoner avoid the exhaustion requirement, the same failure could still prevent him from getting his writ of habeas corpus.[292] In short, you should not rely on exceptions to the exhaustion requirement because they are rarely granted.

(d) What Happens If You Do Not Exhaust State Remedies

If you present your claim to a federal court before you have exhausted all your state remedies, the court may look at the merits of your claim anyway. You are taking a risk here because if the court believes that your claim is without merit, it may deny you relief once and for all, even though you have not finished presenting your claim to the lower courts.[293] Otherwise, the court will reject your petition for not exhausting state remedies, either with or without looking at the merits, and you will need to finish presenting it to the state courts in order to fulfill the exhaustion requirement. This Subsection describes what you should do if a federal court will not consider your petition because you have not exhausted your state remedies and then dismisses your petition without prejudice to allow you to exhaust your facts and claims in the state court.

Upon dismissal, first you should check to see if the state has waived the exhaustion requirement in your case.[294] A federal court will never assume that the state waived the exhaustion requirement in your case just because the state did not insist on exhaustion.[295] There must be an express statement by an authorized state attorney saying that the exhaustion requirement in your case has been waived, otherwise there is no waiver.

If the state has not given you a waiver, you must return to state court and seek relief there. *Remember the one-year time limit!* To ensure your claims will not later be barred from federal review because of the limitations period, you can ask the federal district court to hold your habeas petition in abeyance (delay the federal proceeding) while you return to state court to exhaust your state remedies. You should explain to the federal court that you are concerned that you will pass the statute of limitations, so you want a "stay and abeyance" order to ensure that you will be able to return to federal court after exhausting your state remedies. You also have to offer to dismiss your unexhausted claims in federal court.[296] Often courts issue a stay and abeyance order that will allow you to return to state court to exhaust remedies without fear of the one-year limitations period expiring.[297] Absent cause for equitable tolling (see the explanation of tolling in Part D(4)), the court is not required to warn a *pro se* litigant that his federal claims would be time-barred

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291. *See* Daye v. Attorney General, 696 F.2d 186, 190 n.3 (2d Cir. 1982) (*en banc*) (explaining that failure to comply with a state rule, resulting in a procedural default that bars, under state law, the subsequent assertion of a challenge to the conviction, may also preclude federal habeas through the doctrine of procedural forfeiture unless the petitioner can demonstrate that there was "cause" for his failure to comply with the state procedure and that "prejudice" resulted).

292. *See*, *e.g.*, Castille v. Peoples, 489 U.S. 346, 351–52, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380, 386–387 (1989) (stating that a claim must be fairly presented to the state courts to meet the exhaustion requirement); Teague v. Lane, 489 U.S. 288, 298–99, 109 S. Ct. 1060, 1069, 103 L. Ed. 2d 334, 348 (1989) (finding that a procedural default does not prevent consideration of a habeas petition unless the state court "clearly and expressly" stated that its judgment rests on a state procedural bar (citing Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989))).

293. 28 U.S.C. § 2254(b)(2) (2006). *But see* Glenn v. Bartlett, 98 F.3d 721, 725 (2d Cir. 1996) (explaining that the court's consideration of the merits of a claim does not mean that it excuses any procedural bar that should have prevented the case from coming before a federal court).

294. "Waived" means "decided not to apply." A state waiver of a requirement means that you do not have to fulfill the requirement.

295. 28 U.S.C. § 2254(b)(3) (2006); *see* Lurie v. Wittner, 228 F.3d 113, 123 (2d Cir. 2000) (noting that state waivers of exhaustion are disfavored and that such a waiver must be made expressly).

296. Pliler v. Ford, 542 U.S. 225, 230–31, 124 S. Ct. 2441, 2445, 159 L. Ed. 2d 338, 347 (2004) (describing the Ninth Circuit's procedure for granting a stay and abeyance, under which the unexhausted claims are dismissed, resolved in state court, and then re-added to the federal court claims while the federal court claims that were already exhausted in state court remain pending).

297. Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (directing that federal courts should issue a stay and abeyance for a mixed petition if petitioner had "good cause" for failing to exhaust the unexhausted claims, the unexhausted claims are "potentially meritorious," and there is no indication that the petitioner has engaged in tactics with the purpose of delaying the proceedings); *see*, *e.g.*, Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (agreeing to consider petitioner's proper federal habeas claim as if it had been filed on the date that he originally filed an improper claim because the district court had incorrectly dismissed the original claim for having both unexhausted and exhausted claims, instead of allowing petitioner to resubmit his claim with only the exhausted claims, as was customary in that circuit).

upon his return to federal court if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims.[298]

If the time limit to raise the unexhausted claim in state court has run out, look for an exception to the exhaustion requirement.[299] Because such exceptions are rarely successful, you should use this argument only as a last resort. If the time limit has not run out, file as quickly as possible in state court so that tolling will apply.[300] Once you re-file in state court and satisfy the exhaustion requirement, if your claims are dismissed, you can still re-file a federal habeas petition in federal court if your time to do so has not run out (requesting a stay and abeyance order beforehand will ensure that your time has not run in federal court). This petition—which follows your earlier petition that was dismissed by the district court without prejudice—will not count as a successive habeas petition and will not be subject to dismissal for that reason.[301]

Dismissal of a federal habeas petition for failing to exhaust and running over the one-year time limit can be very harmful because of the strict timelines that AEDPA imposes on habeas petitions. Therefore, make sure you understand this, and that you have complied with the two requirements of exhaustion: (1) you have given the highest state court an opportunity to hear your claim; and (2) you have fairly presented each claim by identifying the facts and the federal law supporting it to the highest state court.

3. Procedural Default

If you present a habeas claim to the federal court that has not been presented to the state court or federal appeals court, your claim may be in "procedural default,"[302] and the federal court will be barred from hearing your claim.[303] If you are a federal prisoner, you can avoid procedural default by raising every habeas claim in your direct appeal. In some circumstances, you may be required to have raised the claims at your trial (for example, by making appropriate objections) to be able to raise the claims in your direct appeal.[304] State prisoners can avoid procedural default by raising every claim in state court. In many cases, state prisoners will be required to have raised claims at trial, through motions or objections, to raise the claims on direct review.[305] State prisoners must be certain to raise all claims in all state collateral proceedings, too.[306]

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298. Pliler v. Ford, 542 U.S. 225, 231, 124, S. Ct. 2441, 2446, 159 L. Ed. 2d 338, 348 (2004).

299. See Part D(2)(c) ("Exceptions to Exhaustion") of this Chapter.

300. Tolling is discussed in Part D(4) ("Time Limit") of this Chapter.

301. *See* Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601, 146 L. Ed. 2d 542, 551 (2000). This issue is further discussed in this Chapter at Part D(5) ("Successive Petitions").

302. 28 U.S.C. § 2254 (b)(1), (c) (2006).

303. *See* United States *ex rel.* Redding v. Godinez, 900 F. Supp. 945, 948–50 (N.D. Ill. 1995) (finding procedural default where petitioner did not raise claims during direct appeal, during state petition for post-conviction relief, or during state petition to appeal from denial of post-conviction relief); *see also* House v. Bell 547 U.S. 518, 522, 126 S. Ct. 2064, 2068, 165 L. Ed. 2d 1, 12 (2006) ("Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted.").

304. Some kinds of claims do not have to be raised at trial to be validly raised on direct appeal. For example, you may bring an ineffective assistance of counsel claim in a § 2255 motion even if you did not raise the issue on direct appeal. *See* Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003) (holding that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal"); *see also* 28 U.S.C. § 2255 (2006).

305. Before your trial ends, you must object to any errors that occurred at trial in order to preserve these issues for review on appeal. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91, 97 S. Ct. 2497, 2508, 53 L. Ed. 2d 594, 610 (1977) (describing how the "contemporaneous-objection rule" encourages the proceedings to be "as free of error as possible," so criminal defendants should make their objections known if they think the trial court has deprived them of any federal constitutional rights). Otherwise, states like New York will consider only those appellate issues involving a violation of fundamental principles of law. For example, if the prosecutor at your trial in New York made inflammatory closing remarks that prejudiced the jury, but your lawyer did not object to this error at trial, you cannot raise this error on direct appeal. New York courts probably will not see prejudicial remarks by a prosecutor as a violation of fundamental principles of law. Thus, if you did not object to the prosecutor's comments during trial, you probably cannot raise this issue on direct appeal or through an Article 440 motion (New York law gives courts discretion in refusing to accept 440 motions). *See* N.Y. Crim. Proc. Law § 440.10(3)(a)–(c) (McKinney 2005). See Chapter 20 of the *JLM* for more information about Article 440. Therefore, you will also be unable to raise the issue in your federal habeas petition. However, always remember that if your attorney was responsible for failing to object, you may have an ineffective assistance of counsel claim. See *JLM*, Chapter 9 and Chapter 12 for more information on ineffective assistance of counsel claims.

306. In New York, you cannot raise claims in a post-conviction proceeding that you neglected to raise on direct appeal. *See* N.Y. Crim. Proc. Law § 440.10(2)(c) (McKinney 2005). *See also* Anderson v. Harless, 459 U.S. 4, 7–8, 103 S. Ct. 276, 278, 74 L. Ed. 2d 3, 7–8 (1982) (rejecting habeas relief because prisoner's constitutional argument had never been presented to, or considered by, the state court); Smith v. Duncan, 411 F.3d 340, 350 (2d Cir. 2005) (finding that the habeas claim was procedurally defaulted because the claim had not been fairly presented to the state court). If your

(a) State Procedural Rules and Procedural Default

Your claim can also be in procedural default if you raised your claim to a state court that refused to review the merits of the claim due to a state procedural rule. This often occurs when prisoners fail to pursue their claim in a timely manner.[307] State prisoners are not allowed to bring habeas claims in federal court if those claims were not reviewed on the merits in state court because the petitioner did not follow a state procedural rule.[308] But if a state procedural rule prevents you from bringing a claim in state court, and the state court ignores the rule and reviews the merits of your claim anyway, a federal court cannot later refuse to review your claim based on the state procedural rule.[309]

If you are in procedural default, you can try to use the "independent and adequate state grounds" doctrine to avoid procedural default.[310] You can get out of procedural default if the procedural rule the state court used to deny you a hearing on the merits was (1) not *independent* of federal law, or (2) not *adequate* (good enough) to bar federal review of the claim. This is a hard standard to meet but is described in detail below.

(i) Showing the State Procedural Rule Is Not "Independent" of Federal Law

To show that the procedural rule the state court used was not independent of federal law, you must show that the state law is intertwined or connected with federal law, and not entirely separate from federal law.[311] State law is intertwined or connected with federal law if judges have to necessarily answer questions about federal law in order to decide the question of state law. For example, if a state procedural rule says that when fundamental or constitutional errors are made the claim is not considered untimely and can be reviewed, then the state court judges have to decide questions of federal law—the constitutional issue—before deciding if the state procedural rule applied to your case.[312] You can try to argue that the procedural rule is not "independent" of federal law and it should not stop the habeas court from reviewing your claim.

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lawyer failed to object to a prosecutor's prejudicial remarks, and you were therefore barred from raising this issue on appeal, you are also barred from raising the issue in a habeas corpus petition. Remember, though, that ineffective assistance of counsel claims can be raised for the first time in a post-conviction proceeding, and your lawyer's failure to raise objections in court may be grounds for an ineffective assistance of counsel claim. See *JLM*, Chapters 9 and 12, for more information on ineffective assistance of counsel claims.

307. *See* Coleman v. Thompson, 501 U.S. 722, 749, 111 S. Ct. 2546, 2564, 115 L. Ed. 2d 640, 669 (1991) (holding that petitioner's failure to file a timely notice of appeal under state law barred further federal habeas review).

308. Harris v. Reed, 489 U.S. 255, 260, 109 S. Ct. 1038, 1042, 103 L. Ed. 2d 308, 315 (1989) (reaffirming that the federal court will not review a federal issue if the state court's judgment is based on an independent and adequate state law ground).

309. *See*, *e.g.*, Freeman v. Attorney General, 536 F.3d 1225, 1231 (11th Cir. 2008) (discussing how, as an exception to the general rule of procedural default, when a state ignores the procedural bar, a federal court cannot apply the bar on the state's behalf and thus must hear the claim (citing People v. Campbell, 377 F.3d 1208, 1235 (11th Cir. 2004) and Davis v. Singletary, 119 F.3d 1471, 1479 (11th Cir.1997)).

310. *See* Coleman v. Thompson, 501 U.S. 722, 729–30, 111 S. Ct. 2546, 2553–54, 115 L. Ed. 2d 640, 655–56 (1991) (stating that the Supreme Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment); Dretke v. Haley 541 U.S. 386, 392, 124 S. Ct. 1847, 1851–52, 158 L. Ed. 2d 659, 668 (2004) (discussing the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds); Hoffman v. Arave, 236 F.3d 523, 530 (9th Cir. 2001) (stating that "so long as the dismissal relies on a state law ground that is independent of the federal question and adequate to support the judgment, it will be insulated from federal review"). *See*, *e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158, 159 (1935) (affirming the non-reviewability of the state law decision in a breach of contract action for leasing motion-picture films).

311. Ake v. Oklahoma, 470 U.S. 68, 74–75, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53, 60–61 (1985); *see also* Boyd v. Scott, 45 F.3d 876, 880 (5th Cir. 1994) (finding that state court decision was "interwoven with federal law, and did not express clearly that its decision was based on state procedural grounds").

312. *See* La Crosse v. Kernan, 244 F.3d 702, 706–07 (9th Cir. 2001) (holding that the state's "untimeliness" rule did not constitute "independent" state grounds because at the time the petitioner defaulted his claim, the rule had a "fundamental constitutional error exception" that involved a ruling on federal law); Johnson v. Gibson, 169 F.3d 1239, 1249 (10th Cir. 1999) (holding that petitioner's claim was not procedurally defaulted because "Oklahoma courts do review such claims for fundamental error—a review that necessarily includes review for federal constitutional error," so procedural bar was not independent of federal law); Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994) (holding that although petitioner failed to bring an objection at trial, the state courts may review for plain error); Bradley v. Meachum, 918 F.2d 338, 343 (2d Cir. 1990) (holding that a state waiver rule that resulted in procedural default of petitioner's claim is not "independent of federal law" because, under Connecticut law, "procedural waiver cannot bar a

(ii) Showing the State Procedural Rule Was Not "Adequate" to Bar Federal Review

When you argue that your default of a state procedural rule is not an adequate (good enough) reason to deny review of your federal habeas petition, you are basically arguing that the state rule is unfair, interferes with enforcement of your federal rights, or is not applied consistently. Therefore, it is not an adequate reason to bar review of your claim.[313] Some common ways to argue that a state procedural rule is not adequate to bar review of your federal claims are

(1) The state's rule is not "firmly established," "consistently applied," or "strictly or regularly followed;"[314]

(2) The state procedural rule did not provide you with a reasonable opportunity to have your federal claim heard in state court because the rule frustrates (interferes with) the enforcement of federal rights or is unreasonably hard to meet and has the effect of frustrating federal rights;[315]

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defendant's challenge 'involv[ing] his constitutional right to a fair trial,'" and the state court had to first decide whether the petitioner received the constitutionally-required fair trial).

313. For a Supreme Court case that held that the state's procedural rule was not adequate to bar federal habeas review, see *Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002). *See also* Monroe v. Kuhlman, 433 F.3d 236, 245 (2d Cir. 2006) (finding state court's application of the contemporaneous objection rule to a situation where jurors viewed evidence during the trial without the judge present inadequate to bar federal review of the claim); Cotto v. Herbert, 331 F.3d 217, 247 (2d Cir. 2003) (finding New York Court of Appeals' application of the contemporaneous objection rule to a situation where there was no cross-examination of a witness who testified at petitioner's trial, and whose out-of-court identification of petitioner was admitted at trial through testimony of police officers, was inadequate to bar federal habeas review of this claim).

314. Ford v. Georgia, 498 U.S. 411, 423–24, 111 S. Ct. 850, 857, 112 L. Ed. 2d 935, 949 (1991); *see also* Johnson v. Mississippi, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987, 100 L. Ed. 2d 575, 583 (1988) (finding that the "procedural bar to defendant's subsequent attempt to raise claim … did not provide 'adequate and independent state ground' for affirming defendant's conviction, where procedural bar had not been consistently or regularly applied in the past"); James v. Kentucky, 466 U.S. 341, 348–49, 104 S. Ct. 1830, 1835, 80 L. Ed. 2d 346, 353 (1984) (holding that only state procedures that are "firmly established and regularly followed … can prevent implementation of federal constitutional rights"); Barr v. City of Columbia, 378 U.S. 146, 149, 84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766, 769 (1964) ("[S]tate procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); Sayre v. Anderson, 238 F.3d 631, 634 (5th Cir. 2001) (asserting that a state ruling that petitioner had procedurally defaulted claims would not bar federal review when the rule was not usually applied to defendants in petitioner's position); Romano v. Gibson, 239 F.3d 1156, 1170 (10th Cir. 2001) (asserting that state procedural rule was not adequate because state court applied the rule inconsistently in the cases of two co-defendants charged and tried together); Moore v. Ponte, 186 F.3d 26, 32–33 (1st Cir. 1999) (stating that procedural default resulting from defendant's violation of the contemporaneous objection rule does not bar federal review because state courts have overlooked the requirement in cases like petitioner's); Gosier v. Welborn, 175 F.3d 504, 507 (7th Cir. 1999) (asserting that state procedural rule was an inadequate bar to federal habeas corpus review because state courts applied the rule inconsistently and incompatibly); Clayton v. Gibson, 199 F.3d 1162, 1171 (10th Cir. 1999) (stating that default did not bar federal review because the state procedural rule was adopted after the default supposedly occurred and could not have been firmly established); Forgy v. Norris, 64 F.3d 399, 401–02 (8th Cir. 1995) (pointing out a previous holding that "unexpectable state procedural bars are not adequate to foreclose federal review of constitutional claims"); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir. 1996) (stating that California's state habeas time limits were not an adequate and independent state grounds to support procedural default where the time limits were not clear, well-established, and consistently applied prior to petitioner's filing of his first state habeas petition); Cochran v. Herring, 43 F.3d 1404, 1409 (11th Cir. 1995) (finding no bar to federal habeas review even though petitioner did not raise *Batson* claim on direct appeal because Alabama courts have not consistently applied a procedural bar to these types of cases), *modified*, 61 F.3d 20 (11th Cir. 1995); Grubbs v. Delo, 948 F.2d 1459, 1463 (8th Cir. 1991) ("[I]f a state applies its rule inconsistently, we are not barred from reaching the federal law claim.").

315. *See* Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("[I]f a state procedural rule frustrates the exercise of a federal right, that rule is 'inadequate' to preclude federal courts from reviewing the merits of the federal claim."); Mapes v. Coyle, 171 F.3d 408, 429 (6th Cir. 1999) (asserting that state procedural ground for denial of petition was not "adequate" because rulings resulted in "erroneous … refus[al] to consider" petitioner's ineffective assistance of appellate counsel claims); Jackson v. Shanks, 143 F.3d 1313, 1318–19 (10th Cir. 1998) (determining that state procedural rule procedurally barring claims not raised on direct appeal cannot be applied to ineffective assistance of counsel claims because doing so would "deprive [petitioner] of any meaningful review of the ineffective assistance of counsel claim"); Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996) (determining that federal habeas review was not barred due to procedural default because California timeliness rule was so unclear that it did "not 'provide … the habeas petitioner with a fair opportunity to seek relief in state court'" (quoting Harmon v. Ryan, 959 F.2d 1457, 1462 (9th Cir. 1992))); Wheat v. Thigpen, 793 F.2d 621, 624–25 (5th Cir. 1986) (stating that state rules not regularly followed prevented the "implementation of federal constitutional rights"); Williams v. Lockhart, 873 F.2d 1129, 1131–32 (8th Cir. 1989) (stating that violation of a "new [state] rule designed to thwart assertion of federal rights" is not an adequate bar to federal

(3) The procedural rule required you to object to the error before you could realize that the error occurred, or that the rule was applied in your case in a way that you could not have anticipated;[316] or
(4) You tried to raise a claim, and even though you did not follow the rule exactly, the way you tried to bring up the claim served the same interest as the state rule.[317]

If you have procedurally defaulted a claim, you can try to use the "independent or adequate state grounds" body of law to get around the procedural default. Remember, you have to show either that the state procedural rule is not independent of federal law or that the rule is not adequate to bar federal review.

(b) Exceptions to Procedural Default

If your claim is in procedural default, there are limited circumstances in which the federal court may still review your claim. These circumstances apply to both state and federal prisoners. The court will review your claim if you satisfy either the (1) "cause and prejudice" test or the (2) "fundamental miscarriage of justice" test.[318] The courts rarely find either of these, so *you should not depend on either of these exceptions to the procedural default rule.*[319] You should work hard to avoid procedural default by first raising all of your claims in state court or on direct federal appeal.

(i) Cause and Prejudice Test

The "cause and prejudice" test is a defense to procedurally defaulted claims. That means that if your claim is procedurally defaulted, the federal habeas court may still review your claim if you can prove that you had "cause" for not following the procedure and experienced "prejudice." To pass this test you must: (1) show cause (in other words, give a good reason for why you failed to follow the state procedural rule, or failed to present the claim in your direct appeal if you are a federal prisoner); and (2) show prejudice (that your case would have come out differently if you had been able to present your claim of constitutional violation).[320]

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habeas review); Walker v. Engle, 703 F.2d 959, 967 (6th Cir. 1983) (holding that notions of comity do not require deference to state court decisions where procedural bars that had no foundation in state law were applied).

316. *See* Gonzales v. Elo, 233 F.3d 348, 353–54 (6th Cir. 2000) (determining that the state rule that barred post-conviction review of claims not raised on direct appeal was inadequate to bar federal review of the claim because the rule was adopted after the petitioner's direct appeal was complete); Barnett v. Hadgett, 174 F.3d 1128, 1135 (10th Cir. 1999) (determining that state procedural rules deeming claims raised under Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) as barred if not raised on direct appeal cannot be applied to cases in which the direct appeal occurred before the *Cooper* decision); United States *ex rel.* Duncan v. O'Leary, 806 F.2d 1307, 1314 (7th Cir. 1986) (determining that petitioner did not default by not raising his ineffective assistance of counsel claim under state law because disagreement between the federal and state courts over the proper standard was such that petitioner could not have known about the claim and could not have been said to waive it).

317. *See* Albuquerque v. Bara, 628 F.2d 767, 772–73 (2d Cir. 1980) (holding that "substantial compliance" with the state procedural rule is enough to overcome procedural default).

318. Two of the main cases on this issue are Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) and Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2564, 115 L. Ed. 2d 640, 669 (1991). These exceptions were reaffirmed after the passage of AEDPA in Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518, 523 (2000) ("We … require a prisoner to demonstrate cause for his state-court default of any federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. … The one exception to that rule … is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice.").

319. United States v. Mabry, 536 F.3d 231, 243 (3d Cir. 2008) (holding there was no miscarriage of justice from petitioner's claim that he did not fully understand what the phrase "miscarriage of justice" meant in his waiver of collateral and direct appeals in his guilty plea because he had not satisfactorily identified any non-frivolous ground, had not produced any substantial appealable issues, and had failed to allege appealable issues that fell outside the terms of his waiver).

320. *See* Coleman v. Thompson, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640, 672 (1991) (holding that where petitioner had no independent constitutional right to counsel on appeal in state proceedings, his claim of ineffective counsel in state habeas petition did not constitute "cause" under the "cause and prejudice" standard); Engle v. Isaac, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572–73, 71 L. Ed. 2d 783, 801 (1982) (reaffirming that any prisoner bringing a constitutional claim to the federal court after a state procedural default must demonstrate cause and actual prejudice). *See also* Reed v. Ross, 468 U.S. 1, 11–13, 104 S. Ct. 2901, 2908–10, 82 L. Ed. 2d 1, 11–14 (1984) (affirming habeas relief because, state law did not allow for constitutional review of the jury's instructions on burden of proof at the time of trial, and the prisoner was prejudiced because he may not have been convicted had the jury been instructed correctly). It is important to note that the new laws issues discussed in Part C(2), "New Laws: The *Teague* Rule," would still apply and may bar relief, even if procedural default were overcome in this situation.

The cause and prejudice standard is the most significant obstacle you must overcome to obtain federal habeas review. Since the Supreme Court announced the standard in 1977,[321] federal courts have thrown out thousands of habeas petitions for failing to meet the standard. Therefore, you must think carefully and creatively about how to satisfy or get around the "cause and prejudice" standard.

1. Showing Cause

Showing "cause" is not easy. Generally, cause must be based on an external (outside) factor that prevented you from avoiding a procedural mistake.[322] Some reasons that courts will consider to have shown "cause" include:

(1) State officials prevented you from following the state procedural rule.[323] For example, at your trial, a state officer led you to believe that a constitutional violation had not occurred, when in fact it had. In this case, the officer's actions would be "cause" for why you did not object to the violation at trial. The court will allow you to argue this claim.[324]

(2) State officials deliberately lied about material information.[325] For example, when a state tells you that all *Brady* material (exculpatory material) has been turned over to you, when in reality it has not been, you cannot be expected to be able to present this evidence—since you did not know about it.[326] The fact that the state initially lied to you establishes a cause for failure to investigate that the court may consider.

(3) The legal basis of your constitutional claim was not reasonably available to you (or your lawyer) at the time of your trial.[327] In other words, a federal court will excuse your failure to object to an incident that occurred at your trial, if you can show that you could not have known from the case law existing at the time of your trial that the incident was a constitutional violation. Unfortunately, most attempts to show cause in this way are unsuccessful.[328] You will not show "cause" by just claiming any of the following things: that your attorney was unaware of the claim; [329] that your attorney

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321. Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

322. *See* Banks v. Dretke, 540 U.S. 668, 696, 124 S. Ct. 1256, 1275, 157 L. Ed. 2d 1166, 1192–93 (2004) ("The 'cause' inquiry, we have also observed, turns on events or circumstances 'external to the defense.'" (citing Amadeo v. Zant, 486 U.S. 214, 222, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988)).

323. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986) (determining that "some interference by officials" would constitute "cause" (citing Brown v. Allen, 344 U.S. 443, 486, 73 S. Ct. 397, 422, 97 L. Ed. 469, 504 (1953))).

324. *See* Strickler v. Greene 527 U.S. 263, 283, 119 S. Ct. 1936, 1949, 144 L. Ed. 2d 286, 303 (1999) (holding that petitioner had shown cause for not raising *Brady* claim in state court since the prosecutor had withheld evidence and the petitioner had relied on the prosecution's open file policy as fulfilling the prosecutor's duty to disclose, but also finding that petitioner did not show prejudice); *see also* Forman v. Smith, 633 F.2d 634, 641 (2d Cir. 1980) (reversing grant of habeas petition, but affirming the principle that if a police officer made a misleading statement that obscures an opportunity to develop a federal constitutional violation claim, such statement would be "cause" for not raising the claim on direct appeal).

325. Banks v. Dretke, 540 U.S. 668, 695–96, 124 S. Ct. 1256, 1274–75, 157 L. Ed. 2d 1166, 1192–93 (2004) (holding that, where prosecutors had lied and concealed information regarding a paid informant, the petitioner had made a showing of cause for not raising *Brady* claim in prior proceedings).

326. *See*, *e.g.*, Banks v. Dretke, 540 U.S. 668, 693, 124 S. Ct. 1256, 1273–74, 157 L. Ed. 2d 1166, 1191 (2004) (determining that because the prosecution persisted in hiding evidence and falsely representing that it had complied fully with its *Brady* disclosure obligations, the petitioner "had cause for failing to investigate, in state post-conviction proceedings").

327. *See* Reed v. Ross, 468 U.S. 1, 16, 104 S. Ct. 2901, 2910, 82 L. Ed. 2d 1, 15 (1984) (holding that, where well-settled law in the state placing the burden of proof on the defendant for self-defense and lack of malice could be challenged as unconstitutional under a new Supreme Court decision, the "novelty" of such a claim was proper cause for failing to raise the claim on direct appeal).

328. *See*, *e.g.*, Fernandez v. Leonardo, 931 F.2d 214, 216–17 (2d Cir. 1991) (finding no cause where the law was unsettled on the claim raised in the habeas petition but where the defense should have known to raise the objection nonetheless). In addition, even if you succeed in arguing that you had "cause" for not raising the constitutional error in your appeal, because you could not have known at the time of your trial that a constitutional error had occurred, the court could decide that this error still cannot be considered because of the *Teague* case, which says you cannot make an argument that raises a "new" rule of law. See Part C(2), "New Laws: The *Teague* Rule," of this Chapter for more information.

329. *See* Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575, 71 L. Ed. 2d 783, 804 (1982) ("Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.").

believed it would be useless to raise the claim because the state court had rejected the claim before;[330] or that your attorney simply overlooked the claim.[331]

(4) By failing to follow the state procedural rule (for example, failing to object at trial, failing to bring an appeal in time, etc.) your attorney provided you with "constitutionally ineffective assistance of counsel."[332] Remember that you must exhaust your claim of ineffective assistance of counsel in the state courts before presenting the claim to the federal court as cause for why you failed to follow a state procedural requirement.[333]

It is important to understand that the above list is not exhaustive: there may be other reasons in your specific case that would persuade a court to find that you have "cause." By *Shepardizing* both *Wainwright*[334] and *Coleman*[335] and researching this issue, you will discover other reasons that courts have found "cause."[336]

You should also be aware of various claims that the courts have determined *do not* constitute "cause." The following list includes only a few possibilities:

(1) Claims of ineffective assistance of counsel, if you did not have a constitutional right to counsel at that proceeding.[337]

(2) Claims that there are important facts that were not fully developed in the trial court, if you failed to develop the facts due to your own or your attorney's neglect.[338]

(3) Claims that rely on evidence that could not have been reasonably available to you at the trial or on direct appeal.[339] It is not enough to argue that you failed to make the claim earlier because you had not yet discovered the evidence. You have to show that you *could not* have discovered the evidence, even if you had tried. For example, if the prosecutor deliberately withheld evidence from the defense counsel at trial, that might show cause.[340]

2. Showing Prejudice

The Supreme Court has not explained "prejudice" as thoroughly as "cause." In *United States v. Frady*, the Court directly addressed the meaning of "prejudice" by stating that "prejudice" requires that you show errors at your trial "worked to [your] actual and substantial disadvantage, infecting [your] entire trial with error of constitutional dimensions."[341] You should Shepardize the *Frady* case to see if courts in your jurisdiction have explained what types of error show prejudice. For example, the Second Circuit has stated

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330. *See* Engle v. Isaac, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783, 802 (1982) ("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.").

331. *See* Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408 (1986) ("We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made.").

332. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 408 (1986). *But see* Tsirizotakis v. Le Fevre, 736 F.2d 57, 62–63 (2d Cir. 1984) (listing cases rejecting a defendant's attempt to show cause by alleging ineffective assistance of counsel).

333. *See* Murray v. Carrier, 477 U.S. 478, 488–89, 106 S. Ct. 2639, 2645–46, 91 L. Ed. 2d 397, 409 (1986) (expressing that the exhaustion doctrine "generally requires" the claim for ineffective assistance of counsel to be presented independently in state court). In New York, exhaustion of the ineffective assistance of counsel claim is done through an Article 440 motion.

334. Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

335. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

336. By *Shepardizing*, you can also make sure that the law has not changed. See Chapter 2 of the *JLM* for an explanation of how to Shepardize a case.

337. *See* Coleman v. Thompson, 501 U.S. 722, 754, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640, 672 (1991) ("[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel.").

338. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 6 n.2, 112 S. Ct. 1715, 1718 n.2, 118 L. Ed. 2d 318, 327 n.2 (1992) (rejecting a rule that would require an evidentiary hearing for habeas corpus cases where the state court hearing did not adequately develop the material facts "due to petitioner's own neglect").

339. McCleskey v. Zant, 499 U.S. 467, 498, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517, 547 (1991).

340. Fairchild v. Lockhart, 979 F.2d 636, 640 (8th Cir. 1992).

341. United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982) (emphasis omitted); *see* McCoy v. Newsome, 953 F.2d 1252, 1261 (11th Cir. 1992) (applying the *Wainwright* standard, the court determined that the errors at trial did not actually and substantially disadvantage the defense, so the defendant was not denied fundamental fairness).

in *dicta*[342] that it would find prejudice if a New York trial court accepted a defendant's guilty plea without holding a hearing on the defendant's competency when required to do so by state law. Such an error, the Second Circuit stated, would "infect" the conviction and violate due process.[343]

The "cause and prejudice" test is very difficult to meet.[344] Do not rely on this excuse if another one is available to you.

(ii) Fundamental Miscarriage of Justice

Another exception to procedural default is the "miscarriage of justice" exception. This exception is also extremely difficult to meet, and you should not rely on this exception to get out of procedurally defaulted claims if you have any other exception available to you. This exception usually only works if you can show that "failure to consider the claims [that are procedurally defaulted] will result in a fundamental miscarriage of justice."[345] The Supreme Court has not clearly said what a fundamental miscarriage of justice is, but in *Schlup v. Delo*, the Court hinted strongly that this exception requires a persuasive showing of actual innocence.[346] It is important to note that if you use this exception, you are not claiming that you are innocent and should be set free; rather, you are claiming that you are innocent and that is why the court should consider your procedurally defaulted and barred constitutional claim.[347]

To meet the requirements for the fundamental miscarriage of justice exception, you must present new evidence showing you are innocent. This evidence must not have been presented at trial.[348] Then you must show that with this new evidence, no reasonable juror would have convicted you.[349] It is also important to

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342. For a definition of *dictum* (the singular form of *dicta*), see Appendix V of the *JLM*, "Definitions of Words Used in the *JLM*."

343. *See* Silverstein v. Henderson, 706 F.2d 361, 368 n.13 (2d Cir. 1983). In *Silverstein*, the petitioner sought habeas relief from a sentence for armed burglary on the grounds that he was mentally retarded and had not understood his guilty plea. The Second Circuit granted habeas relief despite the fact that the petitioner had not raised this claim on direct appeal. The court found that applying the procedural default rule to an incompetent defendant was unconstitutional, and, therefore, it was unnecessary to apply the cause and prejudice test. In a footnote, the court remarked that even if procedural default applied, the defendant would be entitled to a hearing concerning the cause for his failure to raise the issue of competence on direct appeal. *See also* Pearson v. Secretary, No. 07-12828, 2008 U.S. App. LEXIS 8559, at *9 (11th Cir. Apr. 15, 2008) (*unpublished*) (holding that a prisoner raising a claim of cause and prejudice or miscarriage of justice based on the fact that he was proceeding *pro se* does not establish either of the exceptions to the procedural bar).

344. Some prisoners have tried to avoid the cause and prejudice standard by arguing that the standard should not apply in death penalty cases. *See*, *e.g.*, Smith v. Murray, 477 U.S. 527, 538–39, 106 S. Ct. 2661, 2668, 91 L. Ed. 2d 434, 447 (1986). Some prisoners have argued that the standard should not apply to constitutional errors, such as faulty jury instructions, which directly affect a jury's finding of guilt at trial. *See*, *e.g.*, Engle v. Isaac, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572–73, 71 L. Ed. 2d 783, 801 (1982). Other prisoners have argued that the standard should not apply to procedural defaults that occurred on appeal (such as failure to raise a particular claim on appeal), and not at trial. *See*, *e.g.*, Murray v. Carrier, 477 U.S. 478, 491, 106 S. Ct. 2639, 2647, 91 L. Ed. 2d 397, 410–11 (1986). The Supreme Court, however, has rejected all of these arguments. In addition, the Court has ruled that the "cause and prejudice" standard applies even in cases where you have defaulted on not only one but all of your federal constitutional claims, since you failed to file a notice of appeal within the required time. Coleman v. Thompson, 501 U.S. 722, 749–51, 111 S. Ct. 2546, 2564–65, 115 L. Ed. 2d 640, 668–70 (1991).

345. Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991) (reaffirming that the "fundamental miscarriage of justice" exception applies to procedurally defaulted claims). *See also* Murray v. Carrier, 477 U.S. 478, 495–96, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."); Engle v. Isaac, 456 U.S. 107, 135, 102 S. Ct. 1558, 1575–76, 71 L. Ed. 2d 783, 805 (1982) (stating that in some cases "cause" and "prejudice" will include the correction of a fundamentally unfair incarceration).

346. Schlup v. Delo, 513 U.S. 298, 321–22, 115 S. Ct. 851, 864, 130 L. Ed. 2d 808, 832–33 (1995).

347. If you are claiming that you are innocent and should be set free, meaning there was not enough evidence to convict you, the standard is much higher, and you should refer to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Remember that AEDPA created a stricter standard of review, so the *Jackson* standard will likely be applied in an even stricter fashion than described in the court's decision.

348. *See* Schlup v. Delo, 513 U.S. 298, 324, 327–28, 115 S. Ct. 851, 865, 867, 130 L. Ed. 2d 808, 834, 836–37 (1995) (stating that the new evidence does not have to be evidence that would be admissible at trial).

349. Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995). In *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986), the Court first stated the standard for a fundamental miscarriage of justice and said a prisoner must show "a constitutional violation has probably resulted in the conviction of one who is actually innocent" in order to meet the fundamental miscarriage of justice exception. In *Schlup*, the Court

note that this new evidence must not be prohibited by the Federal Rules of Evidence. Persuasive evidence of actual innocence that may not have been admissible in trial *can* be considered by the court in considering this claim.[350] If you can meet these standards, the court will consider your barred claims. The idea is that if you can convince the court that you are innocent, it will then look at the errors in your trial, even though it is normally barred from doing so, in order to make sure that a fundamental miscarriage of justice did not occur.

Finally, the fundamental miscarriage of justice exception can be used to challenge a procedurally defaulted claim if the result of the error is that the death penalty was imposed on someone who is "actually innocent" of a death sentence.[351] To be "actually innocent" of the death penalty means that you are innocent of the elements of the crime that pushed your sentence from a murder sentence to a *capital* murder sentence. To prove this claim, you must show by clear and convincing evidence that, if the constitutional violation had not occurred, you would not have been eligible for the death penalty.[352] This standard is extremely difficult to meet, and you should not rely on it to get around a procedurally defaulted claim.

4. Time Limit

Time is an issue that may complicate the preparation of your habeas petition. Both state and federal prisoners have a one-year time limit for filing federal habeas petitions.[353] This time limit applies even if the state post-conviction timeline is more than a year. Therefore, you must file both your state post-conviction petition and your federal habeas petition (if you are unsuccessful in your state petition) within the one-year time limit. Otherwise, the time runs out on your federal habeas petition, and you will be barred from seeking federal habeas review. Once you file the state post-conviction motion, however, your timeline for filing the federal habeas petition will be tolled, which means that the clock does not keep running while the state considers your motion.[354]

Generally, the one-year timeline will start on the day your case becomes "final"[355] following direct review.[356] Remember, the end of your direct review—not the end of your post-conviction appeals or any other proceeding—triggers the date your case becomes final. Your case will generally become final when the United States Supreme Court proceedings on direct review are completed,[357] or, if you do not file for certiorari,[358] the date when the time expires for filing a petition for certiorari.[359]

However, there are three special circumstances that can extend the time you have to file your federal habeas petition:

(1) If the state or federal government creates an impediment (obstruction or blockage) in violation of the Constitution or laws of the United States that prevents you from filing the application or motion, you

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explained that this standard requires the defendant to "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" if the constitutional error had not occurred. In House v. Bell, 547 U.S. 518, 539 126 S. Ct. 2064, 2078, 165 L. Ed. 2d 1, 22–23 (2006), the Supreme Court determined that AEDPA's higher standard of review does *not* apply in cases where there is a claim of actual innocence.

350 Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808, 836 (1995).

351. *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 1217 n.6, 103 L. Ed. 2d 435, 445 n.6 (1989) (stating that a court may grant a writ even in the absence of a showing of cause for procedural default, but only in an "extraordinary" case); *see also* Sawyer v. Whitley, 505 U.S. 333, 345–46, 112 S. Ct. 2514, 2522–23, 120 L. Ed. 2d 269, 284–85 (1992) (indicating that factors disproving eligibility for the death penalty may overcome a procedural default).

352. Sawyer v. Whitley, 505 U.S. 333, 347–50, 112 S. Ct. 2514, 2523–25, 120 L. Ed. 2d 269, 284–87(1992) (holding that the court must find that but for the alleged constitutional error, the sentencing body could not have found any aggravating factors, and thus the petitioner was ineligible for the death penalty).

353. *See* 28 U.S.C. § 2244(d)(1) (2006) (state prisoners); 28 U.S.C. § 2255(f)(1) (2006) (federal prisoners). However, if you are a state prisoner convicted of the death penalty and your state qualifies as an opt-in state (meaning that, in exchange for providing competent counsel, the state can take advantage of faster resolution of federal habeas claims), your time limit is *much* shorter than one year.

354. *See* 28 U.S.C. § 2244(d)(2) (2006) (state prisoners).

355. *See* 28 U.S.C. § 2244(d)(1)(A) (2006) (state prisoners); 28 U.S.C. § 2255(f)(1) (2006) (federal prisoners).

356. *See* 28 U.S.C. § 2244(d)(1)(A) (2006) (state prisoners); 28 U.S.C. § 2255(f)(1) (2006) (federal prisoners).

357. *See* 28 U.S.C. § 2244(d)(1)(A) (2006) (state prisoners); 28 U.S.C. § 2255(f)(1) (2006) (federal prisoners).

358. "*Certiorari*," or a "writ of *certiorari*," is an appeal to the United States Supreme Court.

359. *See* 28 U.S.C. § 2244(d)(1)(A) (2006) (state prisoners); Clay v. United States, 537 U.S. 522, 532, 123 S. Ct. 1072, 1079, 155 L. Ed 2d 88, 97 (2003) ("[F]or federal criminal defendants who do not file a petition for *certiorari* with [the Supreme Court] on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires.").

have one year after the unconstitutional or illegal impediment is removed to file your federal habeas petition;[360]

(2) If the Supreme Court announces a new retroactive legal right on which your habeas petition can be based, the petition is due one year from the announcement;[361] or

(3) If new facts become discoverable that were not discoverable before the one-year time limit, even with due diligence, your habeas petition is due one year from when the facts became discoverable through due diligence.[362]

The date on which your one-year timeline starts is called the triggering date. If more than one triggering date affects your case, you will have to apply within one year of the latest date of the above three options.[363] But, you should try to file within a year of the earliest triggering date, because it will often be very difficult to show that a later triggering date applies to your case.

If you have multiple claims in your petition and the claims do not all have the same triggering date, you should try to file within one year of the earliest triggering date. If the time limit runs out on one of your claims, the court will probably not hear the claim even if your habeas petition also includes other claims with later triggering dates.[364] For example, imagine that your conviction became final on January 1, and

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360. *See* 28 U.S.C. § 2244(d)(1)(B) (2006) (state prisoners); 28 U.S.C. § 2255(f)(2) (2006) (federal prisoners). The unconstitutional or illegal impediment must be created by the state. An example of an unconstitutional impediment is the withholding of exculpatory evidence (evidence favorable to the defendant) in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963). *See*, *e.g.*, Edmond v. U.S. Attorney, 959 F. Supp. 1, 4 (D.D.C. 1997) (determining that, for petitioner claiming that the government is holding exculpatory evidence, the one-year limitation does not begin until the receipt of the evidence). Another example of a state-created impediment is inadequate prison libraries. *See*, *e.g.*, Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (remanding case for evidentiary hearing on whether petitioner's claim that an unconstitutional impediment existed because of lack of information in the prison law library may be upheld). The State can also create an impediment by interfering with your filing, for example, if prison officials place you in segregation and take away your legal materials. *See* United States v. Gabaldon, 522 F.3d 1121, 1126 (10th Cir. 2008) (finding *pro se* federal prisoner's habeas petition should not have been dismissed by district court because state interfered with his filing by placing him in segregation and confiscating his legal materials). *But see* Monroe v. Beard, 536 F.3d 198, 210 (11th Cir. 2008) (finding confiscation of prisoners' legal materials by prison officials did not violate constitutional rights because the prisoner did not allege actual injury nor did prisoner provide evidence that confiscation was constitutionally unreasonable where there was a legitimate interest in stopping the prisoner from filing fraudulent claims and the decision to confiscate materials was rationally related to this interest; noting due process only requires post-deprivation process for return of confiscated materials).

361. *See* 28 U.S.C. § 2244(d)(1)(C) (2006) (state prisoners); 28 U.S.C. § 2255(f)(3) (2006) (federal prisoners). *See*, *e.g.*, United States v. Adams, No. 90–00431–08, 1996 U.S. Dist. Lexis 8875, at *5 n.2 (E.D. Pa. June 24, 1996) (*unpublished*) (noting that petitioner has one year from the date the right was initially recognized by the Supreme Court). Exactly when the one year ends depends on the circuit in which you are filing. *See* Haugh v. Booker, 210 F.3d 1147, 1150 (10th Cir. 2000) (noting that the circuits disagree as to whether the one-year period starts when the new right is announced, or when the court holds it to be retroactive on collateral claims). However, note that the Supreme Court construed AEDPA to mean that the one year runs from the date a new right was recognized, not the date the right was made retroactive. *See* Dodd v. United States, 545 U.S. 353, 357, 125 S. Ct. 2478, 2482, 162 L. Ed. 2d 343, 349 (2005).

362. *See* 28 U.S.C. § 2244(d)(1)(D) (2006) (state prisoners); 28 U.S.C. § 2255(f)(4) (2006) (federal prisoners). *See*, *e.g.*, Dobbs v. Zant, 506 U.S. 357, 358–59, 113 S. Ct. 835, 836, 122 L. Ed. 2d 103, 107 (1993) (holding that when petitioner's habeas claim, which had been rejected by lower courts, was being reviewed by the federal circuit court, petitioner was allowed to supplement his record with a trial transcript because the delay in locating the transcript had been substantially caused by the state's mistake). For a more recent case discussing the concept of "due diligence" in prison settings, see *Wims v. United States*, 225 F.3d 186, 190–91 (2d Cir. 2000) (finding that the district court erred in dismissing habeas petition filed 17 months after conviction became final because the time delay was reasonable).

363. *See* 28 U.S.C. § 2244(d)(1) (2006) (state prisoners); 28 U.S.C. § 2255(f) (2006) (federal prisoners).

364. The Third and Sixth Circuits have held that each claim in a habeas petition must satisfy the one-year time limit, and claims not satisfying that time limit will be dismissed. Bachman v. Bagley, 487 F.3d 979, 984 (6th Cir. 2007); Fielder v. Varner, 379 F.3d 113, 118–120 (3d Cir. 2004). The Eleventh Circuit has held that, as long as at least one claim in a habeas petition satisfies the one-year time limit, the court can hear *all* claims in the petition, even if some of those claims would otherwise be untimely. Walker v. Crosby, 341 F.3d 1240, 1245 (11th Cir. 2003). The majority of district courts confronting the issue has rejected *Walker* and concluded that any individual claim in a habeas petition should be dismissed if it does not satisfy the time limit. *See* Khan v. United States, 414 F. Supp. 2d 210, 216 (E.D.N.Y. 2006) (declining to address the untimely claims in a habeas petition that also contained a timely claim based on a newly recognized right); Murphy v. Espinoza, 401 F. Supp. 2d 1048, 1052 (C.D. Cal. 2005) (stating that "this Court must assess the timeliness of an inmate's [habeas] claims on a claim-by-claim basis"). *But see* Ferreira v. Dept. of Corr., 494 F.3d 1286, 1289 (11th Cir. 2007) (discussing and upholding *Walker* as valid precedent); Shuckra v. Armstrong, 2003 U.S. Dist. LEXIS 4408, at *12–13 (D. Conn. March 21, 2003) (*unpublished*) (holding that where a habeas petition contains at least one timely claim, other claims cannot be dismissed for untimeliness).

then on March 1 the Supreme Court announced a new retroactive legal right that applies to you. The triggering date for any claims that you have that are related to your trial is January 1, and the triggering date for the claim that you have that is based on the new Supreme Court case is March 1. You should file a habeas petition that contains *all* of your claims by January 1 of the following year. If you file in February, the court will hear your claim based on the new Supreme Court case, but will probably not hear any of the claims related to your trial.

The time limit for habeas petitions is *very strict*, but most federal courts have allowed the statute of limitations to be tolled (meaning that the time limit is put on hold) under certain circumstances. Tolling occurs while your state post-conviction appeal is pending, provided that you filed the petition correctly.[365] This means that if you have filed the state post-conviction petition in the proper court, with all the paperwork submitted properly, and within the time allowed by state law,[366] then the time that the state court spends considering your petition will not count against your one-year time limit. However, your time *does not* toll while a *federal* court is considering your petition.[367] In some extreme situations, you may qualify for "equitable tolling." Time that is equitably tolled does not count against your one-year time limit. However, equitable tolling is only available when "'extraordinary circumstances' beyond the petitioner's control make it impossible to file a petition on time."[368]

Think of the time limit as a stopwatch with one year on its face. Once the direct review of your case becomes final, the clock starts ticking. When an Article 440 motion or state post-conviction petition is filed in state court, the clock is stopped. Once the state court decides the case and all other appeals are completed,[369] the clock starts ticking again, and a habeas petition must be filed in federal court before the one year is up. Note that the clock does not reset to one year. Rather, the only time remaining is what was left when the Article 440 motion or state habeas petition was filed in state court.

5. Successive Petitions[370]

It is difficult to file more than one federal habeas corpus petition. It is very important to file your habeas petition properly and completely the first time. You may not raise a habeas claim a second time after it has

365. *See* 28 U.S.C. § 2244(d)(2) (2006) (explaining that the limitations period is tolled during "the time … which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending"); Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364–65, 148 L. Ed. 2d 213, 218 (2000) (holding that a state post-conviction motion is "properly filed" even if the motion is procedurally barred, as long as the "delivery and acceptance [of the papers] are in compliance with the applicable laws and rules governing filings"). The *Artuz* Court also noted that these rules usually include the form of the document, the time limits on its delivery, the place it must be filed, and the filing fee.

366. *See* Allen v. Siebert, 552 U.S. 3, 7, 128 S. Ct. 2, 4, 169 L. Ed. 2d 329, 334 (2007) (holding that a petition for post-conviction relief rejected by the court as untimely is not "properly filed" under 28 U.S.C. § 2244(d)(2) and thus does not toll the one-year limitation, even though an affirmative defense of the state's statute of limitations may still be available).

367. *See* Duncan v. Walker, 533 U.S. 167, 172, 121 S. Ct. 2120, 2124, 150 L. Ed. 2d 251, 258 (2001) (holding that properly filed federal habeas petitions do not toll the one-year deadline. In this case, Walker's state conviction became final in April 1996, and he filed a habeas petition that was dismissed in July 1996. In May 1997 he tried to file another federal habeas petition, and the Court held that this petition was time-barred because the time he was waiting for the decision on his first federal habeas petition did not stop the clock on the one-year timeline).

368. *See* Rhines v. Weber, 544 U.S. 269, 277–78, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d 440, 452 (2005) (noting that in extraordinary circumstances the court may issue a stay so that the petitioner may have the opportunity to present his claim without the time limit running out). *See also* Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669, 679 (2005) (holding that habeas petitioner has the burden of establishing that he pursued his rights diligently and that some extraordinary circumstance stood in his way of filing within the time limit for equitable tolling to be proper). This is often a very high burden. For example, in the Third Circuit, the court rejected an equitable tolling argument when the petitioner was never informed that the state supreme court had denied his petition, even though his lawyer had been informed, since the lawyer never informed the petitioner. The court held attorney error was not sufficient to establish an extraordinary circumstance. LaCava v. Kyler, 398 F.3d 271, 275–76 (3d Cir. 2005). Courts also may allow equitable tolling of the statute of limitations to allow you to file a state exhaustion petition and an amended federal post-exhaustion petition.

369. Most courts have held that any time used to file a petition for *certiorari* to the Supreme Court after state post-conviction proceedings does not continue to toll the clock. *See* Stokes v. Dist. Attorney, 247 F.3d 539, 542 (3d Cir. 2001) (holding that the 90-day period during which a *certiorari* petition may be filed does not toll the statute of limitations); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001) (affirming that the limitations period is not tolled for those 90 days); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 2001) (finding that the limitations period for filing a habeas petition was not tolled while defendant was seeking an appeal to the Supreme Court).

370. "Successive" means the one after. In other words, petitions after your first one are considered "successive."

been adjudicated on the merits.[371] There are a few instances when you may bring new claims in a successive habeas petition, but these instances are very limited. It is very difficult to show the court that your claim falls into one of the exceptions where petitioners are allowed to file a successive petition.

If your first petition was insufficient for one of a few reasons, the courts will allow you to file a new petition without considering the new petition successive. The following are the situations for which the courts will not consider your second petition successive:

(1) If you failed to exhaust your state remedies, and your first petition is dismissed to allow you to exhaust your state remedies, your second petition, once all the claims are exhausted, is not considered successive.[372]
(2) If your first petition is rejected for failure to pay the filing fee or for mistakes in form, the second, corrected petition is not considered successive.[373]
(3) If the first petition you filed was mislabeled as a Section 2255 petition, but actually was a Section 2241 petition that challenged the execution instead of the validity of the sentence, the court will not bar your second petition for being successive.[374]
(4) If your second petition challenges parts of the judgment that came about as the result of an earlier, successful petition, the court will not bar that second petition.[375] In this case, you must obtain authorization to file a second petition.[376]

In some cases, even if the court deems a second petition to be successive, it may still allow you to proceed with your submission. However, exceptions to the general prohibition on successive petitions are rare and very difficult to meet. The court will only consider a successive petition in extraordinary situations where you are raising a "new" claim in a second petition for federal habeas relief. The exceptions for "new" claims are different for state and federal prisoners.

If you are a state prisoner, these are the possible exceptions to the general prohibition on successive petitions:

(1) Your new claim rests on a "new" and previously unavailable rule of constitutional law that the Supreme Court has deemed is applicable retroactively "to cases on collateral appeal."[377] This means,

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371. 28 U.S.C. § 2244(b)(1) (2006). Section 2244 applies to all petitioners filing under §§ 2241, 2254, and 2255, which includes all state and federal habeas petitioners. You may consider reading the text of 28 U.S.C. § 2244 (2006) in full to better understand the restrictions on successive petitions. *See* Burton v. Stewart, 549 U.S. 147, 153–54, 127 S. Ct. 793, 796–97, 166 L. Ed. 2d 628, 633–34 (2007) (instructing the district court to dismiss prisoner's petition and finding that since the prisoner had not made a motion in the court of appeals for an order authorizing the district court to consider the application, the application was thus a "second or successive" habeas application that he did not have authorization to file).

372. *See* Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601, 146 L. Ed. 2d 542, 551 (2000) (deciding that "a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a 'second or successive' petition as that term is understood in the habeas context"); Carlson v. Pitcher, 137 F.3d 416, 420 (6th Cir. 1998) (affirming that "a habeas petition filed after a previous petition has been dismissed on exhaustion grounds is not a 'second or successive petition'"); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) (*per curiam*) ("Application of the gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review and thus, would conflict with the doctrine of writ abuse, as understood both before and after *Felker* …. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether."). See Part D(2), "Exhaustion of State Remedies and Direct Appeal," of this Chapter for more information on exhaustion.

373. *See* O'Connor v. United States, 133 F.3d 548, 550 (7th Cir. 1998) (asserting that a petitioner's "returned" petition will not be considered an "initial petition"); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (finding that petitioner's failure to pay a filing fee is not to be considered an "unsuccessful petition" and therefore the subsequent petition is not considered "successive").

374. *See* Chambers v. United States, 106 F.3d 472, 474–75 (2d Cir. 1997). See Part A(4) of this Chapter, "Which Laws Apply to Federal Habeas Corpus," for more information on when federal prisoners would use § 2241 instead of § 2255.

375. *See, e.g.*, *In re* Taylor, 171 F.3d 185, 187–88 (4th Cir. 1999) (holding that petitioner's motion is not "second or successive" where petitioner seeks to raise only those issues that originated at the time of re-sentencing, after his first petition had been granted).

376. Burton v. Stewart, 549 U.S. 147, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007) (holding that where petitioner did not obtain authorization to file a second petition challenging the same judgment, the court lacked jurisdiction to hear it).

377. 28 U.S.C. § 2244(b)(2)(A) (2006). This provision only applies to you if the Supreme Court has announced a new right since your case was decided and has explicitly said that this new right would apply to cases that have already been decided. Section 2244(b)(2)(A) only applies if the Supreme Court has held that the law was retroactive in your case. In order to file a second habeas petition, it must be clear at the time of filing that the Court has held the law to be

the Supreme Court has recently clarified or made a rule of constitutional law and noted that it applies, even to cases that were decided before they made the rule. See Part C(2) of this Chapter, "New Laws: The *Teague* Rules."

(2) Your new claim relies on facts that you could not have discovered earlier, even with "due diligence."[378] Additionally, these facts combined with the other facts already on the record establish by "clear and convincing"[379] evidence that "but for"[380] the constitutional error that you are challenging, no reasonable juror would have found you guilty of the offense with which you were charged.[381] See Part D(3)(B)(ii) of this Chapter, "Fundamental Miscarriage of Justice."

If you are a federal prisoner, these are the possible exceptions to the general prohibition:

(1) A recent Supreme Court decision announces a retroactive legal right that was not available when you filed your first petition.[382] In these cases, you do not need to show "the likelihood of innocence." If, after the rejection of your first petition, the Supreme Court announces that a particular new law will be applied to all future and prior cases, you can submit a second petition on the same claims. In these cases, you do not need to show that ignoring the new law will harm you in some way.[383]

(2) The combination of the "newly discovered evidence" with other facts on the record will provide "clear and convincing evidence" that, in the absence of a trial court's error, the jury would have found you not guilty.[384] In these cases, you need to show that the error caused by the court's violation of the Constitution, federal laws, or treaties is not merely "harmless."

Note that even if you can prove any of the above exceptions, other procedural difficulties could still prevent you from filing a second request for habeas relief. In order to file a successive petition in federal district court, you need to get permission from a panel of three federal circuit court judges. Upon your request, the panel of three judges will review your papers and make a decision about whether or not they will allow your special successive petition within thirty days.[385] If the court decides not to review your papers, then you cannot appeal their decision and, thus, you cannot file a second petition.

Because the rules are so strict, you should be careful when you are filing your petition for the first time. Be sure you include all the facts and do not assume that you will have a second chance if you get something wrong or if you do not follow a procedural rule correctly. The new law in AEDPA was meant to be harsh, and it is.[386]

E. The Mechanics of Petitioning for Federal Habeas Corpus

This Section explains the basic process surrounding habeas law: (1) when to file, (2) where to file, (3) whom to file against, (4) how to file, (5) what to expect after you file, and (6) how to appeal.

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retroactive. Tyler v. Cain, 533 U.S. 656, 662, 121 S. Ct. 2478, 2482, 150 L. Ed. 2d 632, 642 (2001) (allowing successive habeas petition if the claim relies "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

378. "Due diligence" means "good effort." 28 U.S.C. § 2254(e)(2)(A)(ii) (2006).

379. "Clear and convincing evidence" is a standard between "preponderance of evidence" and "beyond a reasonable doubt." According to the "clear and convincing evidence" standard, you must show that it is *highly likely* that the new facts would have changed the outcome of your trial. However, you do not have to show that the new facts *definitely* would have changed the outcome of your trial.

380. "But for," in this context, means "without."

381. 28 U.S.C. § 2254(e)(2)(B) (2006).

382. 28 U.S.C. § 2255 (2006).

383. Federal prisoners may be able to bring habeas claims by filing a § 2241 habeas motion even when the new law is not constitutional. To do this, the new law must meet a few conditions: (1) the new law must be substantive, and it must now deem the "criminal" conduct for which the petitioner was convicted no longer "criminal"; and (2) the new law must have been passed after the petitioner's direct appeal, and before the first habeas motion. *See In re* Jones, 226 F.3d 328, 333 (4th Cir. 2000). See Part A(4), "Which Laws Apply to Federal Habeas Corpus," of this Chapter for more information on when federal prisoners should bring § 2241 petitions.

384. 28 U.S.C. § 2255 (2006).

385. 28 U.S.C. § 2244(b)(3)(D) (2006).

386. *See* Felker v. Turpin, 518 U.S. 651, 654, 116 S. Ct. 2333, 2335, 135 L. Ed. 2d 827, 834 (1996) (finding AEDPA's new restrictions on successive habeas corpus petitions constitutional).

1. When to File

You must file your writ for habeas corpus in federal district court within one year after your case becomes "final."[387] This is *very* important; if you miss this time limit, you will most likely not be allowed to bring a federal habeas claim. The time limit is discussed in detail in Part D(4) of this Chapter, "Time Limit."

If you are filing *pro se*,[388] you should file the following three documents within the one-year time limit: (1) a habeas petition,[389] (2) an application for appointment of counsel, and (3) an application for a stay (in death penalty cases only).[390]

2. Where to File

If you are a state prisoner, you may have a choice of federal courts in which to file your petition. You may file your petition in either the district court of the district where you are imprisoned or the district court of the district in which you were convicted.[391] For some people, this may be the same district. For others, this may be two different districts.

There are several advantages to filing in the district court where you were convicted. First, the records of your trial and sentencing are located there. Second, it is likely that additional evidence or witnesses that you may wish to produce for the court can be found there. Third, if you were convicted in a large city or urban area and are now imprisoned in a small town or rural area, more qualified attorneys may be available to you in the district where you were convicted. On the other hand, if you have an attorney, it may be easier for a local attorney to travel to your prison to discuss the case with you. In that case, you may choose to file in the district court of the place where you are now imprisoned. In any case, regardless of where you file, the court in which you file will likely transfer your case to the district where you were convicted if the court decides that a transfer is desirable.[392]

If you are a federal prisoner, you do not have a choice of where to file your habeas petition. You must file your petition in the district in which you were convicted and sentenced.

3. Whom to File Against

If you are a state prisoner filing a Section 2254 petition, or a federal prisoner filing under Section 2241,[393] you need to name a respondent on your petition. If you are a federal prisoner filing under Section 2255, you do not need to name a respondent on your petition.[394]

(a) State Prisoners and Section 2254

As a state prisoner, your habeas petition is a civil, not a criminal, action. You can think of a habeas petition as a lawsuit—you are not suing for money or damages, but rather for a new trial, or for your release from imprisonment. Therefore, you cannot simply file a petition to the court; you must file a petition *against* the person currently responsible for detaining you. The person you file the petition against is called the "respondent." The respondent will be the person who has control over your custody.[395] So, the person you name as the respondent will depend on your type of custody.[396]

Generally, the person who has control over your custody and whom you should name as the respondent is the warden of your prison or the chief officer in charge of state penal institutions.[397] However, there are a

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387. *See* 28 U.S.C. § 2244(d)(1) (2006) (state prisoners); 28 U.S.C. § 2255 (2006) (federal prisoners).

388. "*Pro se*" means that you are appearing in court for yourself and are not represented by a lawyer.

389. Remember to raise all possible claims, as long as you can support them with factual details and explanations about the harms.

390. A "stay" means a temporary court-ordered stop of the judicial proceeding.

391. 28 U.S.C. § 2241(d) (2006).

392. 28 U.S.C. § 2241(d) (2006).

393. If you are filing under 28 U.S.C. § 2241, the guidelines for your respondent will be similar to those for state prisoners filing under § 2254. See Part A(4), "Which Laws Apply to Federal Habeas Corpus," of this Chapter for information on when federal prisoners should use § 2241.

394. This is because a § 2255 motion, unlike a § 2241 or § 2254 petition, is technically a criminal procedural motion. So, the respondent remains the party that prosecuted you—the United States.

395. This is called the "immediate custodian rule." Rumsfeld v. Padilla, 542 U.S. 426, 435, 124 S. Ct. 2711, 2718, 159 L. Ed. 2d 513, 527 (2004).

396. See Part D(1), "In Custody," of this Chapter for more information on custody.

397. "[T]he state officer having custody of the applicant shall be named as respondent." Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. § 2254 (2006). You should name either the warden or officer based on who has "custody" over you. If you are unsure, you should name both the warden and the officer as respondents.

few situations where you should name a different party as respondent. If you are not currently in custody, but are challenging a future custodial sentence, you should name the attorney general of the state that will have custody over you.[398] If your custody falls under one of the few situations where you are not under physical custody of the state,[399] you should name as respondent the person who has legal control over your custody.[400] For example, if you are on parole, you should name the parole officer and the supervising agency, such as the parole board, as the respondents.[401]

4. How to File

To begin a habeas proceeding, you need to obtain a petition form for a writ of habeas corpus. You should write to the clerk of the federal district court in which you plan to file and request this form.[402] If you are a state prisoner, you should request the standard form for a petition under 28 U.S.C. § 2254 for a writ of habeas corpus.[403] If you are a federal prisoner, request a standard form for a 28 U.S.C. § 2255 motion.[404] The clerk should send the form free of charge.[405] Sample blank forms for 28 U.S.C. § 2254 petitions and 28 U.S.C. § 2255 motions are in the United States Code ("U.S.C.") following each statute's rules.[406]

The form will ask for a lot of information. The requested information includes the facts on which you base your claims, your custody status, the state court proceedings in which you exhausted your claims, the citations and results of any other federal habeas petitions, and the relief you seek.[407] The motion must also include all the grounds of relief available to you, the facts supporting each of your claims, and the relief you are requesting.[408] In providing this information, keep the following nine steps in mind.

(a) Write Plainly

Do not worry about using legal terminology with which you are uncomfortable. The court will not penalize you for not using formal legal terms. And, if you misuse legal phrases, you may confuse the court

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398. Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. § 2254 (2006).

399. See Part D(1), "In Custody," of this Chapter for more information on custody.

400. *See* Rumsfeld v. Padilla, 542 U.S. 426, 439, 124 S. Ct. 2711, 2720, 159 L. Ed. 2d 513, 530 (2004) ("[I]dentification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged 'custody.'").

401. *See* Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996) ("If the petitioner is on parole, the parole board or equivalent should be named [as respondent].").

402. For a list of federal district court addresses, see Appendix I at the end of the *JLM*.

403. Rules Governing § 2254 Cases, Rule 2(d), 28 U.S.C. fol. § 2254 (2006) (requiring federal district courts to supply prisoners with forms for habeas corpus petitions); 28 U.S.C. §2254 r. 2(d) (2006). Note that these are citations to the Rules Governing Section 2254 Cases in the United States District Courts. If you have trouble locating these in your library, check with the federal district court clerk.

404. Rules Governing § 2255 Cases, Rule 2(c), 28 U.S.C. fol. § 2255 (2006) (requiring federal district courts to supply prisoners with forms for § 2255 motions); 28 U.S.C. §2255 r. 2(c) (2006). Please NOTE: these are citations to the Rules Governing Section 2255 Cases in the United States District Courts. If you have trouble locating these in your library, check with the federal district court clerk.

405. Rules Governing § 2254 Cases, Rule 2(d), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 2(c), 28 U.S.C. fol. § 2255 (2006) (both requiring that courts provide the forms free of charge); 28 U.S.C. §2254 r. 2(d) (2006); 28 U.S.C. §2255 r. 2(c) (2006).

406. Petition for Relief From a Conviction or Sentence By a Person in State Custody, 28 U.S.C. fol. § 2254 (2006); Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. §2254 Petition for Relief From a Conviction or Sentence By a Person in State Custody (2006); 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody (2006). Note that these are citations to blank sample forms, and should be attached to the rules governing these statutes. If you have trouble locating these in your library, check with the federal district court clerk. Note that the Rules Governing § 2255 Cases, Rule 2(c), 28 U.S.C. fol. § 2255 (2006) and the Rules Governing § 2254 Cases, Rule 2(c), 28 U.S.C. fol. § 2254 (2006) state that individual districts may alter the exact format of the form, but both the forms the court uses and the sample forms should have the same substance.

407. Petition for Relief From a Conviction or Sentence By a Person in State Custody, 28 U.S.C. fol. § 2254 (2006); Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, 28 U.S.C. fol. § 2255 (2006). OR: 28 U.S.C. §2254 Petition for Relief From a Conviction or Sentence By a Person in State Custody (2006); 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody (2006).

408. Rules Governing § 2254 Cases, Rule 2(c)(1)-(4), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 2(b)(1)-(4), 28 U.S.C. fol. § 2255 (2006). OR: 28 U.S.C. §2254 r. 2(c)(1)-(4) (2006); 28 U.S.C. §2255 r. 2(d)(1)-(4) (2006).

and prevent the judge from understanding your claim. Just be sure to write as clearly as possible by checking your reasoning, grammar, and spelling.

(b) Tell the Facts

The most important thing you can do in your petition is to tell the court the relevant facts. Judges usually know the law but rarely know the facts of your case. If you have facts that relate to your legal claims—for example, that the government withheld a ballistics report from your trial lawyer—you should tell the court. Factual details you think are unimportant may be very important to the court.

(c) Proofread

Ask someone you trust to read over your papers. Sometimes it is difficult to evaluate your own arguments. A fresh set of eyes can catch gaps in your reasoning or grammatical mistakes you might have overlooked.

(d) Argue Truthfully and Rely on the Law

Remember who your audience is. You are writing to a federal judge and his legal assistants. Federal judges and their assistants often have a great deal of experience handling habeas petitions, so you should not try to trick them or lie to them. Also, do not make a plea for mercy. Instead, you should appeal to a judge's sense of fairness by providing a strong argument that the government has convicted or sentenced you unfairly. To do this, you should use the legal standards and information provided above in this Chapter.

(e) Provide Copies of Parts of the Record

Throughout the criminal justice process, you have probably received lots of papers like subpoenas, briefs, judgments, and transcripts. These papers make up the record of your case and are often very helpful to a reviewing court. Include copies of as much of the record as you can, and point out the relevant parts of the record in your legal argument. If you are missing some of the record or do not have access to a copy machine, ask the court to get the relevant parts of the record from the trial court or the prosecution. If possible, identify the important parts of the record as specifically as you can. For example, do not simply say that the judge asked impermissible questions at your trial; instead, identify (if possible) what those questions were and the transcript page numbers where the questions appear.

(f) Provide Citations

Statutes, administrative rules, and judicial opinions often have citations explaining where they can be found. Whenever possible, provide citations to the laws and cases that apply to your factual situation. See Chapter 2 of the *JLM*, "Introduction to Legal Research," to learn how to find these laws and cases and how to provide citations. You are not required to give citations,[409] but they may help the judge make his or her decision efficiently. If you know only a part of the citation, like the name of a case, you can simply include that part. If you do not know the citation, do not include it and do not worry about it. Try not to include long lists of cases in your petition ("string cites"). Instead, rely on the best ones for your case. If a lot of cases say the same thing, pick the most recent decision from the highest court and cite it.

(g) Present All Possible Claims

As discussed in Part D(5) ("Successive Petitions") of this Chapter, you probably have only one chance to submit a federal habeas petition. Thus, you should submit all the claims that are supported by the facts of your case and by the law.

(h) Sign, Date, and Copy

After you complete the form, you must sign it.[410] In addition, date the petition and/or swear to the date that it was given to a prison official to be mailed.[411] Then, make three copies of the completed petition so that

409. *See* Jones v. Jerrison, 20 F.3d 849, 853 (8th Cir. 1994) ("No statute or rule requires that a petition identify a legal theory or include citations to legal authority.").

410. Rules Governing § 2254 Cases, Rule 2(d)(5), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 2(c)(5), 28 U.S.C. fol. § 2255 (2006) (requiring you, or someone you have authorized, to sign the petition under penalty of perjury); 28 U.S.C. §2254 r. 2(d)(5) (2006); 28 U.S.C. §2255 r. 2(c)(5) (2006).

411. Petition for Relief From a Conviction or Sentence By a Person in State Custody, p.15, 28 U.S.C. fol. § 2254 (2006); Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, p.14, 28 U.S.C. fol. § 2255

you have four in total. You must send the original and two copies to the clerk of the court.[412] Keep the remaining copy for your own records.

(i) Pay Your Filing Fee

The filing fee for a habeas petition is five dollars.[413] If you cannot afford the fee, you should ask the clerk of the court for an *in forma pauperis* application.[414] This application seeks the court's permission to proceed "in the manner of a poor person" by not paying court fees and costs. In addition to completing the *in forma pauperis* form, you must write and sign an application of indigence.[415] Also, you must provide a certificate from your prison warden indicating how much money is in your prison account.[416] When you have the *in forma pauperis* form, the application of indigence, and the prison account certificate ready, you should make a copy for your own records and send the originals to the clerk of the court. If the clerk accepts your application, you will not have to pay the filing fee or any other expenses arising in your habeas proceeding.

Federal prisoners filing a motion under 28 U.S.C. § 2255 do not have to pay a filing fee.[417] However, federal prisoners should still complete the *in forma pauperis* form, discussed above, because it will be helpful to have the form on file in the event that the judge chooses to appoint you counsel.[418] Federal prisoners filing 28 U.S.C. § 2241 petitions,[419] and state prisoners filing 28 U.S.C. § 2254[420] petitions will have to pay the filing fee or file the *in forma pauperis* application discussed above.

Passage of the Prison Litigation Reform Act ("PLRA"), which requires prisoners to make full or partial payment of the application fee for civil suits, raised a question about whether habeas petitioners would be required to pay filing fees regardless of their *in forma pauperis* status.[421] However, federal courts of appeal have uniformly held that requirements set out in the PLRA do not apply to habeas corpus petitions.[422]

5. What to Expect After Filing

After you have filed your petition, you can expect the court to issue one or more of the following: (a) a dismissal, (b) an order to show cause, and/or (c) an evidentiary hearing. Generally, the court must conduct an evidentiary hearing if you "alleged facts, which, if found to be true, would have entitled [you] to habeas

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(2006). [OR: 28 U.S.C. §2254 Petition for Relief From a Conviction or Sentence By a Person in State Custody, p.15 (2006); 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody, p.14 (2006).It is important to note the date in case the petition does not arrive at the court for an extended period of time after you have given it to prison officials to be mailed. Rules Governing § 2254 Cases, Rule 3(d), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 3(d) 28 U.S.C. fol. § 2255 (2006) (stating that a petition is considered on time as long as it enters the prison internal mailing system on or before the last day of filing); 28 U.S.C. §2254 r. 3(d) (2006); 28 U.S.C. §2255 r. 3(d) (2006).

412. Rules Governing § 2254 Cases, Rule 3(a), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 3(a), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. §2254 r. 3(a) (2006); 28 U.S.C. §2255 r. 3(a) (2006).

413. 28 U.S.C. § 1914(a) (2006).

414. Rules Governing § 2254 Cases, Rule 3(a)(2), 28 U.S.C. fol. § 2254 (2006); 28 U.S.C. §2254 r. 3(a)(2) (2006).

415. Rules Governing § 2254 Cases, Rule 3(a)(2), 28 U.S.C. fol. § 2254 (2006) (requiring an affidavit that the prisoner is unable to pay the filing fee in accordance with 28 U.S.C. § 1915); 28 U.S.C. §2254 r. 3(a)(2) (2006). *See also* 28 U.S.C. § 1915 (2006) (on general requirements for proceedings *in forma pauperis*).

416. Rules Governing § 2254 Cases, Rule 3(a)(2), 28 U.S.C. fol. § 2254 (2006); 28 U.S.C. §2254 r. 3(a)(2) (2006).

417. *See* Rules Governing § 2255 Cases, Rule 3 advisory committee's note, 28 U.S.C. fol. § 2254 (2006) ("There is no filing fee required of a movant under these rules."); 28 U.S.C. § 2255 r. 3 advisory committee's note (2006).

418. *See* Rules Governing § 2255 Cases, Rule 3 advisory committee's note, 28 U.S.C. fol. § 2254 (2006) (stating that affidavit for an in forma pauperis form will still be attached to the form provided for a § 2255 motion in case the movant will need the form at a later stage); 28 U.S.C. § 2255 r. 3 advisory committee's note (2006).

419. 28 U.S.C. § 1915 (2006) (general guidelines on proceedings in forma pauperis). For more information on when a federal prisoner should use 28 U.S.C. § 2241 instead of § 2255, see Part A(4), "Which Laws Apply to Federal Habeas Corpus?," of this Chapter.

420. Rules Governing § 2254 Cases, Rule 3(a), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 3(a), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. §2254 r. 3(a) (2006); 28 U.S.C. §2255 r. 3(a) (2006).

421. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 ((codified at 28 U.S.C. §1915(b)(1) (1996)). Please see Chapter 14 of the *JLM* for a full discussion of the PLRA.

422. *See*, *e.g.*, United States v. Levi, 111 F.3d 955 (D.C. Cir. 1997) (*per curiam*) (holding that the PLRA filing fee provisions do not apply to habeas proceedings); Smith v. Angelone, 111 F.3d 1126, 1129-30 (4th Cir. 1997) (holding that the PLRA filing fee provisions do not apply to habeas proceedings); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (holding that the PLRA filing fee provisions do not apply to habeas proceedings).

relief."[423] In other words, the court is supposed to give you the benefit of the doubt and assume the truth of your alleged facts when deciding whether to look at the evidence. However, the court may make its decision without you present.[424]

(a) Dismissal

After you file your habeas request, the judge may dismiss your entire petition. The judge will do so if it appears on the face of your petition that you are not entitled to relief, that is, if habeas law does not provide you with any relief even assuming your claims are true.[425] For instance, the court will dismiss your claim if in your federal habeas petition you complain about a harmless error. The court may also reject your claim if the facts of your case on the record are not fully developed (in other words, if you have not fully stated that you have a federal claim), or if it is clear that your petition was not filed within the one-year time limit.

(b) Order to Show Cause

If the judge decides that, assuming the truth of your claim, you may have a case, he or she will issue an "order to show cause" to the person who has you in custody.[426] If you are a state prisoner, this person is probably the superintendent of your prison.[427] If you are a federal prisoner, the United States Attorney (the prosecutor) is this person.[428] The "order to show cause" directs the warden or attorney to state why the judge should not issue a writ of habeas corpus.[429] The warden or attorney must then reply by filing an "answer" within a time limit fixed by the court,[430] and must supply you with a copy of his answer.[431] If you object to any statement of fact in the answer, you need to contest the statements in a document known as a "traverse."[432]

423. *See* Ciak v. United States, 59 F.3d 296, 307 (2d Cir. 1995) (requiring an evidentiary hearing where petitioner alleged trial counsel abandoned defense strategy because of conflict of interest); *see also* Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994) (dismissing habeas petition as premature when discovery had not been completed on whether trial counsel failed to use exceptions to rape shield law); United States v. Blaylock, 20 F.3d 1458, 1465–69 (9th Cir. 1994) (requiring evidentiary hearing where defendant claimed counsel's failure to inform defendant of government's plea offer constituted ineffective counsel); Gov't of Virgin Is. v. Weatherwax, 20 F.3d 572, 573, 580 (3d Cir. 1994) (requiring evidentiary hearing where defendant claimed counsel's failure to seek *voir dire* constituted ineffective counsel because, if true, claim would be grounds for habeas corpus relief); Frazer v. United States, 18 F.3d 778, 781, 784–85 (9th Cir. 1994) (entitling prisoner to evidentiary hearing unless files and record of the case conclusively show that the prisoner is not entitled to relief).

424. *See* 28 U.S.C. § 2243 (2006) (state prisoners do not have to be present when the court is only dealing with issues of law); 28 U.S.C. § 2255 (2006) (federal prisoners do not have to be present at the hearing determining a § 2255 motion).

425. Rules Governing § 2254 Cases, Rule 4, 28 U.S.C. fol. § 2254 (2006) ("If it plainly appears from the petition and any attached exhibits that the petitioner is note entitled to relief in the district court, the judge must dismiss the petition."); Rules Governing § 2255 Cases, Rule 4(b), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. §2254 r. 4 (2006); 28 U.S.C. §2255 r. 4(b) (2006).

426. Rules Governing § 2254 Cases, Rule 4, 28 U.S.C. fol. § 2254 (2006) ("If the petition is not dismissed, the judge must order the respondent to file an answer, motion or other response."); Rules Governing § 2255 Cases, Rule 4(b), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. §2254 r. 4 (2006); 28 U.S.C. §2255 r. 4(b) (2006).

427. Rules Governing § 2254 Cases, Rule 2(a), 28 U.S.C. fol. § 2254 (2006); 28 U.S.C. § 2254 r. 2(a) (2006).

428. Rules Governing § 2255 Cases, Rule 4(b), 28 U.S.C. fol. § 2255 (2006) ("If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response."); 28 U.S.C. § 2255 r. 4(b) (2006).

429. Rules Governing § 2254 Cases, Rule 4, 28 U.S.C. fol. § 2254 (2006). The state attorney or a district attorney will usually represent the warden. Rules Governing § 2255 Cases, Rule 4(b), 28 U.S.C. fol. § 2254 (2006); 28 U.S.C. § 2254 r. 4 (2006); 28 U.S.C. § 2255 r. 4(b) (2006).

430. Rules Governing § 2254 Cases, Rule 5(b), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 5(b), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. § 2254 r. 5(b) (2006); 28 U.S.C. § 2255 r. 5(b) (2006).

431. Rules Governing § 2254 Cases, Rule 5 advisory note, 28 U.S.C. fol. § 2254 (2006) ("Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner."); 28 U.S.C. § 2254 r. 5 advisory committee note (2006).

432. A "traverse" is your way of denying any important facts claimed by the warden. Under Rule 5 following § 2254 and § 2255, you may submit a "reply" in response to the other side's answer within a time fixed by the judge.

(c) Evidentiary Hearing

Under AEDPA, the habeas court is required to assume the facts as determined by the state court.[433] However, after receiving the petition, answer, and traverse, the habeas court may choose to hold an evidentiary hearing on the facts that were not fully developed in state trial court.[434] The habeas court's decision to hold a hearing may depend on why the facts were not developed in the trial court. In other words, whether a hearing will be held may be affected by (1) whether some error you are responsible for prevented the development of the facts, or (2) whether the state's error prevented the factual development.

6. Petitioner's Error

If you or your lawyer failed to fully develop the facts in state court, this is referred to as a "petitioner's error." AEDPA has severely limited the opportunities for evidentiary hearings in this situation. The rule states that you must show two things: "cause" and "innocence."[435]

You can show "cause" in one of two ways:

(1) By showing you are now relying on a retroactive right newly recognized by the Supreme Court;[436] or
(2) By showing you are now relying on newly discovered facts that could not be uncovered earlier during the state proceedings through "due diligence" (reasonable effort).[437]

In addition to showing cause, you must show "innocence." You can show innocence if the "facts underlying [your] claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found [you] guilty of the underlying offense."[438] This means that you must prove that a "reasonable" juror would not have found you guilty of the crime of which you were convicted if the constitutional error you are alleging had never happened.

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433. 28 U.S.C. § 2254(e)(1) (2006) ("a determination of a factual issue made by a State court shall be presumed to be correct."). Rules Governing § 2254 Cases, Rule 5(e), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 5(d), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. § 2254 r. 5(e) (2006); 28 U.S.C. § 2255 r. 5(d) (2006).

434. *See* Rules Governing § 2254 Cases, Rule 8 advisory note, 28 U.S.C. fol. § 2254 (2006) (stating that the judge may hold an evidentiary hearing where the material facts of the case are in dispute (citing Townsend v. Sam, 372 U.S. 293 (1963))); 28 U.S.C. § 2254 r. 8 advisory committee note (2006). *See also* 28 U.S.C. § 2254(d) (2006) (circumstances under which a hearing is mandatory). The federal district court may designate a magistrate to conduct hearings on your petition. Rules Governing § 2254 Cases, Rule 8(b), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 8(b), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. § 2254 r. 8(b) (2006); 28 U.S.C. § 2255 r. 8(b) (2006). After the hearing, the magistrate will file findings of facts and recommendations with the court. The magistrate must mail you a copy of these findings and recommendations. Rules Governing § 2254 Cases, Rule 8(b), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 8(b), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. § 2254 r. 8(b) (2006); 28 U.S.C. § 2255 r. 8(b) (2006). You must serve and file written objections to the magistrate's findings and recommendations *within 10 days* of receiving the magistrate's proposals. Rules Governing § 2254 Cases, Rule 8(b), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 8(b), 28 U.S.C. fol. § 2255 (2006); 28 U.S.C. § 2254 r. 8(b) (2006); 28 U.S.C. § 2255 r. 8(b) (2006). While Rule 8(b) states only that you "may" file written objections, you should *always* file written objections if you disagree with any of the magistrate's findings or recommendations.

435. 28 U.S.C. § 2254(e)(2) (2000).

436. This means a newly recognized right that can be applied to past situations.

437. 28 U.S.C. § 2254(e)(2)(A) (2000). For a case providing an example of evidence not previously discoverable through "due diligence," see *Michael Wayne Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). In that case, the Supreme Court held that in order to obtain an evidentiary hearing in federal court the petitioner must show he exercised due diligence in trying to develop the facts in state court. If the petitioner can show he was "diligent in developing the record and presenting, if possible, all claims of constitutional error," but facts remained inadequately developed, the petitioner may be entitled to a federal evidentiary hearing. Michael Wayne Williams v. Taylor, 529 U.S. 420, 437, 120 S. Ct. 1479, 1491, 146 L. Ed. 2d 435, 452 (2000). Additionally, the requirement of due diligence does not depend on whether the efforts were successful, but on whether "the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Michael Wayne Williams v. Taylor, 529 U.S. 420, 435, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435, 451 (2000). The Court also held that "in the usual case that the prisoner, [must] at a minimum, seek[] an evidentiary hearing in the state court in the manner prescribed by state law." Michael Wayne Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490, 146 L. Ed. 2d 435, 452 (2000); *see also* Dobbs v. Zant, 506 U.S. 357, 359, 113 S. Ct. 835, 836, 122 L. Ed. 2d 103, 107 (1993) (finding that a trial transcript may not be excluded for delay in its discovery where the delay was a result of the state's error).

438. 28 U.S.C. § 2254(e)(2)(B) (2006); *see* Sawyer v. Whitley, 505 U.S. 333, 345, 112 S. Ct. 2514, 2522, 120 L. Ed. 2d 269, 284 (1992) (citing the "actual innocence" exception, but not allowing an exception based solely upon a showing of the existence of additional mitigating evidence that bore only on the discretionary decision between the death penalty and life imprisonment).

Only by showing both cause and innocence will you be granted an evidentiary hearing to further develop your facts. If you cannot show these two things, the court will proceed with the facts as they appear in the state court record. It is difficult to overcome your error using the cause and innocence standard. So, if the lack of factual development was caused by your error, the court probably will not grant you an evidentiary hearing. This is why it is so important to investigate and raise all the facts supporting all your constitutional claims in state court. It is also why you must ask the state court to appoint an investigator and all the experts you need to help you discover and identify facts supporting your constitutional claims. Be sure to request discovery of documents, and always request an evidentiary hearing at which you can present your witnesses and evidence and can prove your claims.

7. State's Error

If the state or the state court prevented the development of facts in your case, you will receive a mandatory hearing. In *Townsend v. Sain*, the Supreme Court listed six situations in which state errors require the federal court to hold an evidentiary hearing:[439]

(1) The merits of the factual dispute were not resolved in the state hearing;
(2) The state's factual determination is not fairly supported by the record as a whole;
(3) The state court's fact-finding procedure did not adequately provide a full and fair hearing;
(4) There is a substantial allegation of newly discovered evidence;
(5) The material facts were not adequately developed at the state court hearing;[440] or
(6) The state judge did not afford the applicant a full and fair hearing for any reason.

Remember that these situations afford you a hearing only if the state or the court was at fault for not developing the facts during the state proceedings.

8. How to Appeal

If you filed a petition for habeas corpus in federal district court and your petition was denied, you may appeal to the appropriate United States Court of Appeals (also called the circuit court).[441] Because AEDPA has severely restricted the opportunity to file a second or successive petition for habeas relief, the opportunity to appeal your first petition is even more important. Be sure to follow the procedures correctly. You must file a notice of appeal in the district court within thirty days of the district court judgment.[442] You must be sure to file on time because it is unlikely the circuit court will grant an extension.[443]

An appeal is not mandatory, and you do not have an automatic right to appeal a denial of your habeas petition. You must get permission to appeal by obtaining a "certificate of appealability" from a federal district or circuit court judge.[444] You do this by filing an application for a certificate of appealability with your notice of appeal in district court. If the district court denies your request for a certificate of appealability entirely, you may request one from the appeals court by filing an application for a certificate of

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439. Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770, 786 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5, 112 S. Ct. 1715, 1717–18, 118 L. Ed. 2d 318, 326–27 (1992).

440. Under *Keeney v. Tamayo-Reyes*, absent a showing of cause for failure to develop the facts in state court proceedings and actual prejudice resulting from the failure, a federal court will not provide a habeas petitioner with an evidentiary hearing where the petitioner had an adequate opportunity to develop the relevant facts in state court proceedings, unless a fundamental miscarriage of justice would result from the failure to hold a hearing. Keeney v. Tamayo-Reyes, 504 U.S. 1, 11, 112 S. Ct. 1715, 1721, 118 L. Ed. 2d 318, 330–31. *But see* Rhoden v. Rowland, 10 F.3d 1457, 1460 (9th Cir. 1993) (remanding for an evidentiary hearing because, unlike petitioner in *Tamayo-Reyes*, petitioner took all steps possible to develop a record of prejudice). Note that the standards of both *Townsend* and *Keeney* were superseded by the passage of the AEDPA in 1996.

441. 28 U.S.C. § 2253 (2006).

442. 28 U.S.C. § 2107(a) (2006).

443. While obtaining an extension is hard, a federal court may grant an extension under Federal Rule of Appellate Procedure 4(a)(5)(A), which will allow the court to extend the time for filing if you can show excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A). In *Mendez v. Knowles*, 535 F.3d 973, 980–81 (9th Cir. 2008), the court granted an extension based on excusable neglect, when the defendant's mailed habeas petition arrived to the court a day late. The court believed it was permissible to grant an extension because it would not prejudice the other party, the defendant acted in good faith when he filed the petition for an extension, and the delay was only for one day and had no impact on the judicial proceedings. Note these are still very narrow circumstances, and different courts may be more or less open to granting extensions.

444. 28 U.S.C. § 2253(c)(1) (2006); *see, e.g.*, Hogan v. Zavaras, 93 F.3d 711, 712 (10th Cir. 1996) (denying certificate of appealability for failure to show a substantial denial of a constitutional right after writ of habeas corpus was denied by federal district court).

appealability with that court's clerk.[445] If the district court grants a certificate for only some of your claims, you may ask the court of appeals to include additional claims the district court did not specify. [446]

The circuit judge will permit an appeal only upon a "substantial showing of the denial of a constitutional right."[447] To satisfy this "substantial showing" standard, you must specify the issue(s) involved in the violation of your federal constitutional rights.[448] Be sure to ask for a certificate of appealability on every issue you want to appeal. Your appeal will be limited to those issues on which the certificate is granted.

Some of the "appealable issues" that have been accepted in the past are listed below:

(1) Even if the parties consent, does a magistrate judge have the authority under 28 U.S.C. § 636 and Article III of the Constitution to make a final judgment in a habeas corpus case?[449]
(2) Did the trial court deny you the right to confront witnesses?[450]
(3) Did the prosecutor commit a *Brady* violation concerning blood-testing evidence?[451]
(4) Did the prosecutor commit a *Brady* violation by withholding witness statements at trial that were favorable to your case?[452]
(5) Was your confession coerced by police beatings?[453]
(6) Was your trial counsel constitutionally ineffective?[454]

If your petition was dismissed for procedural reasons, like failure to exhaust state remedies,[455] a certificate of appealability will issue only if reasonable jurors could debate whether (1) a constitutional violation occurred, and (2) the district court correctly dismissed your petition.[456] Issuing a certificate of appealability does not require showing that the appeal will succeed but that reasonable jurors could debate whether the petition should have been resolved differently.[457] The inquiry does not require full consideration of the factual or legal bases presented in support of the claim,[458] which makes getting a certificate of appealability a bit easier.

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445. If the court of appeals denies your request for a certificate of appealability, you may try to appeal this denial to the Supreme Court. The Court has held that it has jurisdiction to hear such appeals. Hohn v. United States, 524 U.S. 236, 247, 118 S. Ct. 1969, 1975, 141 L. Ed. 2d 242, 256 (1998).

446. See, for example, Rule 22-1(e) of the Ninth Circuit Rules, which allows a defendant to present issues that did not appear in the application for the certificate of appealability and which submits this motion to expand the certificate of appealability to be decided by the merits panel. 9th Cir. R. 22–1(e).

447. 28 U.S.C. § 2253(c)(2) (2006).

448. 28 U.S.C. § 2253(c)(3) (2006); *see* Herrera v. United States, 96 F.3d 1010, 1012 (7th Cir. 1996) (requiring that the defendant specify the issues involved in order to obtain a certificate of appealability).

449. *See* Orsini v. Wallace, 913 F.2d 474, 476 (8th Cir. 1990) (finding that magistrate judges have the authority to order entry of judgment in a habeas case upon consent of the parties).

450. *See* Norris v. Schotten, 146 F.3d 314, 329–31 (6th Cir. 1998) (stating that an error in limiting cross-examination will allow for a grant of habeas relief only if the error rises to the level of a denial of fundamental fairness).

451. Norris v. Schotten, 146 F.3d 314, 334 (6th Cir. 1998) (stating *Brady* principles apply only when exculpatory information is not disclosed or when a tardy disclosure prejudices the defendant).

452. Mahler v. Kaylo, 537 F.3d 494, 504 (5th Cir. 2008) (reversing district court's denial of defendant's petition for habeas relief upon finding that state court unreasonably applied clearly established federal law under *Brady* when it found that evidence which was favorable to the defendant and withheld by the prosecutor was not material).

453. *See* Nelson v. Walker, 121 F.3d 828, 832 (2d Cir. 1997) (finding that defendant satisfied the requirement of substantial showing of a denial of a constitutional right, as the record indicated that further inquiry was necessary into his claim that his confession was involuntary).

454. See Part B(2) ("Standards and Tests for Claims of Violations") of this Chapter for more information on ineffective assistance of counsel.

455. See Part B(5) ("Successive Petitions") of this Chapter for more information on failure to exhaust.

456. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542, 555 (2000) (reversing after determining defendant had shown reasonable jurists could conclude district court's procedural rulings were wrong). The Second Circuit applied the same standard in *Matias v. Artuz*, 8 Fed. Appx. 9, 11–12 (2d Cir. 2001).

457. Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 931, 944 (2003) ("A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues are adequate to deserve encouragement to proceed further.").

458. Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed. 931, 950 (2003) ("This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.").

F. How to Get Help from a Lawyer

You do not have a constitutional right to a court-appointed lawyer in a federal habeas corpus proceeding. In non-capital cases, a court may provide you with a lawyer when the "interests of justice" require the court to do so.[459] If you are not appointed a lawyer, your right to access the courts includes at least some access to either a law library or "jailhouse" lawyers.[460] See *JLM*, Chapter 3, "Your Right to Learn the Law and Go to Court," for more information. It is important to note that even if you are appointed counsel for your habeas petition, you do not have a right to *effective* assistance of counsel.[461]

Generally, federal courts will appoint a lawyer to represent you if one of the following is true:

(1) Your case involves complex legal issues;[462]
(2) You are mentally or physically disabled;[463]
(3) You cannot investigate key facts, or the issues in your case require expert testimony to be resolved;[464]
(4) The court decides to hold a hearing to investigate the facts of your case;[465]
(5) The court allows you to conduct discovery;[466] or
(6) Your habeas petition is denied in district court but a certificate of appealability is granted to appeal in the court of appeals.

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459. 18 U.S.C. § 3006A(a)(2)(B) (2006); 28 U.S.C. § 2255 (2006); Rules Governing § 2254 Cases, Rules 6(a), 8(c), 28 U.S.C. fol. § 2254 (2006); Rules Governing § 2255 Cases, Rule 6(a), 8(c), 28 U.S.C. fol. § 2255 (2006); *see also* Reese v. Fulcomer, 946 F.2d 247, 263–64 (3d Cir. 1991) (describing the factors the court should consider before appointing counsel to an indigent habeas petitioner as: (1) whether the habeas claim is frivolous; (2) whether appointment of counsel will benefit the petitioner and the court; (3) the complexity of the legal or factual issues in the case; and (4) the ability of the petitioner to investigate facts and present claims). You should research when you are entitled to a lawyer.

460. *See* Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977) (holding that the right of access to the courts includes a right to either adequate law libraries or assistance from persons trained in the law). *See also* Lewis v. Casey, 518 U.S. 343, 351–53, 116 S. Ct. 2174, 2180–81, 135 L. Ed. 2d 606, 617–19 (1996) (affirming prisoners' rights to access law libraries and librarian staff but limiting the *Bounds* decision by holding that prisoners need to show an actual injury suffered to prove a violation of the right to access to the courts).

461. 28 U.S.C. § 2254(i) (2006) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under § 2254.").

462. *See*, *e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (requiring appointment of counsel because the factual and legal issues were sufficiently complex and numerous; also finding that petitioner's ability to investigate the issues was significantly impaired by his imprisonment); United States *ex rel.* Jones v. Franzen, 676 F.2d 261, 267 (7th Cir. 1982) (appointing counsel for complex legal issues when allegations included withholding evidence, admission of co-defendant's statements, and improper jury sequestration). *But see* Williams v. Groose, 979 F.2d 1335, 1337 (8th Cir. 1992) (refusing to appoint counsel when petitioner had assistance in his earlier judicial proceedings that raised substantially similar claims as the habeas claim).

463. Merritt v. Faulkner, 697 F.2d 761, 764–66 (7th Cir. 1983) (appointing counsel to a recently blinded petitioner in a non-habeas petition that had the same requirements for appointment of counsel as habeas petitions). *But see* Phelps v. United States, 15 F.3d 735, 738 (8th Cir. 1994) (refusing to appoint counsel to petitioner committed to a mental health institution when the court found that he was "fully capable of arguing the issues" and there was "no inference that [petitioner] was unable to understand the legal proceedings in which he was participating").

464. *See*, *e.g.*, Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (requiring appointment of counsel because the factual and legal issues were sufficiently complex and numerous and because petitioner's imprisonment significantly impaired his ability to investigate the issues); United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960) (ruling that when complex factual data must be developed and prisoner does not have sufficient ability or training to recognize, organize, or elicit testimony to develop such data, appointment of counsel may be necessary); Al Odah v. United States, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (determining that prisoners who did not have access to a law library, had an "obvious language barrier," and were "almost certainly lack[ing] a working knowledge of the American legal system" were entitled to appointed counsel because it was "impossible" for them to investigate their claim); Lemeshko v. Wrona, 325 F. Supp. 2d 778, 788 (E.D. Mich. 2004) (finding counsel should be appointed in a habeas action where prisoner "has made a colorable claim, but lacks the means to adequately investigate, prepare, or present the claim").

465. The Rules Governing § 2254 Cases, Rule 8(c), 28 U.S.C. fol. § 2254 (2006) and the Rules Governing § 2255 Cases, Rule 8(c), 28 U.S.C fol. § 2255 (2006) require a court to appoint a lawyer if the court decides to hold a hearing to investigate the facts of your case. *See also* United States v. Duarte-Higareda, 68 F.3d 369, 370 (9th Cir. 1995) (finding court appointment of counsel mandatory when evidentiary hearings are required for habeas petitions under 28 U.S.C. § 2255 or 28 U.S.C. § 2254).

466. The Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C. fol. § 2254 (2006) and the Rules Governing § 2255 Cases, Rule 6(a), 28 U.S.C. fol. § 2255 (2006) suggest that a court should provide you with a lawyer if the court allows you to use discovery and believes a lawyer is necessary for effective use of discovery proceedings. See Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery," for a discussion of discovery.

The federal district judge usually has full discretion in this matter, meaning that the appellate court normally will not overturn the district judge's decision about the appointment of counsel. However, at least one jurisdiction has made a general rule that counsel should be appointed whenever an indigent prisoner has a strong legal claim in a habeas petition.[467]

To request a court-appointed lawyer, you must prepare a motion for appointment of counsel, a brief memorandum stating the legal and factual reasons why the court should appoint a lawyer, and an *in forma pauperis* application, including the supporting documents discussed in Part E(4) of this Chapter.

You may file these papers at several different times during your habeas proceeding. For example, you may request a lawyer even before you file your petition, so that the lawyer can help you prepare the petition. Courts, however, are unlikely to appoint an attorney at this early stage because they do not know the nature or complexity of your claims. So, you may want to wait until you submit your petition or until a later stage in the proceeding, such as during discovery or a hearing, when the rules favor appointment of a lawyer.

G. Conclusion

This Chapter explains the writ of habeas corpus and lays out the procedures you will need to follow to petition for the writ. Remember, your imprisonment violates federal law if your arrest, trial, or sentence violated a federal statute, treaty, or the U.S. Constitution. But, the process and standards for your habeas claim will differ according to whether you are a federal or state prisoner. In either case, a federal habeas petition claims your imprisonment is illegal because your arrest, trial, or sentence violated federal law.

467. The court's rule extends to civil actions in general, not just habeas petitions. Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (holding that "when an indigent [person] presents a colorable civil claim to a court, the court, upon request, should order the appointment of counsel" if satisfied that the prisoner has alleged a prima facie case).

APPENDIX A:

THE NINE STEP APPEALS PROCESS

This chart represents the steps a state prisoner must take when appealing a decision, starting from the initial trial, all the way through to the habeas petition.

The first column, on the left, shows how you would make direct appeals. Box 1 is your initial trial. After this trial you make your direct appeals to the higher state courts, which is box 2. After your direct appeals to the higher state courts, you appeal to the United States Supreme Court, in box 3, as the last step in your direct appeals process.

The second column, in the middle of the chart, represents your state post-conviction proceedings, which you begin *after* your direct appeals are complete. Box 4 shows the first of the collateral attacks, and you begin this process in the same court where your trial was. In box 5, you appeal to the higher state courts. Finally, in box 6, you appeal to the United States Supreme Court, the last step in your state post-conviction proceedings.

The final step is to begin your federal habeas corpus petition, which you start in the appropriate federal district court, in box 7. You begin the federal habeas process *after* completing your direct appeals process, and after you have completed your state post-conviction proceedings. In box 8, you appeal to the appropriate circuit court, and finally, you appeal to the United States Supreme Court in the last box 9.

You can always ask the Supreme Court to hear your case, but it does not have to grant your request. If you do ask the Supreme Court to hear your case, it is called petitioning for a *writ of certiorari*. The Supreme Court will either grant your petition (hear your case) or deny your petition (refuse to hear your case). It is worth noting that the Supreme Court rarely grants these petitions. That said, it is important to file, even if you think you might not be successful.

DIRECT APPEAL	STATE POST-CONVICTION	FEDERAL HABEAS
(1) Trial in the Court	(4) Post-Conviction in Court Where Convicted	(7) Federal District Court
↓	↓	↓
(2) Direct Appeal to State Intermediate Court and State Supreme Court	(5) Appeal to State Intermediate Court and State Supreme Court	(8) Court of Appeal (Circuit Court)
↓	↓	↓
(3) U.S. Supreme Court	(6) U.S. Supreme Court	(9) U.S. Supreme Court

APPENDIX B:

CHECKLIST FOR FIRST-TIME FEDERAL HABEAS CORPUS PETITIONERS

Before submitting your habeas petition, make sure that you can answer "yes" to each of the following questions:

For state and federal prisoners:

(1) Have you tried to get help from an attorney?
(2) Does your conviction or sentence violate the Constitution, federal law, or treaties?
(3) Have you described how your conviction or sentence violates the Constitution, federal law, or treaties?
(4) Have you discussed every possible violation and included a detailed explanation of the facts for each violation?
(5) If the violation concerns the illegal search and seizure clause of the Fourth Amendment, have you shown that you were denied the opportunity to discuss this claim in the trial or appeals process?
(6) If possible, does your petition avoid relying on "new" law?
(7) Does the violation have a substantial effect on the verdict or sentence? Was the violation not "harmless?"
(8) Have you explained why the violation was not harmless?
(9) Can you file your habeas petition within one year from when your case became final?
(10) Have you written to the clerk to ask for a model form?
(11) Have you checked your petition to see if your arguments are logical and organized and have the correct spelling and grammar?
(12) If possible, have you asked someone to read and check your papers?
(13) Have you made four copies of the petition and kept one for yourself?

For state prisoners:

(1) Are you in state custody?
(2) Have you followed state procedures in exhausting the state remedies or have you challenged your procedural default?
(3) Have you chosen where you will file your petition?

For federal prisoners:

(1) Are you in federal custody?
(2) Have you finished your initial appeal motion to your sentencing court?

For state prisoners convicted of capital punishment:

(1) Have you sought the advice of an attorney?
(2) Have you applied for a stay of execution?
(3) If your state meets the guidelines in Section 2261 (if your state is an "opt-in" state), can you file your habeas petition within six months of the date your conviction becomes final?

A JAILHOUSE LAWYER'S MANUAL

Chapter 14:
The Prison Litigation Reform Act

Columbia Human Rights Law Review

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CHAPTER 14

THE PRISON LITIGATION REFORM ACT*

A. Introduction

The Prison Litigation Reform Act ("PLRA") changes various parts of the United States Code that address civil rights litigation and *in forma pauperis* ("IFP") proceedings (proceedings where you file a lawsuit as a poor person and avoid paying many of the normal fees and costs). Overall, the PLRA is designed to make it harder for prisoners to file complaints in federal court.

This Chapter will inform you of the parts of the PLRA and court decisions applying it, offer some practical advice, and suggest ways to defend yourself in *pro se* litigation when the PLRA is raised by prison officials. Some of this advice is tentative and may be changed, because there are important questions about the PLRA that the courts have not yet settled.[1]

The PLRA makes it extremely important to be sure your legal claim has a firm basis before you file it. Under the PLRA, even if you proceed *in forma pauperis*, you have to pay the full $350 filing fee (and another $450 if you wish to appeal the court's decision) in installments. You also run the risk of getting a "strike" under the PLRA's "three strikes" provision, which says that if you have three cases dismissed as frivolous, malicious, or for failing to state a valid legal claim, you can no longer use the IFP procedure, and you will have to pay the entire filing fee in advance without the option of paying in installments. The PLRA also requires that you first try all of the procedures available to you in prison to address your problem. This is called exhausting your administrative remedies. This means that you *must* file a grievance (or other appropriate administrative remedy, such as a disciplinary appeal) and pursue all available appeals within the prison system before you can file a suit in federal court. You have to do this even if you are suing for money damages and the grievance system does not provide damages. These are only a few of the obstacles and restrictions the PLRA imposes.

Part B of this Chapter discusses the PLRA's effect on your responsibility for paying filing fees. Part C provides an overview of the PLRA's "three strikes" provision. Part D explains the new requirement that forces a court to dismiss any prisoner cases that it believes are frivolous or malicious, that fail to state a claim, or that seek damages from a defendant who is immune from such claims. Part E discusses at length one of the most important aspects of the PLRA: the requirement that you exhaust all administrative remedies before you will be allowed into court. Part F describes the physical injury requirement of the PLRA, which restricts you from bringing a federal civil action for mental or emotional injury without first showing a physical injury. Parts G through L briefly discuss the PLRA provisions that (1) limit the attorneys' fees prisoners can recover in a successful suit; (2) allow defendants in a prisoner suit not to respond to the prisoner's complaint unless the court tells them to do so; (3) allow for proceedings that happen before the trial to be conducted by telephone or video; (4) allow the court to order the loss of earned good-time credit if it finds that your claim was filed for a malicious or harassing purpose; (5) require that any damages awarded to a prisoner for a loss or injury he suffered be paid directly to satisfy any restitution orders (money owed by a prisoner for any damages to a victim); and (6) change how injunctions can be issued and maintained.

B. Filing Fees

The PLRA requires indigent prisoners who are granted IFP status in federal court to pay the filing fee in full or in installments, as they have the money in their prison accounts. You may wonder why you should bother seeking IFP status if you are going to have to pay the filing fees anyway. The reason is that if you do

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* This Chapter was written by John Boston of The Legal Aid Society. If you would like to learn more or have questions about the PLRA, you are encouraged to write to The Legal Aid Society, Prisoners' Rights Project, 199 Water Street, New York, NY, 10038.

1. Unfortunately, many significant decisions interpreting the PLRA are unreported—that is, they do not appear in the Federal Reporter and Federal Supplement volumes available in prison law libraries. They are available on the Lexis and Westlaw computer services. Citations like "1999 WL 12345" are Westlaw citations. Citations like "1999 U.S. App. LEXIS 19764" are Lexis citations. Some jurisdictions do not allow you to cite to these decisions (use them to support your legal argument). For additional important information about unpublished cases, see Chapter 2 of the *JLM*, "Introduction to Legal Research."

not proceed IFP, you will have to pay the entire fee before you can file the case. Also, IFP litigants can have their summons and complaints served by the U.S. Marshals Service[2] and can be excused from payment of some costs (though not fees) on appeal.[3] Without IFP status, you will have to take care of service and pay appeal costs yourself.[4]

If you are seeking IFP status, you must submit *certified* statements[5] of your prison accounts for the preceding six months.[6] If a delay in your submissions results from prison authorities' inaction, your case will not be dismissed.[7] If prison officials fail or refuse to provide a certified statement, the court can order them to do so.[8] District courts in various states have different procedures for acquiring the certified statements.[9] You should obtain the necessary forms and instructions from the clerk of the court in which you plan to bring suit.[10]

If you are granted IFP status, you must pay the *entire* fee for filing either a complaint or an appeal[11] according to the following formula:

> (1) (b)(1) ... The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—
> (A) the average monthly deposits to the prisoner's account; or
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.
> (2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.[12]

Your case should not be dismissed if you cannot pay the initial fee. The statute says that the initial fee is to be collected "when funds exist," and it adds that prisoners shall not be prohibited from bringing suit or appealing a judgment because they cannot pay.[13] A case should not be dismissed for nonpayment without

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2. 28 U.S.C. § 1915(d) (2006).

3. 28 U.S.C. § 1915(c) (2006).

4. See *JLM*, Chapter 6, "An Introduction to Legal Documents" for information on necessary documents.

5. 28 U.S.C. § 1915(a)(2) (2006).

6. *See* Spaight v. Makowski, 252 F.3d 78, 79 (2d Cir. 2001) (holding that the relevant time period on appeal is six months before filing the notice of appeal, not six months before moving for *in forma pauperis* status). As a practical matter, courts have accepted information supplied by prison officials that was a little out of date. *See* Jackson v. Wright, No. 99 C 1294, U.S. Dist. LEXIS 3487, at *1 n.2 (N.D. Ill. Mar. 10, 1999) (*unpublished*) (accepting statement ending the month before the complaint was filed in light of the small amounts involved); Lam v. Clark, No. 99 C 558, U.S. Dist. LEXIS 1573, at *2–3 (N.D. Ill. Feb. 10, 1999) (*unpublished*) (accepting account information ending three and a half weeks before the filing of the complaint, since there is a consistent pattern for the six months covered).

7. *See* Lawton v. Ortiz, No. 06-1167 (FSH), 2006 U.S. Dist. LEXIS 66905, at *2 (D.N.J. Sept. 19, 2006) (*unpublished*) (granting IFP status where prisoner said officials did not respond to his requests for an account statement and other evidence showed he was indigent). In addition, delay in submitting the financial information will not cause you to miss the statute of limitations as long as the complaint itself is submitted in time. *See* Garrett v. Clarke, 147 F.3d 745, 746 (8th Cir. 1998) ("[T]he prisoner should be allowed to file the complaint, and then supply a prison account statement within a reasonable time.") (citations omitted); *but see* Murray v. Dosal, 150 F.3d 814, 817 n.4 (8th Cir. 1998) (applying *Garrett* but noting strong disagreement).

8. *See* Stinnett v. Cook County Med. Staff, No. 99 C 1696, U.S. Dist. LEXIS 4605, at *2 (N.D. Ill. Mar. 19, 1999) (*unpublished*) (requiring prison officials to send a certified copy of prisoner's financial statement to the court).

9. In the New York federal courts, for example, three of the four district courts (the Southern, Eastern, and Northern Districts) obtain the certified statement directly from prison officials; prisoner plaintiffs must submit a form to the court authorizing the disclosure of this information and the payment of the fee from their prison accounts. In the Western District of New York, prisoners must sign such an authorization and must also obtain certification from the prison of their funds. The prison should include in the certification the average balances for the preceding six months.

10. The addresses of the federal district courts (organized by Circuit) are provided in Appendix I of the *JLM*.

11. The fee for filing a federal court civil complaint is $350.00. 28 U.S.C. § 1914(a) (2006). For appeals, there is a $450.00 filing fee (effective November 1, 2003). *See* U.S. Courts, Federal Court Fees, *available at* http://www.uscourts.gov/fedcourtfees/courtappealsfee_january2009.pdf (last visited Oct. 30, 2009).

12. 28 U.S.C. §§ 1915(b)(1)–(2) (2006).

13. 28 U.S.C. § 1915(b)(4) (2006); *see* Taylor v. Delatoor, 281 F.3d 844, 850–51 (9th Cir. 2002) (holding that a prisoner who cannot pay the initial fee must be allowed to proceed with his case and not merely be granted more time to pay).

first determining if the prisoner has had the ability to pay.[14] However, if you intentionally do not pay, or if you fail to take the necessary steps to pay, your case is likely to be dismissed.[15] Prisoners generally may not be stopped from bringing an action because they owe fees from a prior action.[16] However, one federal circuit has held that prisoners who try to avoid paying filing fees dishonestly or who fail to pay fees because they are subject to the "three strikes" provision[17] can be denied IFP status or be barred completely from filing.[18]

If you lose a case, a federal court may decide to charge you with the costs of the lawsuit.[19] Courts are free to choose whether they will make you pay the costs.[20] But, if a court decides to charge you with costs, you cannot appeal that decision.[21]

There are no exceptions to the fee requirement. Once your case is filed, you owe the fee. The court cannot defer payment until after your release.[22] You usually must pay these filing fees even if your case is dismissed immediately, if you fail to submit the necessary financial information,[23] or if mistakes by the lower court make an appeal necessary.[24] You cannot get the fee back by voluntarily withdrawing the complaint or appeal.[25] Prison officials must keep collecting fees if you remain within their legal custody, even if you are transferred to another jurisdiction.[26] They are required to prioritize these fees over other deductions that are taken out of your account.[27]

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14. Redmond v. Gill, 352 F.3d 801, 804 (3d Cir. 2003) (holding that the district court abused its discretion in dismissing a case when the plaintiff failed to return an authorization form for payment of fees within 20 days, and requiring that the plaintiff be given more time); Hatchett v. Unknown Nettles, 201 F.3d 651, 652 (5th Cir. 2000) ("[I]t is an abuse of discretion for a district court to dismiss an action for failure to comply with an initial partial filing fee order without making some inquiry regarding whether the prisoner has complied with the order by submitting any required consent forms within the time allowed for compliance."); Beyer v. Cormier, 235 F.3d 1039, 1041 (7th Cir. 2000) (holding that the court should have communicated with prison officials or granted an extension of payment deadline). *But see* Cosby v. Meadors, 351 F.3d. 1324, 1332–33 (10th Cir. 2003) (holding that a court that issued repeated orders for the plaintiff to show cause could dismiss where the plaintiff did not document any reasons for his failure to pay).

15. *See* Cosby v. Meadors, 351 F.3d. 1324, 1332–33 (10th Cir. 2003) (affirming dismissal of case where plaintiff said he could not pay the fees but had spent his money on other items); Jackson v. N.P. Dodge Realty Co., 173 F. Supp. 2d 951, 952 (D. Neb. 2001) (rejecting prisoner's claim where he was clearly able to pay).

16. *See* Walp v. Scott, 115 F.3d 308 (5th Cir. 1997) (reversing a dismissal based on a pending action and stating that there is no requirement that a prisoner complete payment of fees before beginning another action).

17. 28 U.S.C. § 1915(g) (2006). For more information on the "three strikes" provision, see the next section .

18. *See* Campbell v. Clarke, 481 F.3d 967, 969–70 (7th Cir. 2007) (reasoning that a judge's discretion allows for the rejection of an action filed without fees when there is evidence of manipulation by the filing prisoner); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) (barring a prisoner who had "struck out" under 28 U.S.C. § 1915(g) from filing further litigation until he paid the past-due filing fees). However, a recent decision held that a prisoner who is subject to the "three strikes" provision of the PLRA and who has not paid filing fees owed from prior suits cannot be barred from filing under the "imminent danger of serious physical injury" exception to that provision. Miller v. Donald, 541 F.3d 1091, 1096–97 (11th Cir. 2008).

19. 28 U.S.C. § 1915(f)(2) (2006). In one recent case, a prisoner was assessed $7989.90 in costs and $15,750 in attorneys' fees. *See* Sanders v. Seabold, 188 F.3d 509, 509 (6th Cir. 1999)

20. Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000) (noting "the ability of a court to require, as a matter of discretion, that the indigent prisoner pay the costs, or some part of them").

21. Whitfield v. Scully, 241 F.3d 264, 272–73 (2d Cir. 2001) ("[T]he 1996 amendments to § 1915 have undercut the ability of prisoners to appeal an award of costs on the ground of indigency").

22. Ippolito v. Buss, 293 F. Supp. 2d 881, 883 (N.D. Ind. 2003) (denying a prisoner's request to defer payments).

23. *See* McGore v. Wrigglesworth, 114 F.3d 601, 605 (6th Cir. 1997) (warning that failure to pay fees or to provide necessary affidavit of indigency or trust account statement may eventually result in dismissal of case); Leonard v. Lacy, 88 F.3d 181, 186 (2d Cir. 1996) ("[W]e will apply the PLRA to impose any required obligation for filing fees (subject to installment payments) upon all prisoners who seek to appeal civil judgments without prepayment of fees"); *but see* Smith v. District of Columbia, 182 F.3d 25, 29 (D.C. Cir. 1999) (not requiring prisoners to pay the full filing fee whenever their *in forma pauperis* application is denied)

24. Lebron v. Russo, 263 F.3d 38, 42 (2d Cir. 2001) (refusing to grant an exception to filing fee requirement even where plaintiff had to re-file due to a judicial error in the first filing).

25. Goins v. Decaro, 241 F.3d 260, 261 (2d Cir. 2001) ("The PLRA makes no provision for return of fees partially paid or for cancellation of the remaining indebtedness in the event that an appeal is withdrawn.").

26. Beese v. Liebe, 153 F. Supp. 2d 967, 970 (E.D. Wis. 2001) (holding that state officials are obligated "to put into place procedures for continuing the collection of the filing fees … The payments do not stop, nor are they even temporarily placed on hold, just because the Secretary has chosen to send [the prisoners] out-of-state.") (citation omitted).

27. Smith v. Huibregtse, 151 F. Supp. 2d 1040, 1043 (E.D. Wis. 2001) (finding "funds exist within the meaning of the PLRA whenever a prisoner has funds or receives income and prison officials must give payment of federal court filing

Filing fee payments are based on all money the prisoner receives (not just prison wages), and deductions from the fee may not be made for money spent on legal copies and postage.[28] The twenty percent monthly payment is to be made separately for each case. The Second Circuit has held that only one fee and one award of costs are to be collected at a time, so a prisoner will never be required to pay more than forty percent of his income.[29] Other courts in different parts of the country have held that all fees are to be collected at the same time.[30]

In class actions, only the prisoners who signed the complaint or notice of appeal are responsible for payment of fees.[31] In cases involving more than one plaintiff, the courts have disagreed about payment of filing fees. One federal appeals court held that each plaintiff must pay an equal amount of the fee saying that, "each prisoner should be proportionally liable for any fees and costs that may be assessed."[32] Another appeals court held that multiple prisoners joining similar claims in a single suit must each pay a filing fee, but also have to file separate complaints.[33] More recently, another federal appeals court agreed that each prisoner plaintiff must pay the full filing fee, but need not file a separate complaint.[34]

The last two holdings appear contrary to the recent Supreme Court decision in *Jones v. Bock*,[35] which held that courts should not interpret the exhaustion requirement to depart from usual procedural practices except when the PLRA actually says to do so.[36] The usual practice is to allow plaintiffs to file joint complaints under Rule 20 of the Federal Rules of Civil Procedure, and to our knowledge, only one filing fee is usually required when multiple plaintiffs join in the same complaint.[37] Therefore, assuming *Jones* covers

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fees priority").

28. Rutledge v. Romero, No. 99 C 3453, 1999 U.S. Dist. LEXIS 9021, at *2–5 (N.D. Ill. June 3, 1999) (*unpublished*) (establishing that funds calculation is based on all money in the account, including money from third parties and money intended for legal communication). Courts have disagreed about whether money that is withheld from a prisoner's income and held until release should be counted in calculating the fees or used to pay the fees. *Compare* Cardew v. Gord, 26 F. App'x 48, 2001 U.S. App. LEXIS 24268, at *3 (2d Cir. 2001) (*unpublished*) (upholding a district court decision that "lag pay" should not be used for filing fees), *with* Spence v. McCaughtrey, 46 F. Supp. 2d 861, 862–63 (E.D. Wis. 1999) (holding prisoner's "release account" was a "prisoner's account" under the statute and should be used for filing fees purposes).

29. Whitfield v. Scully, 241 F.3d 264, 278 (2d Cir. 2001) ("28 U.S.C. § 1915(b)(2) permits the recoupment of up to 40 percent of a prisoner's monthly income at any given time—20 percent for filing fees under § 1915(b) and an additional 20 percent for costs under § 1915(f).").

30. Lefkowitz v. Citi-Equity Group, 146 F.3d 609, 612 (8th Cir. 1998) (holding the 20% assessment rate applies in every case); *see also* Miller v. Lincoln County, 171 F.3d 595, 596 (8th Cir. 1999) (declining to reduce the monthly payments for a prisoner with multiple cases).

31. Talley-Bey v. Knebl, 168 F.3d 884, 887 (6th Cir. 1999) ("[I]n cases involving class actions, ... the responsibility of paying the required fees and costs rests with the prisoner or prisoners who signed the complaint .... [O]n appeal, the prisoner or prisoners signing the notice of appeal are obligated to pay all appellate fees and costs.").

32. *In re* Prison Litigation Reform Act, 105 F.3d 1131, 1138 (6th Cir. 1997). One lower court has taken a different approach to dividing the filing fee, holding that the parties can divide the fee as they like. Every person is responsible if the fee goes unpaid, even if they have already paid more than their share. *See* Alcala v. Woodford, No. C 02-0072 TEH (pr), 2002 U.S. Dist. LEXIS 9504, at *2–3 (N.D. Cal. May 21, 2002) (*unpublished*) (holding that all parties are responsible for seeing that the fee is paid in full, and that all may be penalized for a failure to pay).

33. Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001) (holding that the clear language of the PLRA requires each prisoner to bring a separate suit). A number of other courts have adopted *Hubbard*. *See* Caputo v. Belmar Municipality & County, No. 08-1975 (MLC), 2008 U.S. Dist. LEXIS 36883, at *5–6 (D.N.J. May 2, 2008) (*unpublished*); Kron v. Cook, No. H-07-4054, 2008 U.S. Dist. LEXIS 4687, at *1 (S.D. Tex. Jan. 23, 2008) (*unpublished*); Lilly v. Ozmint, No. 2:07-1700-JFA-RSC, 2007 U.S. Dist. LEXIS 49153, at *2 (D.S.C. July 11, 2007) (*unpublished*); Osterloth v. Hopwood, No. CV 06-152-M-JCL, 2006 U.S. Dist. LEXIS 83461, at *2–3 (D. Mont. Nov. 15, 2006) (*unpublished*); Sharif v. Dallas County, No. 3:06-CV-0143-K ECF, 2006 U.S. Dist. LEXIS 73756, at *1 (N.D. Tex. Oct. 5, 2006) (*unpublished*).

34. Boriboune v. Berge, 391 F.3d 852, 854–56 (7th Cir. 2004); *see* Suarez v. A1, No. 06-2782 (JBS), U.S. Dist. LEXIS 93720, at *11–13 (D.N.J. Dec. 13, 2006) (*unpublished*) (acknowledging the difficulties of joint litigation, but holding different plaintiffs who sought the same remedy could proceed jointly though they each had to pay a separate filing fee).

35. Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

36. Jones v. Bock, 549 U.S. 199, 212, 127 S. Ct. 910, 919–20, 166 L. Ed. 2d 798, 811–12 (2007).

37. The relevant statute says: "The clerk of each district court shall require the *parties* instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay *a* filing fee of $350 ... " 28 U.S.C. § 1914(a) (emphasis added). That language strongly suggests that only a single filing fee is required even if there are multiple plaintiffs. The statute continues: "The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States." 28 U.S.C. § 1914(b) (2006)..

filing fees, then prisoners should be allowed to pay only one filing fee even when there are multiple plaintiffs.

The joinder rules also permit plaintiffs to sue multiple defendants and bring multiple claims in the same lawsuit, but only as long as the injuries all arise out of the same "transaction, occurrence, or series of transactions or occurrences" and when there is "any question of law or fact common to all defendants."[38] Those rules have sometimes been enforced loosely. However, some courts are now strongly enforcing the joinder rules against prisoners so that they cannot pay a single filing fee to litigate claims that strictly speaking call for separate complaints and payments.[39]

Many constitutional challenges to the filing fees provisions have been unsuccessful.[40] Courts have emphasized the fact that the filing fees provisions do not actually bar anyone from bringing suit.[41]

The filing fees provisions of the PLRA govern proceedings in federal court, and presumably have no application in state court. We are aware of no decisions on the issue.

The filing fees provisions only apply to civil actions. Habeas corpus petitions and other post-judgment proceedings are generally *not* considered civil actions.[42] Motions to vacate a criminal sentence under 28 U.S.C. § 2255 are also generally not considered civil actions.[43]

On the other hand, some courts have found that certain types of writs (motions) are considered civil actions and are thus subject to the PLRA. Such writs are considered civil when they seek relief that is similar to that in a civil action, as opposed to writs that are directed to criminal matters. For example, some courts consider writs of mandamus (motions commanding a public official to perform his or her duty) and other extraordinary writs to be civil actions.[44]

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38. Fed. R. Civ. P. 20(a)(2) (joinder of defendants); *see also* Fed. R. Civ. P. 18 (joinder of claims).

39. *See* George v. Smith, 507 F.3d 605, 607–08 (7th Cir. 2007); *see also* Pope v. Miller, No. CIV-07-0284-F, 2007 U.S. Dist. LEXIS 61921, at *1–2 (W.D. Okla. Aug. 21, 2007) (*unpublished*) (holding the claims of two plaintiffs misjoined under the Federal Rules where they involved distinct factual issues as to exhaustion and merits). An example of how this works is *Vasquez v. Schueler*, No. 06-cv-00743-bbc, 2007 U.S. Dist. LEXIS 88193, at *5–6 (W.D. Wis. Nov. 29, 2007) (*unpublished*). The plaintiff in that case raised six different claims that arose at four different times. The court said that he had to pursue them in four separate lawsuits. The only claims that could be combined in the same lawsuit were claims of excessive force and of denial of medical or mental health care following the use of force.

40. Lefkowitz v. Citi-Equity Group, 146 F.3d 609, 612 (8th Cir. 1998) (rejecting an equal protection claim and holding the filing fee provision does not unconstitutionally restrict access to the courts); Lucien v. DeTella, 141 F.3d 773, 775–76 (7th Cir. 1998) (finding the statute does not violate prisoners' due process rights); Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997) (finding no equal protection violation); Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997) (holding the provisions constitutional both generally and as applied to the prisoner); Hampton v. Hobbs, 106 F.3d 1281, 1288 (6th Cir. 1997) ("[W]e find that the fee provisions of the Prison Litigation Reform Act violate neither a prisoner's constitutional right of access to the courts, nor his rights under the First Amendment, the Due Process Clause, the Equal Protection Clause, or the Double Jeopardy Clause of the United States Constitution.").

41. *See*, *e.g.*, Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997) (upholding 28 U.S.C. § 1915(b)(4) (1996)).

42. *See* Skinner v. Wiley, 355 F.3d 1293, 1294 (11th Cir. 2004) (holding PLRA inapplicable to habeas petitions arising from prison disciplinary proceeding); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (holding that PLRA does not apply when challenging a delayed parole revocation hearing); Walker v. O'Brien, 216 F.3d 626, 633–36 (7th Cir. 2000) (holding that proper habeas actions are not civil actions governed by PLRA, regardless of subject matter); Blair-Bey v. Quick, 151 F.3d 1036, 1039–41 (D.C. Cir. 1998) (holding that PLRA does not apply to challenges to parole procedures), *on reh'g,* 159 F.3d 591 (D.C. Cir. 1998); Anderson v. Singletary, 111 F.3d 801, 805 (11th Cir. 1997) (holding that the filing fee requirement of PLRA does not apply to *in forma pauperis* habeas petitions or appeals). *But see* Kincade v. Sparkman, 117 F.3d 949, 952 (6th Cir. 1997) (stating that prisoners may not "cloak" civil actions as habeas/post-conviction cases).

A habeas petition challenges your custody in some fashion. Most courts hold you cannot challenge prison conditions via federal habeas corpus. *See*, *e.g.*, Beardslee v. Woodford, 395 F.3d 1064, 1068–69 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005). The main exceptions to this rule involve confinement, segregation, and disciplinary proceedings. Some courts have held that getting out of segregation, like getting out of prison entirely, may be pursued by habeas. *See*, *e.g.*, Medberry v. Crosby, 351 F.3d 1049, 1053 (11th Cir. 2003). Others have held that it cannot. *See*, *e.g.*, Montgomery v. Anderson, 262 F.3d 641, 643–44 (7th Cir. 2001). Disciplinary proceedings resulting in loss of good time instead of or in addition to placement in segregation must be challenged by petitioning for habeas corpus. *See* Edwards v. Balisok, 520 U.S. 641, 644, 117 S. Ct. 1584, 1587, 137 L. Ed. 2d 906, 911 (1997).

43. Kincade v. Sparkman, 117 F.3d 949, 950 (6th Cir. 1997) (examining the history and purpose of the Prison Litigation Reform Act); United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (determining that the absense of filing fees in the Antiterrorism and Effective Death Penalty Act shows that the PLRA was not meant to apply to motions to vacate under § 2255).

44. *See* Santee v. Quinlan, 115 F.3d 355, 357 (5th Cir. 1997) (finding writ of mandamus filed by prisoner

Bankruptcy cases and challenges to seizures of property, despite their relation to criminal proceedings, have been treated as civil actions and are subject to the filing fees provisions.[45] However, in non-bankruptcy and property-seizure contexts, courts are divided on the issue of whether motions made within criminal prosecutions to address conditions of confinement related to the prosecution are civil actions.[46]

The filing fees provisions apply only to "prisoners." Under the PLRA, a prisoner is defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."[47] This definition includes pretrial detainees as well as military prisoners,[48] and prisoners in privately operated prisons and jails,[49] juvenile facilities,[50] and "halfway houses," or drug treatment programs when the prisoner is confined to the program as a result of a criminal charge or conviction.[51] If you are incarcerated as a result of civil proceedings, you are not a prisoner under the PLRA,[52]

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essentially civil, and therefore covered by PLRA); *In re* Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding writ of prohibition in question was within the scope of PLRA because it contained "underlying claims that are civil in nature"); *In re* Tyler, 110 F.3d 528, 529 (8th Cir. 1997) ("[A] mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA."); *In re* Washington, 122 F.3d 1345, 1345 (10th Cir. 1997) (determining that writs for mandamus are civil actions under PLRA). *Contra* Madden v. Myers, 102 F.3d 74, 76 (3d Cir. 1996) (finding "a writ of mandamus is by its very nature outside the ambit of [PLRA]"); Martin v. United States, 96 F.3d 853, 854 (7th Cir. 1996) (holding "a petition for mandamus in a criminal proceeding is not a form of prisoner litigation" and thus is not covered by PLRA); *In re* Nagy, 89 F.3d 115, 116 (2d Cir. 1996) (denying PLRA coverage "to writs directed at judges conducting criminal trials").

45. *See* United States v. Howell, 354 F.3d 693, 695–96 (7th Cir. 2004) (holding that prisoners challenging administrative forfeiture are required to abide by the limitations imposed by PLRA); United States v. Jones, 215 F.3d 467, 469 (4th Cir. 2000) (holding that a motion under the Federal Rule of Criminal Procedure 41(e) for the return of seized property is a civil action); Lefkowitz v. Citi-Equity Group, 146 F.3d 609, 612 (8th Cir. 1998) (concluding that "under the plain language of [PLRA], the phrase 'civil action or appeal' is not limited to challenges to conditions of confinement, and encompasses the instant commercial litigation."); Pena v. United States, 122 F.3d 3, 4 (5th Cir. 1997) (holding that a motion under Federal Rule of Criminal Procedure 41(e) for the return of seized property is a "civil action" subject to the PLRA filing fee requirements).

46. *See* United States v. Lopez, 327 F. Supp. 2d 138, 140–42 (D.P.R. 2004) (finding that a motion challenging placement in administrative segregation after the government decided to seek the death penalty against the defendant was not a civil action); United States v. Hashmi, 621 F. Supp. 2d 76, 85–86 (S.D.N.Y. Jan. 16, 2008) (holding that a motion in a criminal case contesting "Special Administrative Measures" ("SAM"s) affecting communication between the defendant and his counsel was not governed by PLRA). *Contra* United States v. Antonelli, 371 F.3d 360, 361 (7th Cir. 2004) (holding that a motion in a long-completed criminal case challenging a prison policy forbidding prisoners from retaining possession of pre-sentence reports should have been treated as a separate civil action); U.S. v. Khan, 540 F. Supp. 2d 344, 349–52 (E.D.N.Y. 2007) (finding PLRA applies to motion challenging SAMs and other pretrial jail restrictions).

47. 28 U.S.C. § 1915(b) (2006) (requiring prisoners to pay a filing fee); *see also* 28 U.S.C. § 1915 (h) (2006) (defining "prisoner").

48. *See* Marrie v. Nickels, 70 F. Supp. 2d 1252, 1262 (D. Kan. 1999) (finding PLRA applies to military prisoners).

49. *See e.g.*, Roles v. Maddox, 439 F.3d 1016, 1017–18 (9th Cir. 2006) (holding the PLRA applicable to persons held in private prisons); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 993–94 (6th Cir. 2004) (same); Ross v. County of Bernalillo, 365 F.3d 1181, 1184 (10th Cir. 2004) (same)

50. *See* Christina A. *ex rel.* Jennifer A. v. Bloomberg, 315 F.3d 990, 994–95 (8th Cir. 2003) (holding attorneys' fees provisions apply to juveniles); Lewis v. Gagne, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) (holding exhaustion requirement applies to juveniles).

51. *See* Jackson v. Johnson, 475 F.3d 261, 266–67 (5th Cir. 2007) (holding that parolee in a halfway house, which he could not leave without permission as a result of his criminal conviction was a prisoner); Ruggiero v. County of Orange, 467 F.3d 170, 174–75 (2d Cir. 2006) (holding that, despite state law, a "drug treatment campus" was a "jail, prison, or other correctional facility" under 42 U.S.C. § 1997e(a), even though state law said it was not a correctional facility, because that term "includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law"); Witzke v. Femal, 376 F.3d 744, 752–53 (7th Cir. 2004) (holding "intensive drug rehabilitation halfway house" was an "other correctional facility" under PLRA).

52. *See* Michau v. Charleston County, S.C., 434 F.3d 725, 727–28 (4th Cir. 2006) (holding that a person was civilly detained pursuant to sexually violent predator statute); Perkins v. Hedricks, 340 F.3d 582, 583 (8th Cir. 2003) (holding that a person was civilly detained in prison Federal Medical Center); Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001) (holding person committed after finding of not guilty by reason of insanity is not a "prisoner" under the PLRA); LaFontant v. INS, 135 F.3d 158, 165 (D.C. Cir. 1998) (finding immigration detainees not "prisoners" subject to fee provisions of PLRA).

unless you are civilly committed in connection with pending criminal charges continue to be pretrial detainees, in which case you would be subject to the PLRA as a pretrial detainee.[53]

Ex-prisoners, including parolees,[54] who file complaints or notices of appeal after they are released are not considered prisoners under the PLRA and are not bound by the PLRA filing fees provisions.[55] If indigent, ex-prisoners can proceed without any prepayment or installment payment of fees, like any other poor person.

In addition, courts have disagreed about prisoners released *after* filing a complaint or notice. Some courts (including the Second Circuit) say that the obligation to pay ends on the prisoner's release.[56] Other courts say that a released prisoner must pay any fees that were due before release.[57] One court has said that a released prisoner must pay the full filing fee regardless of release, but does not explain how payments should be assessed against a released prisoner.[58]

C. The "Three Strikes" Provision

Filing fees are also addressed by the "three strikes" provision, one of the harshest aspects of the PLRA, which provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[59]

This provision means that if you have had three complaints or appeals dismissed as frivolous, malicious, or failing to state a claim, you cannot proceed *in forma pauperis* ("IFP") unless you can show you are in imminent danger of serious injury.[60] Thus, you have to pay the entire filing fee *up front*, or your case will

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53. *See* Kalinowski v. Bond, 358 F.3d 978, 979 (7th Cir. 2004) (holding that persons committed under the Illinois Sexually Dangerous Persons Act are prisoners); Gibson v. Commissioner of Mental Health, No. 04 Civ. 4350 (SAS), 2006 U.S. Dist. LEXIS 27428, at *10–11 (S.D.N.Y. May 8, 2006) (*unpublished*) (holding a person held civilly as incompetent to stand trial was a prisoner).

54. As pointed out above, persons who are paroled to institutions and are not free to leave such institutions, may remain prisoners under PLRA. However, normal parole restrictions do not make you a prisoner. *See* Bisgeier v. Michigan Dept. of Corr., No. 07-13625, 2008 U.S. Dist. LEXIS 5460, at *4 (E.D. Mich. Jan. 25, 2008) (*unpublished*) ("While there may be certain conditions imposed upon Plaintiff as a parolee, there can be no doubt that he is neither 'confined,' 'incarcerated,' nor 'detained in' any jail, prison, or other correctional facility.").

55. *See, e.g.*, Cox v. Mayer, 332 F.3d 422, 425 (6th Cir. 2003); Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002); Dixon v. Page, 291 F.3d 485, 488-89 (7th Cir. 2002); Robbins v. Switzer, 104 F.3d 895, 897 (7th Cir. 1997); Gibson v. Commissioner of Mental Health, No. 04 Civ. 4350 (SAS), 2006 U.S. Dist. LEXIS 27428, at *10–11 (S.D.N.Y. May 8, 2006) (*unpublished*) ("[C]ourts have determined that the PLRA does apply to a prisoner who filed a suit during his confinement and thereafter was released from prison.")

56. *See*, *e.g.*, DeBlasio v. Gilmore, 315 F.3d 396, 398–99 (4th Cir. 2003) (holding released prisoner need not pay fees due before release because "[a] released prisoner should not have to shoulder a more difficult financial burden than the average indigent plaintiff in order to continue his lawsuit") (citations omitted); McGann v. Comm'r, Soc. Sec. Admin., 96 F.3d 28, 29–30 (2d Cir. 1996) (holding that the PLRA fee requirements do not apply to a released prisoner, but dismissing the suit as frivolous).

57. *See*, *e.g.*, *In re* Smith, 114 F.3d 1247, 1251–52 (D.C. Cir. 1997) (holding that the PLRA merely excuses the prepayment of fees and not the payment of fees at all); Robbins v. Switzer, 104 F.3d 895, 898–99 (7th Cir. 1997) (denying that release from prison eliminates the obligation that would have been met while the imprisonment continued).

58. *See* Gay v. Tex. Dept. of Corr. State Jail Div., 117 F.3d 240, 242 (5th Cir. 1997).

59. 28 U.S.C. § 1915(g) (2000). As with the filing fees provisions discussed in the previous Section, this provision does not apply to a person who is not a prisoner when he or she files suit. *See* Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001) (holding the provision does not apply to person who was committed after finding of a not guilty by reason of insanity).

60. One court has held that a prisoner with three strikes is barred from intervening in an already filed civil action. Holloway v. Magness, No. 5:07CV00088 JLH/BD, 2008 U.S. Dist. LEXIS 44823, at *9 (E.D. Ark. June 6, 2008) (*unpublished*). The court does not explain how it gets from the the statutory language, "bring a civil action or appeal a judgment in a civil action or proceeding," to intervention, which is neither "bringing a civil action" nor "appealing a judgment."

probably be dismissed,[61] and you will still have to pay the fee in installments.[62] If you have not paid the fee, and the court rules that you are subject to the three strikes provision, most courts say you should have an opportunity to pay in order to avoid dismissal.[63] One court, however, has said that a prisoner who sought IFP status, even though he had already been found to have three strikes, had committed "a fraud on the federal judiciary," and so his appeal was dismissed.[64] That same court has also held that a litigant with three strikes can be barred from filing any further papers in court until all previously incurred fees have been paid.[65] However, that rule cannot be extended to bar IFP filings by prisoners whose cases satisfy the "imminent danger of serious physical injury" exception to § 1915(g).[66]

The three strikes provision makes it crucial for you to be sure that the facts that you assert amount to a violation of law in any complaint you file. If you file lawsuits based just on your general feeling that someone has mistreated you, you will probably be assessed strikes and may not be able to proceed IFP in the future.

The three strikes provision, like the filing fees provisions, only applies to prisoners who are incarcerated when they file suit.[67] It applies to civil actions or appeals, categories that generally do not include habeas corpus or other challenges to criminal convictions or sentences.[68]

Rule 60(b) of the Federal Rules of Civil Procedure can sometimes be used to remove a strike, although courts are unlikely to do so except in very unusual circumstances.[69]

The three strikes provision of the PLRA governs actions brought in federal court, and is not binding on state courts,[70] so an indigent prisoner with three strikes may prefer to file in state court if the state law permits. However, some federal courts have suggested that it is inappropriate, or even sanctionable, for

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61. *See* Jones v. Federal Bureau of Prisons, No. 5:07cv158, 2008 U.S. Dist. LEXIS 47775, at *3 (E.D. Tex. June 19, 2008) (*unpublished*) (rejecting request for a "payment plan," since that would amount to proceeding *in forma pauperis*). On the other hand, one decision does state that district courts have the discretion to allow a litigant with three strikes to pay fees over time. Dudley v. United States, 61 Fed. Cl. 685, 688, 2004 U.S. Claims LEXIS 221, at *10–11 (Fed. Cl. Aug. 12, 2004) (*unpublished*). In addition, a timely notice of appeal confers appellate jurisdiction even if the filing fee is not tendered on time. Daly v. United States, No. 03-1445, 109 F. App'x 210, 212, 2004 U.S. App. LEXIS 15794, at *4 (10th Cir. July 30, 2004) (*unpublished*). This might mean that if you have not paid the filing fee within the 30 days during which a notice of appeal must be filed, you will have some additional time to pay the fee. This question has not been answered to our knowledge.

62. Jerelds v. Smith, No. 1:07-cv-00111-MP-AK, 2008 U.S. Dist. LEXIS 21562, at *1 (N.D. Fla. Mar. 6, 2008) (*unpublished*) (stating that a plaintiff whose suit was dismissed for three strikes could not get a refund of his partial fee payment, "since by filing an action he agreed to a full payment of the filing fees").

63. *See* Smith v. District of Columbia, 182 F.3d 25, 29–30 (D.C. Cir. 1999) (stating that a person barred from filing as a poor person has 14 days to pay the filing fee so his suit may proceed); Craig v. Cory, No. 98-1128, 1998 U.S. App. LEXIS 26602, at *4, 1998 Colo. J. C.A.R. 5453, 5453 (10th Cir. Oct. 20, 1998) (*unpublished*) (holding that PLRA does not bar prisoner with three strikes from suing, provided he pays the filing fee). *But see* Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (holding a suit must be dismissed without prejudice and refiled, since the statute says fees must be paid when the suit begins).

64. Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) ("Litigants to whom [the three strikes provision] applies take heed! An effort to bamboozle the court by seeking permission to proceed *in forma pauperis* after a federal judge has held that § 1915(g) applies to a particular litigant will lead to immediate termination of the suit.").

65. Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999).

66. Miller v. Donald, 541 F.3d 1091, 1098–99 (11th Cir. 2008). Subsection C(1)(a) below discusses that exception.

67. Jackson v. Johnson, 475 F.3d 261, 266–67 (5th Cir. 2007) (noting that persons released on parole into the general public are not "prisoners" under PLRA, but holding that a person confined to a halfway house remained a prisoner subject to the three strikes provision).

68. *See* Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 779 (10th Cir. 1999) (finding habeas corpus petitions are not "civil actions" for purposes of 28 U.S.C. § 1915); *In re* Crittendom, 143 F.3d 919, 920 (5th Cir. 1998) (deciding the character of a writ of mandamus depends on the underlying suit; here, because it was a civil action, the three strikes rule required the prisoner to pay the filing fee first). *See* Part B of this Chapter for the definition of civil actions.

69. *See* Fed. R. Civ. P. 60(b) (stating that there are certain grounds where a court may "relieve a party or its legal representative from a final judgement, order, or proceeding"); *see also* Dalvin v. Beshears, 943 F. Supp. 578, 579 n.3 (D. Md. 1996) (holding plaintiff's suit to obtain a standing order of the court was not frivolous for PLRA purposes because it was the only way he could get it). Prisoners who have been charged with a strike for failure to exhaust administrative remedies may wish to pursue this remedy in light of the Supreme Court's decision that failure to exhaust is not a failure to state a claim. *See* Jones v. Bock, 549 U.S. 199, 213–15, 127 S. Ct. 910, 920–21, 166 L. Ed. 2d 798, 812–13 (2007). For more information on exhaustion, see Part E of this Chapter.

70. *See* Lakes v. State, 333 S.C. 382, 387, 510 S.E.2d 228, 231 (S.C. Ct. App. 1998) (holding that a prisoner could proceed IFP, since South Carolina has no analogy to PLRA's three strikes provision).

prisoners to do so in cases when *defendants* can remove to federal court.[71] This view seems wrong to us. Section 1915(g) applies only to persons with three strikes who "bring" an action under the federal *in forma pauperis* statute. Prisoner plaintiffs should hardly be penalized for the actions of defendants, especially in light of the Supreme Court's warning that courts should not expand the PLRA's requirements according to their policy views.[72]

1. What is a Strike?

The PLRA is very specific about which dismissals count as strikes: dismissals for failure to state a claim, frivolousness, or maliciousness. Failure to state a claim means that even if all facts in your complaint are true, they still do not establish a violation of law the court could remedy.[73] A legally frivolous suit is one that fails to raise an "arguable question of law,"[74] one based on an "indisputably meritless legal theory,"[75] or one in which the complaint itself makes clear that the case is barred by a defense, like the statute of limitations or the immunity doctrines.[76] A factually frivolous suit is one alleging "fantastic or delusional scenarios."[77] A malicious suit is one filed for an improper purpose or amounting to an abuse of the legal system.[78]

A case dismissed on grounds other than frivolousness, maliciousness, or failure to state a claim is *not* a strike.[79] Dismissals are not automatically strikes if they are on grounds such as lack of prosecution,[80] lack of jurisdiction,[81] or expiration of the statute of limitations.[82]

A grant of summary judgment—which is partly based on the absence of material issues of fact—on part or all of a case is generally not a strike.[83] One reason this is particularly important is that government lawyers often improperly file motions to dismiss claims that raise *disputed factual issues*. The court should treat these as summary judgment motions, even though the government called them motions to dismiss for

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71. Crooker v. Burns, 544 F. Supp. 2d 59, 62 (D. Mass. Apr. 10, 2008) (citing prior unpublished opinion where the court said it was inappropriate for the prisoner to file in state court when he knew the case would be removed to federal court).

72. *See* Jones v. Bock, 549 U.S. 199, 212–13, 220–24, 127 S. Ct. 910, 919–20, 924–26, 66 L. Ed. 2d 798, 810–12, 816–18 (2007); Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008) (applying *Jones* prohibition on judicial supplementation of PLRA to three strikes provision).

73. *See* Jones v. Bock, 549 U.S. 199, 212–13, 127 S. Ct. 910, 920–21, 66 L. Ed. 2d 798, 812–13 (2007); Conley v. Gibson, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957) (holding a case should not be dismissed for failure to state a claim unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

74. Neitzke v. Williams, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 349 (1989).

75. Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989).

76. *See* Neitzke v. Williams, 490 U.S. 319, 327–28, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348–49 (1989); Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991) (holding that dismissal of a claim on grounds of frivolousness where statute of limitations had expired is appropriate).

77. Neitzke v. Williams, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989).

78. *See* Pittman v. Moore, 980 F.2d 994, 994-995 (5th Cir. 1993) (stating that repetitive litigation is malicious); Spencer v. Rhodes, 656 F. Supp. 458, 464 (E.D.N.C. 1987) (holding that a case filed out of desire for vengeance and not to remedy a violation of legal rights was malicious), *aff'd*, 826 F.2d 1061 (4th Cir. 1987).

79. *See* Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007) (refusing to treat an appeal dismissed as premature as a strike, stating the PLRA "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws"); Fortson v. Kern, No. 05-CV-73223-DT2005, 2005 U.S. Dist. LEXIS 38466, at *4–5 (E.D. Mich. Dec. 19, 2005) (*unpublished*) (holding dismissal for failure to pay initial filing fee is not a strike); Maree-Bey v. Williams, No. 04-1759 (RCL), 2005 U.S. Dist. LEXIS 35722, at *7 (D.D.C. Aug. 1, 2005) (*unpublished*) (holding that dismissal under Rule 8 of the Federal Rules of Civil Procedure is not a strike).

80. Butler v. Department of Justice, 492 F.3d 440, 443–45 (D.C. Cir. 2007) (holding that dismissal for lack of prosecution is not a strike); Harden v. Harden, No. 8:07CV68, 2007 U.S. Dist. LEXIS 56922, at *3 (D. Neb. Aug. 3, 2007) (*unpublished*) (holding that dismissals for lack of jurisdiction or failure to prosecute are not strikes).

81. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 437 (D.C. Cir. 2007) (holding that "[d]ismissals for lack of jurisdiction do not count as strikes unless the court expressly states that the action or appeal was frivolous or malicious.").

82. Myles v. U.S., 416 F.3d 551, 553 (7th Cir. 2005) (noting that dismissal based on statute of limitations is not a strike since it is based on an affirmative defense).

83. *See* Stallings v. Kempker, No. 04-1585, 109 F. App'x 832, 2004 U.S. App. LEXIS 19312, at *4 (8th Cir. 2004) (*unpublished*) (modifying a judgment to remove the strike from a case ended by summary judgment); Chappell v. Pliler, No. CIV S-04-1183 LKK DAD P, 2006 U.S. Dist. LEXIS 92538, at *9 (E.D. Cal. Dec. 21, 2006) (*unpublished*) ("The granting of summary judgment on some claims precludes a determination that the case was dismissed for failure to state a claim on which relief could be granted.").

failure to state a claim.[84] If this happens to you, it is very important that you alert the court that there is a disputed factual issue. That way, even if you lose, you will lose by summary judgment, and you will not gain a strike.

The failure to exhaust administrative remedies is not a failure to state a claim unless apparent on the face of the complaint.[85] That means dismissal for non-exhaustion should generally not be a strike.[86] Most courts have held a partial dismissal—that is, an order throwing out some claims or some defendants, but letting the rest of the case go forward—is not a strike,[87] nor is a case where some claims are dismissed on grounds specified in Section 1915(g) but other claims are dismissed on other grounds.[88] But, there are some recent decisions to the contrary. For example, the Seventh Circuit appeals court has held that if *any* claim is dismissed, the prisoner can be charged a strike.[89] Other circuits have held that a prisoner can be charged a strike if part of the case is dismissed on "three strikes grounds," even if the rest of it is dismissed for failure to exhaust administrative remedies.[90]

A case that is voluntarily withdrawn is not a strike.[91] An action that was never accepted for filing cannot be a strike.[92] Only *federal* court dismissals count as strikes, since a state court is not a "court of the United States" under the statute.[93] At least one court has charged the plaintiff a strike in a case filed in state court

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84. Motions to dismiss for failure to state a claim are distinct from motions for summary judgment as a matter of law. *Compare* Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted) *with* Fed. R. Civ. P. 56 (summary judgment).

85. Jones v. Bock, 549 U.S. 199, 212–13, 127 S. Ct. 910, 920–21, 166 L. Ed. 2d 798, 812–13 (2007) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense."). *Id.* at 216 ("[T]here is no basis for concluding that Congress implicitly meant to transform exhaustion from an affirmative defense to a pleading requirement….").

86. Some courts have held a case dismissed for non-exhaustion is a strike because it seeks "relief to which [the plaintiff] is not entitled" and is therefore frivolous. *See, e.g.*, Wallmark v. Johnson, No. 2:03-CV-0060, 2003 U.S. Dist. LEXIS 7088, at *4 (N.D. Tex. Apr. 28, 2003) (*unpublished*). You can argue that these courts are wrong because an unexhausted case does not necessarily fail to raise "an arguable question of law" or rest on an "indisputably meritless legal theory," which, as discussed above, is what "frivolous" means. Further, as the Second Circuit has said, PLRA "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws." Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007). Certainly, if you had an argument in an earlier case that what you did should have satisfied the exhaustion requirement, or that no administrative remedy was really available to you, that case should not be seen as frivolous and treated as a strike.

87. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C. Cir. 2007) (statute does not apply to actions "containing at least one claim falling within none of the three strike categories"); Tafari v. Hues, 539 F. Supp. 2d 694, 701–02 (S.D.N.Y. 2008) (extensive discussion and review of case law).

88. *See* Juarez v. Frank, No. 05-C-738-C, 2006 U.S. Dist. LEXIS 571, at *14 (W.D. Wis. Jan. 6, 2006) (*unpublished*) (holding that where state law claim was dismissed because court declined to exercise supplemental jurisdiction, case was not a strike); Fortson v. Kern, No. 05-CV-73223-DT2005, 2005 U.S. Dist. LEXIS 38466, at *5 (E.D. Mich. Dec. 19, 2005) (*unpublished*) (holding that a case deemed frivolous as to one defendant and otherwise dismissed for failure to pay filing fee was not a strike); Barela v. Variz, 36 F. Supp. 2d 1254, 1259 (S.D. Cal. 1999) (holding that a case was not a strike where some claims were dismissed for failure to state a claim and defendants were granted summary judgment in others). *But see* Jones v. Cimarron Corr. Facility, 2005 U.S. Dist. LEXIS 21982, at *3 (W.D. Okla. Aug. 25, 2005) (holding that a case was a strike even though one claim was dismissed without prejudice for failure to exhaust).

89. George v. Smith, 507 F.3d 605, 607–08 (7th Cir. 2007) (plaintiff in this case asserted 50 distinct claims against 24 defendants in a single suit). The Seventh Circuit has also held that in cases involving multiple plaintiffs, *every* plaintiff is charged a strike if a claim involving *any one* of the plaintiffs is a strike. Boriboune v. Berge, 391 F.3d 852, 855–56 (7th Cir. 2004).

90. Pointer v. Wilkinson, 502 F.3d 369, 376 (6th Cir. 2007); Banks v. United State Marshal, 274 Fed. Appx. 631, 635 (10th Cir. 2008).

91. Armentrout v. Tyra, No. 98-3161, 1999 U.S. App LEXIS 1769, at *1 (8th Cir. Feb. 9, 1999) (*unpublished*). However, one court has held that a prisoner who receives a magistrate judge's recommendation for dismissal cannot avoid a strike by dismissing voluntarily. *See* Johnson v. Edlow, 37 F. Supp. 2d 775, 776–78 (E.D. Va. 1999) (citing prior pattern of seeking voluntary dismissal after court and defendants had expended substantial resources on the case; dismissing as malicious); Sumner v. Tucker, 9 F. Supp. 2d 641, 644 (E.D. Va. 1998) (holding that an action may be dismissed, without prejudice, by the plaintiff without order of the court at any time before service by the adverse party of an answer or a motion for summary judgment).

92. Wilson v. Yaklich, 148 F.3d 596, 603 (6th Cir. 1998) (finding cases never filed do not count as strikes).

93. Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998) (holding actions dismissed from state and local courts do not count for purposes of strikes).

and removed to federal court by the defendants.[94] This appears to be wrong, since § 1915(g) applies to those who on three occasions brought suit or filed an appeal "in a court of the United States" that was dismissed as frivolous, malicious, or failing to state a claim.

A motion filed in an already filed case is not a strike.[95] A dismissal without prejudice is a strike if it is on the grounds stated in the three strikes provision.[96] The courts have not yet determined whether the prisoner is given a second strike if the case is re-filed (for example, with an amended complaint designed to correct the problems that led to dismissal) and is then dismissed again.[97]

A dismissal is not a strike if it is impossible to tell what caused the dismissal.[98] Some decisions have held that prisoners should not be given a strike based on law that was unclear or that changed after they filed.[99] Dismissals may be strikes even if they were not IFP cases.[100] Cases filed or dismissed before the PLRA was enacted have been counted as strikes.[101]

A dismissal in a habeas corpus action is not a strike.[102] Courts have disagreed over whether actions dismissed because they were mistakenly filed under 42 U.S.C. § 1983, but should have been filed as habeas petitions, count as strikes.[103] Similarly, a case that should have been filed under Section 1983 but was filed as a habeas petition to avoid the three strikes provision may be counted as a strike.[104] Courts have sometimes just treated habeas petitions that should have been filed under Section 1983 as Section 1983 cases and gone forward with them.[105] One court has warned that this should not automatically be done because prisoners could end up being charged a strike so they should have a chance to think it over before proceeding.[106] In a class action, only named plaintiffs are subject to the three strikes provision.[107]

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94. *See* Olmsted v. Sherman, No. 08-cv-439-bbc, 2008 U.S. Dist. LEXIS 61368, at *1 (W.D. Wis. Aug. 12, 2008) (*unpublished*). You can argue that this is wrong because § 1915(g) applies to those who on three occasions brought suit or filed an appeal "in a court of the United States" that was dismissed as frivolous, malicious, or failing to state a claim. However, the court in *Olmstead* found: "Section 1915A does not distinguish between cases filed by prisoners and cases removed by defendants. The statute requires screening of all complaints "in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," without regard to how the complaint came before the court." 2008 U.S. Dist. LEXIS 61368, at *2-3.

95. Belton v. U.S., No. 07-C-925, 2008 U.S. Dist. LEXIS 68964, at *34–35 (E.D. Wis. June 2, 2008) (*unpublished*) (motion under Rule 60(b) is not a strike; statute "does not apply to motions, only 'actions' or 'appeals'").

96. Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999) (*per curiam*) ("Moreover, a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim."); O'Neal v. Price, 531 F.3d 1146, 1154-56 (9th Cir. 2008) (declining to read a with-prejudice requirement into the PLRA); *but see* McLean v. United States, 566 F.3d 391, 396-97 (4th Cir. 2009) (holding that since a dismissal without prejudice is not an adjudication on the merits, it does not count as a strike under 1915(g).. Price, 531 F.3d 1146, 1154-56 (9th Cir. 2008); *but see* McLean v. United States, 566 F.3d 391, 396-97 (4th Cir. 2009).

97. *See* Day v. Maynard, 200 F.3d 665, 667 n.1 (10th Cir. 1999) (*per curiam*).

98. *See* Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005) (defendants must produce court records or documentation to allow district courts to determine whether a prior case was dismissed because it was "frivolous, malicious, or failed to state a claim."); Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998) (finding no strike when order dismissing prisoner's action did not explain the reason for dismissal , because "[the court] is unaware of any principle that would permit [it] to presume that the dismissal was on one of the grounds referenced in § 1915(g)").

99. *See* Clemente v. Allen, 120 F.3d 703, 705 n.1 (7th Cir. 1997) (holding appeal was not a strike in the absence of published law on the question before the court ruled); Hairston v. Falano, No. 99-C-2750, 1999 U.S. Dist. LEXIS 9027, at *3–4 (N.D. Ill. May 28, 1999) (*unpublished*) (holding dismissal was not a strike where plaintiff's claim, valid when filed, was dismissed based on a later Supreme Court decision).

100. Duvall v. Miller, 122 F.3d 489, 490 (7th Cir. 1997) (holding dismissals that were not brought *in forma pauperis* still count for strikes).

101. See, e.g., Welch v. Galie, 207 F.3d 130, 131 (2d Cir. 2000) (holding strikes provision can apply retroactively).

102. Andrews v. King, 398 F.3d 1113, 1122–23 & n.12 (9th Cir. 2005) and cases cited.

103. *See* Bure v. Miami-Dade Police Dept., No. 08-20483-CV-UNGARO, 2008 WL 2374149, at *3 (S.D. Fla. June 6, 2008) (*unpublished*) (mistakenly filed § 1983 is a strike); Grant v. Sotelo, No. 2:98-CV-0347, 1998 U.S. Dist. LEXIS 16798, at *3–5 (N.D. Tex. Oct. 17, 1998) (*unpublished*) (holding § 1983 case that should have been filed under habeas corpus is frivolous; citing cases); Rogers v. Wis. Dept. of Corr., No. 04-C-980, 2005 U.S. Dist. LEXIS 1864, at *6 (W.D. Wis. Feb. 3, 2005) (*unpublished*) (holding that dismissal of a § 1983 action that should have been filed as a habeas petition is not a strike because "dismissal ... for failure to use the proper avenue for relief" is not a ground listed in the statute). *See also* Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 464 (5th Cir. 1998) (holding that § 1983 actions that should have been filed as habeas petitions but would have been frivolous as such were strikes).

104. Andrews v. King, 398 F.3d 1113, 1123 n. 12 (9th Cir. 2005).

105. *See* Carson v. Johnson, 112 F.3d 818, 819 (5th Cir. 1997) (construing habeas corpus petition as a § 1983 case).

106. Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (dismissing habeas corpus actions and indicating

At least one court has held that a dismissal counts as a strike even if the case was filed by an ex-prisoner after release, if the plaintiff later returns to prison.[108] However, this holding seems contrary to the statutory language, which refers to prior actions brought "while incarcerated or detained."[109]

Appeals count as separate strikes under Section 1915(g) only if they are "dismissed ... [as] frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted."[110] If the appeals court merely affirms a district court decision that was dismissed for one of the reasons stated in Section 1915(g), the appeal is not usually considered to be a separate strike.[111] An appeal that is dismissed on grounds other than those stated in Section 1915(g) cannot be a separate strike even if the district court decision counts as a strike.[112]

Most courts have held that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals."[113] Thus, if you receive a third strike in a district court decision, you should still be able to appeal that decision IFP without being barred by the three strikes provision.[114] If an appeals court finds that your claim was not frivolous, the strike will be eliminated.[115]

The defendants bear the burden of producing sufficient evidence to show that you have three strikes. If they do, the burden shifts to you to show that you do not have three strikes.[116] Defendants do not meet their

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plaintiffs may re-file complaints as civil rights claims).

107. Meisberger v. Donahue, 245 F.R.D. 627, 630 (S.D. Ind. 2007) (finding no authority for the argument that unnamed class members can receive strikes).

108. *See* Robbins v. Switzer, 104 F.3d 895, 897 (7th Cir. 1997) (holding dismissal would count as strike if released petitioner ever returns to prison).

109. 28 U.S.C. § 1915(g) (2000). *See* Arvie v. Lastrapes, 106 F.3d 1230, 1232 (5th Cir. 1997) (*per curiam*) (remanding to determine whether the plaintiff was a prisoner when he filed his previous actions).

110. 28 U.S.C. § 1915(g) (2000). *See* Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997) (holding that frivolous appeal of a dismissed claim counts as a second strike). *Compare with* Andrews v. King, 398 F.3d 1113, 1120–21 (9th Cir. 2005) (holding that an appeal dismissed for lack of jurisdiction is not a strike).

111. Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999) ("Under the plain language of the statute, only a dismissal may count as strike, not the affirmance of an earlier decision to dismiss."); Adepegba v. Hammons, 1996 U.S. App. LEXIS 41289, at *11 (5th Cir. Dec. 31, 1996) ("It is straightforward that affirmance of a district court dismissal as frivolous counts as a single 'strike.'"). Courts are not always careful in dealing with this issue. *See* Montanez v. DeTella, No. 97-3698, 1999 U.S. App. LEXIS 628, at *6 (7th Cir. Jan. 14, 1999) (*unpublished*) (stating affirmance of appeal from dismissal is itself a second strike, without discussing contrary authority); Rice v. Christopher, No. 98-1295, 1999 U.S. App. LEXIS 2040, at *5–6 (10th Cir. Feb. 9, 1999) (*unpublished*) ("Because a complaint dismissed under § 1915(e)(2)(B)(i) and affirmed on appeal counts as two prior occasions for purposes of § 1915(g), two 'strikes' are recorded against Mr. Rice."). If you get a decision like this, be sure to ask the court to reconsider charging you with the second strike.

112. Tafari v. Hues, 473 F.3d 440, 442–44 (2d Cir. 2007) (holding an appeal dismissed as premature was not a strike); Cosby v. Knowles, No. 97-1400, 145 F.3d 1345, 1998 U.S. App. LEXIS 7845, at *4–5 (10th Cir. Apr. 23, 1998) (*unpublished*) (noting that dismissal based on denial of *in forma pauperis* status, not the merits, is not a strike even though merits were frivolous).

113. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C. Cir. 2007) ("A contrary rule would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function. Had Congress intended such an unusual result, we expect it would have clearly said so."); Campbell v. Davenport Police Dept., 471 F.3d 952, 953 (8th Cir. 2006) ("The three section 1915A(b) dismissals could not be counted as strikes when the district court cited them (or when this appeal was filed), because Campbell had not yet exhausted or waived his appeals in those cases."). Once the time for appeal has passed, filing a late notice of appeal will not keep the dismissal from being a strike. Smith v. District of Columbia, 182 F.3d 25, 27–28 (D.C. Cir. 1999).

114. Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999); Adepegba v. Hammons, 1996 U.S. App. LEXIS 41289, at *13-14 (5th Cir. Dec. 31, 1996). The Seventh Circuit Court of Appeals, however, has made matters more complicated, holding that a prisoner cannot directly appeal a decision that counts as a third strike. Instead, the prisoner must first apply to the appeals court for *in forma pauperis* status. The appeals court will then decide whether the lower court was correct in issuing the third strike to the prisoner, or whether the lower court was incorrect and should not have issued the third strike. In other words, the appeals court will decide the merits of the appeal in the course of determining whether the prisoner can proceed IFP. Robinson v. Powell, 297 F.3d 540, 541 (7th Cir. 2002).

115. Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999) (concluding that "[i]f we reverse a district court dismissal under 28 U.S.C. § 1915(e)(2)(B), the district court dismissal does not count as a strike"); Adepegba v. Hammons, 1996 U.S. App. LEXIS 41289, at *13-14 (5th Cir. Dec. 31, 1996) ("[W]e find it plain that reversal of a dismissal as frivolous nullifies the 'strike.'").

116. Andrews v. King, 398 F.3d 1113, 1116, 1120 (9th Cir. 2005); *accord* Thompson v. Drug Enforcement Admin., 492 F.3d 428, 435-36 (D.C. Cir. 2007); Green v. Morse, No. 00-CV-6533-CJS, 2006 U.S. Dist. LEXIS 52085, at *7–9

burden just by showing dismissals; they must also show the reasons for the dismissals.[117] When applying the three strikes rule, a court must clearly identify each dismissal it used.[118]

The three strikes provision cannot be applied to revoke IFP status in a case filed before the plaintiff had three strikes, since the statute is a limit on prisoners' ability to "bring" suit, not on their ability to maintain suits already brought.[119] A case is "brought" for these purposes when the plaintiff submits the complaint to the court.[120] The three strikes provision also does not prevent a plaintiff from filing an amended complaint in a suit filed before he had three strikes.[121] One federal court has held that when multiple plaintiffs join in one lawsuit, each plaintiff's claims must be treated as a separate "action," and each plaintiff must be charged a strike for every plaintiff whose "action" is dismissed in its entirety.[122] This decision appears contrary to the statute.[123]

(a) The "Imminent Danger of Serious Physical Injury" Exception

The three strikes provision does not bar a prisoner from proceeding *in forma pauperis* if he is in "imminent danger of serious physical injury."[124] The existence of such a danger is judged at the time the suit was filed or when the prisoner makes an IFP application in the district court or on appeal.[125]

Any credible allegation of imminent danger of serious physical injury meets the statutory requirement,[126] but many allegations have been dismissed as incredible or insubstantial.[127] If serious

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(W.D.N.Y. May 26, 2006) (*unpublished*). In practice, courts often raise three strikes on their own at initial screening.

117. Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005); *see* Thompson v. Drug Enforcement Admin., 492 F.3d 428, 436(D.C. Cir. 2007) (holding that once the burden of evidence shifts to the prisoner, he must "explain *why* the past dismissals should not count as strikes) (*emphasis added).*

118. *See* Evans v. Ill. Dept. of Corr., 150 F.3d 810, 812 (7th Cir. 1998) ("[I]n the order denying leave to proceed *in forma pauperis* the district court must cite specifically the case names, case docket numbers, districts in which the actions were filed, and the dates of the orders dismissing the actions."); Jennings v. Dist. Ct. for Seventh Judicial Dist., No. 98-8068, 172 F.3d 879, 1999 U.S. App. LEXIS 2386, at *2–3 (10th Cir. Feb. 16, 1999) (*unpublished*) (remanding because district court did not specify which prior actions or appeals were frivolous).

119. Nicholas v. Am. Detective Agency, No. 07-2018, 254 F. App'x 116, 2007 U.S. App. LEXIS 26185, at *1–3 (3d Cir. Nov. 9, 2007) (*unpublished*); Cruz v. Marcial, No. 3:01cv406, 2002 U.S. Dist. LEXIS 7307, at *3–4 (D. Conn. Apr. 18, 2002) (*unpublished*). *Contra* Nichols v. Rich, No. 2:01-CV-0369, 2004 U.S. Dist. LEXIS 5766, at *2 (N.D. Tex. Apr. 7, 2004) (*unpublished*) (citing goals of the statute but not addressing its actual language).

120. O'Neal v. Price, 531 F.3d 1146, 1151–52 (9th Cir. 2008).

121. Elkins v. Schrubbe, No. 04-C-85, 2005 WL 1154273, at *1 (E.D. Wis. Apr. 20, 2005) (*unpublished*).

122. Boriboune v. Berge, 2005 U.S. Dist. LEXIS 11480, at *15-20 (W.D. Wis. June 1, 2005) (*unpublished*) (declaring that several plaintiffs received three strikes from this single multi-plaintiff lawsuit). The court does not claim to find the basis for its holding in the statutory language; rather, it says it is interpreting a Seventh Circuit opinion remanding the case, and expresses hope that the court of appeals will clarify the matter. That has not happened.

123. *See* Swenson v. McDonald, No. CV 05-93-GF-CSO, 2006 U.S. Dist. LEXIS 5784, at *7-12 (D. Mont. Jan. 30, 2006) (*unpublished*) (criticizing logic of *Boriboune*). *Swenson* points out that *Boriboune*'s penalty of strikes based on the separate claims of individual plaintiffs contradicts the statute's reference to "action[s]" rather than claims; that its view that each prisoner litigant is responsible under Rule 11 for statements other plaintiffs make is inconsistent with the lack of authority of *pro se* litigants to make representations for anyone other than themselves and with *pro se* prisoners' limited ability to investigate the merits of others' claims; and that the practical difficulties of multi-plaintiff prisoner litigation does not lend itself to assuming each litigants' responsibility for all actions and decisions in the litigation. *See also* Part B of this Chapter on filing fees for helpful analogies concerning joint actions.

124. 28 U.S.C. § 1915(g) (2000).

125. Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007) (rejecting argument that time-of-filing rule denies court access to those who cannot get their claims in during the time they are in danger); Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C. Cir. 2006); Heimermann v. Litscher, 337 F.3d 781, 782 (7th Cir. 2003); Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003); Abdul-Akbar v. McKelvie, 239 F.3d 307, 312–16 (3d Cir. 2001) (en banc); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (all holding danger must exist at the time of filing the complaint).
Some courts have said that a danger that arose *after* the case was filed, and was ongoing, did not fit the exception. Trice v. Vazquez, No. CV206-185, 2006 U.S. Dist. LEXIS 79700, at *1 (S.D. Ga. Nov. 1, 2006) (*unpublished*).

126. *See* Ciarpiaglini v. Saini, 352 F.3d 328, 330–31 (7th Cir. 2003) (holding allegations of panic attacks leading to heart palpitations, chest pains, labored breathing, choking sensations, and paralysis meet the imminent danger standard; disapproving extensive inquiry into seriousness of allegations at pleading stage); Gibbs v. Cross, 160 F.3d 962, 964 (3d Cir. 1998) (holding allegation that plaintiff was subjected to "dust, lint and shower odor" via cell vent, resulting in severe headaches, change in voice, mucus full of dust and lint, and watery eyes sufficiently alleged imminent danger of serious injury).

127. *See*, *e.g.*, Merriweather v. Reynolds, No. 2:07-3418-PMD-RSC, 2008 U.S. Dist. LEXIS 38175, at *9 (D.S.C.

allegations are disputed, the court may hold a hearing or rely on affidavits and depositions to resolve the question.[128] Some courts, however, seem to just make *ad hoc* judgments about the credibility of the prisoner's claim based on no more than the *pro se* complaint's allegations.[129] The risk of future injury can be sufficient to invoke the imminent danger exception.[130] The "imminent danger" requirement has been held to be satisfied by allegations that prison staff refused protective custody to a prisoner targeted by gangs;[131] disclosed a prisoner's history as an informant, resulting in threats and assaults;[132] or repeatedly placed a prisoner near known enemies.[133] Courts have also found imminent danger where the plaintiff was denied treatment for an ongoing serious medical problem,[134] disability,[135] or subjected the plaintiff to environmental conditions that caused or aggravated such problems.[136]

If a plaintiff's allegations meet the statutory standard, the relevant claim should be allowed to go forward without being restricted to the precise defendants and allegations currently responsible for the danger.[137] However, a risk not at all related to the allegations in the complaint does not fall within the exception.[138] A claim of imminent danger does not excuse the prisoner from meeting the PLRA's administrative exhaustion requirement.[139]

May 11, 2008) (*unpublished*) (rejecting allegations of threats, enemies, danger from prison gangs, etc.; "unsupported, vague, self-serving, conclusory speculation" does not establish imminent danger); Althouse v. Roe, 542 F. Supp. 2d 543, 546 (E.D. Tex. 2008) (holding claim that attention deficit hyperactivity disorder might lead the plaintiff impulsively to put himself in danger was too speculative to show imminent danger); Burghart v. Corr. Corp. of Am., No. CIV-08-62-C, 2008 U.S. Dist. LEXIS 16732, at *2–3 (W.D. Okla. Mar. 4, 2008) (*unpublished*) (complaints of migraine headaches, fatigue, depression, weight gain and sleeping disorders did not meet standard); Johnson v. Ala. Dept. Of Corr., No. 2:07-cv-0767-WKW (WO), 2008 U.S. Dist. LEXIS 6669, at *2–3 (M.D. Ala. Jan. 29, 2008) (*unpublished*) (pleading the discontinuance of hormone treatment for gender identity disorder, allegedly causing "excessive weight gain, complete body fat redistribution, dizzy spells, fainting spells, headaches, hot-flashes, anxiety, severe depression, more depression than usual, ... [and] the growth of first time facial hair," did not meet the imminent danger standard).

128. Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997) (instructing the district court to explore allegations and the states response before dismissal).

129. *See*, *e.g.*, Pruden v. Mayer, No. 3:CV-08-0559, 2008 U.S. Dist. LEXIS 26700, at *3–4 (M.D. Pa. Apr. 2, 2008) (*unpublished*) (concluding that prisoner's medical care claims did not pose imminent danger because they had occurred over a long period of time).

130. Gibbs v. Cross, 160 F.3d 962, 966–67 (3rd Cir. 1998) (relying on alleged environmental hazards in prison); *see* Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C. Cir. 2006) (holding that deterioration from lack of treatment for Hepatitis C sufficiently pled imminent danger of serious physical injury).

131. Cain v. Jackson, No. C-07-354, *2007 U.S. Dist. LEXIS 70495*, at *2 (S.D. Tex. Sept. 24, 2007) (*unpublished*) (alleging that plaintiff had been assaulted repeatedly by gang members and denied protective custody).

132. *See* Malik v. McGinnis, 293 F.3d 559, 562 (2d Cir. 2002); Gibbs v. Roman, 116 F.3d 83, 84–86 (3d. Cir. 1997).

133. *See* Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (finding that having repeatedly been attacked by a prisoner housed nearby and filing only days after an attack proved imminent danger).

134. *See* Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C. Cir. 2006) (holding that deterioration from lack of treatment for Hepatitis C sufficiently pleaded imminent danger of serious physical injury); Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004) (holding that a prisoner who alleged that lack of treatment was worsening his illnesses sufficiently pleaded imminent danger of serious physical injury); McAlphin v. Toney, 281 F.3d 709, 711 (8th Cir. 2002) (prisoner's complaint alleging denial of treatment for medical/dental condition posed imminent danger was sufficient to permit him to proceed *in forma pauperis* despite the fact that he had three strikes).

135. Fuller v. Wilcox, No. 08-3077, 2008 U.S. App. LEXIS 16581, at *3 (10th Cir. Aug. 4, 2008) (*unpublished*) (denial of a wheelchair, meaning that plaintiff must crawl, and could not walk to the shower or lift himself to his bed, "could result in a number of serious physical injuries").

136. Smith v. Ozmint, No.:0:07-3644-PMD-BM, 2008 U.S. Dist. LEXIS 33608, at *10–12 (D.S.C. Apr. 23, 2008) (*unpublished*) (finding imminent danger standard met by allegations of use of hazardous Chinese products, 24-hour illumination in cells, exposure to deranged behavior and unsanitary conditions from mentally ill prisoners in the segregation unit, deprivation of sunlight, and exposure to mold).

137. *See* Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007) ("[Q]ualifying prisoners can file their entire complaint IFP; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief."); Ciarpiaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (holding damages claim could go forward even though injunctive claim on which "imminent danger" allegation was based was moot). *But see* McAlphin v. Toney, 375 F.3d 753, 755–56 (8th Cir. 2004) (holding that a complaint that satisfies the imminent danger exception cannot be amended to include claims that do not involve imminent danger).

138. Fuller v. Johnson County Bd. of County Com'rs, No. 07-3001-SAC, 2007 U.S. Dist. LEXIS 12179, at *2 (D. Kan. Aug. 8, 2007) (*unpublished*) (complaints about the ventilation system did not meet the imminent danger standard where the plaintiff's claim addressed accessibility for the disabled).

139. McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (upholding the rule that prisoners must fulfill the

One court has held that self-inflicted injury cannot meet the imminent danger standard because "[e]very prisoner would then avoid the three strikes provision by threatening suicide."[140] However, many prison suicides and attempted suicides result directly from serious mental illness.[141] For this reason, arguments can be made that mentally-ill prisoners should be able to go to court to get treatment for their mental illness.

The federal circuits have upheld the three strikes provision as constitutional.[142] Furthermore, while no circuit court has held that the three strikes provision is unconstitutional on First Amendment grounds, some prisoners' advocates have unsuccessfully argued that the provision is unconstitutional because the right to access and petition the courts is protected by the First Amendment.[143]

D. Screening and Dismissal of Prisoner Cases

The PLRA requires federal courts to screen all suits by prisoners against government employees *and* all *in forma pauperis* ("IFP") cases at the litigation's outset. The PLRA mandates that a court must dismiss cases that are frivolous or malicious, that fail to state a claim on which relief may be granted, or that seek damages from a defendant immune from damage claims.

If a court does not immediately dismiss such claims, the court must dismiss them as soon as they come to the court's attention. This power of dismissal, which used to be limited to *in forma pauperis* cases, now extends to *all* prisoner cases.[144] The courts' ability to dismiss cases *sua sponte* (without a motion by the defendant) used to be limited to frivolous and malicious cases, but has now been extended to cases failing to

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administrative exhaustion requirement).

140. Wallace v. Cockrell, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 3602, at *10 (N.D. Tex. Mar. 10, 2003) (*unpublished*), *approved as supplemented*, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 4897, at *1–4 (N.D. Tex. Mar. 27, 2003) (*unpublished*). This case appears to be on the periphery of the law, and can perhaps be limited to its facts.

141. *See* Sanville v. McCaughtry, 266 F.3d 724, 728 (7th Cir. 2001) (alleging prison officials' failure to medicate mentally-ill prisoner resulted in prisoner's suicide); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988) (affirming injunction based on findings that state prison's policies for treatment of mentally-ill prisoners were insufficient for prisoners' protection).

142. *See* Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007) (rejecting claims of unconstitutionality); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (rejecting access to courts claim); Higgins v. Carpenter, 258 F.3d 797, 799–801 (8th Cir. 2001) (rejecting equal protection and access to courts claims); Medberry v. Butler, 185 F.3d 1189, 1192 (11th Cir. 1999) (rejecting Ex Post Facto Clause argument); Rodriguez v. Cook, 169 F.3d 1176, 1178–82 (9th Cir. 1999) (rejecting due process, equal protection, access to courts, Ex Post Facto Clause, and separation of powers arguments); White v. Colorado, 157 F.3d 1226, 1233–34 (10th Cir. 1998) (rejecting access to courts and equal protection challenges); Wilson v. Yaklich, 148 F.3d 596, 604–06 (6th Cir. 1998) (rejecting equal protection, due process, and other claims); Rivera v. Allin, 144 F.3d 719, 723–29 (11th Cir. 1998) (stating IFP status is "a privilege, not a right"; upholding provision against 1st Amendment, access to courts, separation of powers, due process, and equal protection challenges) (abrogated on other grounds by Jones v. Bock, 549 U.S. 199, 214–15 , 127 S. Ct. 910, 919–20 (2007)).

143. In other contexts, the Supreme Court has found that the right to court access "is part of the right of petition protected by the First Amendment." Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642, 648 (1972). *See also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43, 121 S. Ct. 1043, 1049–50, 149 L. Ed. 2d 63, 72–73 (2001) (stating that advocacy in litigation *is* speech); Thornburgh v. Abbott, 490 U.S. 401, 403, 109 S. Ct. 1874, 1876, 104 L. Ed. 2d 459, 466 (1989) (arguing the three strikes provision addresses the conduct of litigation in court and not the internal operations of prisons; it is governed by the same First Amendment standards as other "free world" free speech claims); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686, 701 (1964) (finding that the First Amendment requires "breathing space," and a margin for error is required for inadvertent false speech, or true speech will be deterred). This principle has been applied in other areas of law. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642, 646 (1972) (applying rule in antitrust context); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741, 103 S. Ct. 2161, 2169, 76 L. Ed. 2d 277, 287 (1983) (applying rule in labor context). Thus, sanctions may not be imposed under the relevant statutes against persons who bring litigation unless the litigation is both objectively and subjectively baseless. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61, 113 S. Ct. 1920, 1929, 123 L. Ed. 2d 611, 624–25 (1993) (requiring both subjective and objective intent). Applied to the three-strikes provision, the "breathing space" principle would mean that prisoners could only be punished for knowing falsehood or intentional abuse of the judicial system—a category far narrower than the scope of the provision.

144. Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000) (holding that the power to dismiss "applies to all prison litigants, without regard to their fee status, who bring civil suits against a governmental entity, officer, or employee"); Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999) (same); Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) (same); Martin v. Scott, 156 F.3d 578, 579–80 (5th Cir. 1998) (same); McGore v. Wrigglesworth, 114 F.3d 601, 608 (6th Cir. 1997) (same) (reversed on other grounds).

state a claim and cases suing immune defendants.[145] The Second and Tenth Circuits have held that such dismissals may be done without prior notice or an opportunity to respond,[146] but the Second Circuit has cautioned this ought to be done only where "it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective."[147]

Most courts have held that *pro se* litigants are allowed an opportunity to amend deficient complaints before the court dismisses them under the PLRA.[148] One court has held that the PLRA prohibits this practice, but that holding is probably undermined by *Jones v. Bock*.[149] Additionally, administrative exhaustion is not a pleading requirement, so failure to include it in the complaint is not a failure to state a claim.[150]

The way in which appeals courts review PLRA dismissals has not been fully settled. Some courts have held that dismissal under the PLRA is subject to *de novo* review, which means that the appeals court may decide the matter however it thinks best.[151] However, some courts have limited *de novo* review to dismissals for failure to state a claim, and have held that dismissals deemed frivolous or malicious remain subject to an "abuse of discretion" standard (which means that the appeals court will not overrule the district court's decision unless it thinks the district court made a very big mistake).[152] Other courts have not fully addressed the question.[153] The Second Circuit has held that the *de novo* standard applies under 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c)(2),[154] but has not addressed dismissal under 28 U.S.C. § 1915(e).[155]

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145. These requirements appear in three overlapping statutory provisions: 28 U.S.C. § 1915(e)(2) (2006); 28 U.S.C. § 1915A (2006); and 42 U.S.C. § 1997e(c)(1) (2006).

146. Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000) (upholding lower court *sua sponte* dismissal where no hearing was provided); Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999) (per curiam) ("The statute clearly does not require that process be served or that the plaintiff be provided an opportunity to respond before dismissal.").

147. Giano v. Goord, 250 F.3d 146, 151 (2d Cir. 2001) (quoting Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999)) ("We do note that '[w]here a colorable claim is made out, [sua sponte] dismissal is improper prior to service of process and the defendants' answer.").

148. Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795–96 (2d Cir. 1999) (holding dismissal of a *pro se* complaint under § 1915(e)(2)(B) should be done with leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim"); Brown v. Johnson, 387 F.3d 1344, 1348–49 (11th Cir. 2004) (same); Grayson v. Mayview State Hosp., 293 F.3d 103, 111 (3d Cir. 2002) (same); Razzoli v. Fed. Bureau of Prisons, 230 F.3d 371, 377 (D.C. Cir. 2000) (same); Perkins v. Kansas Dept. of Corr., 165 F.3d 803, 806 (10th Cir. 1999). *Compare* McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997) (holding that, under the PLRA, courts do not have the discretion to allow an opportunity to amend deficient complaints).

149. In *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir. 1997), the court said: "Under the Prison Litigation Act, courts have no discretion in permitting a plaintiff to amend a complaint to avoid a sua sponte dismissal." However, the Supreme Court has held that the screening requirement "does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." Jones v. Bock, 549 U.S. 199, 206, 127 S. Ct. 910, 916, 166 L. Ed. 2d 798, 807 (2007). Since a plaintiff's right to amend the complaint freely—and without even asking the court's permission, if an answer has not been filed—is part of the "usual procedural practice," it seems that the basis for the Sixth Circuit's holding has been undermined. *See* Fed. R. Civ. P. 15(a).

150. *See* Jones v. Bock, 549 U.S. 199, 213–15, 127 S. Ct. 910, 920–21, 166 L. Ed. 2d 798, 812–13 (2007) (finding that "failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.") For more information on Exhaustion, see Part E of this Chapter.

151. *See* Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (holding that dismissals for failure to state a claim are reviewed *de novo*); Black v. Warren, 134 F.3d 732, 733 (5th Cir. 1998) (same); Mitchell v. Farcass, 112 F.3d 1483, 1489–90 (11th Cir. 1997) (same); McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997) (same); Atkinson v. Bohn, 91 F.3d 1127, 1128 (8th Cir. 1996) (same).

152. *See* Bilal v. Driver, 251 F.3d 1346, 1348–49 (11th Cir. 2001) (holding that abuse of discretion standard was proper for review of dismissal based on frivolity); Harper v. Showers, 174 F.3d 716, 718 n.3 (5th Cir. 1998) (stating that *de novo* review is only appropriate for dismissals for failure to state a claim on which relief may be granted). In practice, the "abuse of discretion" standard makes it very unlikely that an appellate court will overturn the district court's ruling.

153. *See* Jackson v. Ward, No. 98-7181, 185 F.3d 874, 1999 U.S. App. LEXIS 25909, at *1 (10th Cir. July 15, 1999) (*unpublished*) (holding that dismissals under § 1915(e)(2)(B)(i) as frivolous or malicious are reviewed for abuse of discretion, but the court should "consider, inter alia, whether the plaintiff is proceeding pro se and whether the district court inappropriately resolved genuine issues of material fact").

154. Liner v. Goord, 196 F.3d 132, 134 (2d Cir. 1999) (holding that "28 U.S.C. § 1915A and 42 U.S.C. § 1999e(c)(2) dismissals are subject to de novo review").

155. Fitzgerald v. First E. Seventh St. Tenants Corp., 221 F.3d 362, 364 n.2 (2d Cir. 2000) (indicating that the standard of review for § 1915(e) is unsettled law).

Despite differences in the way in which appeals courts review PLRA dismissals, the PLRA screening provision does not affect the rule that a court reviewing a motion for summary judgment must accept all allegations of material fact as true, and construe them in the light most favorable to the plaintiff, or the rule that courts must construe *pro se* pleadings liberally when determining whether the plaintiff has stated a claim.[156]

The screening provisions have been held not to violate due process,[157] equal protection,[158] or the right of access to the courts.[159]

E. Exhaustion of Administrative Remedies

The PLRA exhaustion requirement says:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] ... or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.[160]

More prisoners lose their cases because of failure to exhaust administrative remedies than from any other part of the PLRA.

The bottom line: if something happens to you that you may want to bring suit about,

(1) Find out what remedies are available right away, because time deadlines are often very short. If you wait until you have firmly decided whether to sue, it may be too late to exhaust your administrative remedies.
(2) Always use the prison grievance system or any other available remedy, such as a disciplinary appeal.
(3) If you think there is a reason why you should not have to exhaust your administrative remedies, forget it. Exhaust them anyway.
(4) Take all the available appeals, even if you get what you think is a good decision.
(5) If you do not get an answer to a grievance, try to appeal anyway. Many grievance systems say that if a certain amount of time passes and there's no decision, you can treat the non-response as a denial of the grievance, and appeal.
(6) If you're not sure which remedy to use, try all available remedies.
(7) If prison employees tell you an issue is not grievable but you think it is, request that they process your grievance anyway so you will have a record. And, if there is a way to appeal or grieve a decision that something is not grievable, do it too!
(8) If prison employees tell you something will be taken care of and you do not need to file a grievance, exhaust anyway if you think there is any chance you may wish to file suit.
(9) Follow the rules of the grievance system or other remedy as best you can.
(10) If the people running the grievance system or in charge of the remedy tell you that you filed your grievance incorrectly and you need to do something differently to fix it, follow their instructions and make a record of what you were told.
(11) If you make a mistake, like missing a time deadline, do not give up. File the grievance anyway, explain the reasons, and ask that your grievance be considered despite your mistake, and appeal as far as you can if you lose.

Always remember that once you file suit, prison officials and their lawyers will use anything they can find to get your case thrown out of court, and they will look for any possible basis to say that you filed

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156. *See* Resnick v. Hayes, 213 F.3d 443, 446 (9th Cir. 2000) (agreeing with district court's liberal construction of *pro se* pleading); Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795–96 (2d Cir. 1999) (per curiam) (noting that *pro se* complaints must be read liberally).

157. Vanderberg v. Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001) ("The complained of procedure did not deny Plaintiff due process."); Curley v. Perry, 246 F.3d 1278, 1283–84 (10th Cir. 2001) (finding no due process violation).

158. Vanderberg v. Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001) (holding that section 1915(e)(2)(B)(ii) does not violate the Equal Protection Clause); Curley v. Perry, 246 F.3d 1278, 1285 (10th Cir. 2001) (finding no equal protection violation).

159. Martin v. Scott, 156 F.3d 578, 580 n.2 (5th Cir. 1998) (finding provision does not unconstitutionally restrict access to federal courts).

160. 42 U.S.C. § 1997e(a) (2006).

incorrectly and should not be allowed to sue. You want to show the court that you did everything you could to comply with the exhaustion requirement, including following the prison's rules for grievances and other complaints or appeals.

The PLRA makes exhaustion of the grievance system *mandatory*.[161] That is true even if you are suing for damages and the grievance system does not provide damages.[162] If you do not exhaust your administrative remedies, your case will be *dismissed* rather than stayed (held pending exhaustion),[163] although you can make an argument for your case being stayed, based on a recent Supreme Court case, *Jones v. Bock*.[164] You must exhaust *before* you file suit, not afterward, or your case will be dismissed.[165] Dismissal for non-exhaustion is supposed to be "without prejudice."[166] Dismissal without prejudice means that you can come back to court after you pursue your grievance. However, dismissal without prejudice may also mean that you have a short amount of time to pursue your grievance. See Part E(6) of this Chapter for more information about time limits. If the statute of limitations (time limit) has run on your claim when it is dismissed, your case may be permanently barred for that reason too.[167] So, it is very important to exhaust correctly the first time, since you may not get a second chance.

If you do manage to exhaust after a dismissal, you *may* have to pay a new fee to re-file your case, though courts have not completely resolved this issue.[168] In addition, you may be charged a "strike," which may

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161. Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (requiring "exhaustion in cases covered by [U.S.C.] § 1997e(a)"). Though mandatory, exhaustion is not jurisdictional. Woodford v. Ngo, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 385 (2006). That means if you didn't exhaust and you think you have a good enough reason, the court at least has the power to consider your argument—though such arguments rarely succeed, as discussed throughout this Chapter.

162. Booth v. Churner, 532 U.S. 731, 738–39, 121 S. Ct. 1819, 1823–24, 149 L .Ed. 2d 958, 964–65 (2001).

163. Neal v. Goord, 267 F.3d 116, 121–23 (2d Cir. 2001); Perez v. Wis. Dept. of Corr., 182 F.3d 532, 534–35 (7th Cir. 1999). A few decisions have granted stays pending exhaustion under very unusual circumstances. *See* Kennedy v. Mendez, No. 3:CV-03-1366, 2004 U.S. Dist. LEXIS 20170, at *5–6 (M.D. Pa. Oct. 7, 2004) (*unpublished*) (stating that a stay was appropriate because exhaustion was raised when the litigation was at an advanced state and claims that were not exhausted were closely related to those that had been exhausted); Campbell v. Chaves, 402 F. Supp. 2d 1101, 1108–09 (D. Ariz. 2005) (directing the prison system to consider a grievance where a staff member had told the prisoner to file a tort claim rather than a grievance. The tort claim had been rejected for jurisdictional reasons, while the grievance system rules had been changed so the matter would have been grievable).

164. In *Jones v. Bock*, 549 U.S. 199, 214, 127 S. Ct. 910, 920, 166 L. Ed. 2d 798, 812 (2007), the Supreme Court held that the PLRA did not overturn usual litigation practices except to the extent it did so explicitly. The discretion to grant a stay is part of usual litigation practice. Congress did not say anything in the PLRA about stays pending exhaustion—so it can be argued that courts retain their usual discretion to stay cases. *See* Cruz v. Jordan, 80 F. Supp. 2d 109, 124 (S.D.N.Y. 1999) ("There is simply no evidence that Congress intended by Section 1997e(a) to remove every aspect of the district court's traditional equity jurisdiction."). Even if a court were persuaded by this argument, we would expect it would grant a stay only if the prisoner had a pretty good reason for not having exhausted before filing, as in the cases in the previous footnote.

165. Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); Jackson v. District of Columbia, 254 F.3d 262, 269 (D.C. Cir. 2001).

166. Giano v. Goord, 380 F.3d 670, 679–80 (2d Cir. 2004) (holding that a prisoner's claim should be dismissed without prejduce if administrative remedies were still available to him). Some courts have held that dismissal may be with prejudice if you had the opportunity to exhaust administrative remedies but did not do so and did not have any special circumstances that justified your not acting. *See, e.g.*, Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2004). One federal appeals court has held that all dismissals for non-exhaustion should be without prejudice, since states may allow litigants to cure failure to exhaust, or plaintiffs may be able to proceed without exhaustion in state court, and defenses to a new suit should be addressed in that suit. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004).

167. There may be "tolling" provisions of state law suspending the operation of the statute of limitations when you bring a suit, it is dismissed, and you have to re-file it. See Part E(6) of this Chapter for more information about tolling.

168. Courts have generally said that a new case must be filed after dismissal for non-exhaustion, rather than reopening the dismissed case. *See* Williams v. Ramirez, No. CIV S-06-1882 MCE DAD P, 2006 U.S. Dist. LEXIS 61617, at *3–4 (E.D. Cal. Aug. 28, 2006) (*unpublished*) (advising plaintiff that a new post-exhaustion complaint should not bear the docket number of the dismissed action; a new *in forma pauperis* application is required). Some courts, however, may allow prisoners to reopen their cases after exhaustion of administrative remedies. *See* Roberts v. Taminga, 20 Fed. Appx. 455, 456–57, *2001 U.S. App. LEXIS 21287, at *5* (6th Cir. 2001) (*unpublished*) (discussing the District Court's order that the prisoner be able to reopen his case but finding that the prisoner had still not exhausted administrative remedies in the six months the court had given him). Ordinarily, filing a new case would require a new filing fee. However, the only federal circuit to actually focus on the filing fee question has held that a plaintiff need not pay a new filing fee when re-filing a claim that was previously dismissed for non-exhaustion. Owens v. Keeling, 461 F.3d 763, 772–74 (6th Cir. 2006). Other courts have suggested that prisoners will still have to pay a filing fee if the complaints were not exactly the same.

affect your ability to proceed *in forma pauperis* in the future.[169] (See Part C above for more information on the PLRA's "three strikes" provision.) One federal circuit has held dismissal for failure to exhaust is with prejudice as to your ability to proceed *in forma pauperis*—that is, you will have to pay the filing fee up front if you exhaust and re-file your case.[170] This holding appears contrary to the Supreme Court's recent opinion in *Jones v. Bock*, which stated that courts cannot just make up rules under the PLRA contrary to usual federal litigation practice.[171]

The exhaustion provision of the PLRA applies to any case brought by "a prisoner confined in any jail, prison, or other correctional facility" about prison conditions under federal law.[172] A case is "brought by a prisoner" if the plaintiff is a prisoner at the time of filing. If you are no longer a prisoner, you need not have exhausted your administrative remedies.[173] PLRA exhaustion does not apply to petitions for habeas corpus, though habeas has its own slightly different exhaustion requirement.[174] PLRA exhaustion, however, has been applied in Section 1983 actions filed in state court, including those later removed to federal court.[175]

Most courts have held there is no emergency exception to the exhaustion requirement.[176] There are a few decisions that have allowed cases to go forward without exhaustion to avoid irreparable harm,[177] but they do not provide much legal justification for disregarding the exhaustion requirement. The strongest basis for requesting court intervention without waiting for exhaustion is to appeal to a court's traditional powers of discretion.[178] No one seems to have obtained relief on that basis yet (though one court threatened to grant it,

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See Barrett v. Pearson, 2008 U.S. Dist. LEXIS 9156, at *3–4 (E.D. Okla. 2008) (*unpublished*) (holding, in part, that because the prisoner charged different people in each complaint, he had to pay a second filing fee).

169. For more information about this issue, see Part C(1) of this Chapter. As explained there, if your complaint is dismissed because non-exhaustion is apparent on the face of the complaint, the dismissal may be a strike. Otherwise, it should not be, but some courts have used other questionable justifications for charging prisoners a strike for exhaustion-related dismissals.

170. Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998).

171. *See* Jones v. Bock, 549 U.S. 199, 212–14, 127 S. Ct. 910, 919–20 (2007). It is also contrary to the decision in *Owens v. Keeling*, which held that if you exhaust and re-file after a dismissal for non-exhaustion, you do not have to pay a new fee at all. Owens v. Keeling, 461 F.3d 763, 772–74 (6th Cir. 2006). Courts in the Fifth Circuit seem not to have re-examined the *Underwood* holding in light of *Jones*. *See* Barnes v. Brownlow, No. 6:08cv194, 2008 U.S. Dist. LEXIS 51504, at *2 (E.D. Tex. July 7, 2008) (*unpublished*); McGrew v. Teer, No. 07-702-JVP DLD, 2008 U.S. Dist. LEXIS 43354, at *2 (M.D. La. June 3, 2008) (*unpublished*) Johns v. Edwards, No. 06-3767, 2007 U.S. Dist. LEXIS 47890, at *3 (E.D. La. June 28, 2007) (*unpublished*) (all following *Underwood* without question).

172. 42 U.S.C. § 1997e(a) (2006). For more discussion of when a person is a prisoner for PLRA purposes, see footnotes 48–59 and text accompanying them.

173. Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002) (citing cases); Greig v. Goord, 169 F.3d 165, 167–68 (2d Cir. 1999); *see also* Jasperson v. Fed. Bureau of Prisons, 460 F. Supp. 2d 76, 87 (D.D.C. 2006) (plaintiff who filed a challenge to restrictions on placement in halfway house *before* he surrendered to the Bureau of Prisons did not have to exhaust because he was not yet confined, even if he was legally in Bureau's custody). PLRA's administrative exhaustion requirement, discussed in Part E of this Chapter, applies to "a prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a) (2006). The difference in phrasing does not seem to make any substantive difference.

174. United States v. McGriff, 468 F. Supp. 2d 445, 447 (E.D.N.Y. 2007) (noting habeas exhaustion requirement can be dispensed with on grounds of futility or prevention of irreparable harm, unlike the PLRA requirement). For more information on habeas corpus claims, see Chapter 13 of the *JLM*.

175. *See*, *e.g.*, Johnson v. State of La. *ex rel.* Dept. of Public Safety & Corr., 468 F.3d 278, 280 (5th Cir. 2006) ("The PLRA's exhaustion requirement applies to all Section 1983 claims regardless of whether the inmate files his claim in state or federal court.").

176. *See*, *e.g.*, Bovarie v. Giurbino, 421 F. Supp. 2d 1309, 1314 (S.D. Cal. 2006) (holding as "irrelevant" prisoner's claim that the time constraints imposed on him by litigation did not allow for completion of grievance process concerning law library access).

177. *See* Evans v. Saar, 412 F. Supp. 2d 519, 527 (D. Md. 2006) (declining to dismiss the case for non-exhaustion, because "given the shortness of time, [the] Court [was] unprepared to decide whether [plaintiff's] failure to exhaust [was] attributable to his delay in filing his administrative claim or the State's delay in deciding it."); Howard v. Ashcroft, 248 F. Supp. 2d 518, 533–34 (M.D. La. 2003) (holding that prisoner fighting transfer from community corrections to a prison need not exhaust where it was clear that her claim would be rejected, her appeal would take months, and that prison officials wanted to transfer her despite her pending appeal).

178. Jackson v. District of Columbia, 254 F.3d 262, 267–68 (D.C. Cir. 2001) (stating that the PLRA does not specifically disallow the courts from exercising their traditional equitable power to grant injunctions preventing irreparable harm while the exhaustion of administrative remedies is pending, but that the lower court was not required to recognize an irreparable injury exception to the PLRA's exhaustion requirement).

and jail officials hastily addressed the problem),[179] but the argument may have been strengthened by the *Jones v. Bock* decision, which held that courts should not deviate from the usual practices of litigation unless the PLRA explicitly says so.[180] Nevertheless, this argument is unlikely to succeed except in extreme cases. If you are arguing for relief "pending" exhaustion, you should have the grievance process underway when you do.

For information about the New York State prison grievance system, see *JLM*, Chapter 15, "Inmate Grievance Procedures."

1. What Is Exhaustion?

Exhaustion under the PLRA means "proper exhaustion," which is "compliance with an agency's deadlines and other critical procedural rules."[181] Part C(5) of this Chapter discusses this point in detail.

Exhaustion also means taking your complaint all the way to the top of the internal prison complaint process that applies to your problem, whatever that process may be (usually the grievance system). You must take every appeal available to you,[182] and finish the process *before* you file suit.[183] Once the deadline for final decision of your last appeal has passed, you can file suit even if you have not heard the decision.[184] As long as you file suit after the time limit for a decision has passed, you have exhausted your administrative remedies, even if the authorities then issue a late decision.[185] It is not clear how long you

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179. Tvelia v. Dept. of Corr., No. Civ. 03-537-M, U.S. Dist. LEXIS 2227, at *5 (D.N.H. Feb. 13, 2004) (*unpublished*) (stating that notwithstanding the exhaustion requirements of the PLRA, federal courts have the equitable power to stop ongoing conduct that violates an inmate's constitutional rights, but holding that in this case the inmate already received relief for the violation). Several courts have rejected the idea of granting relief pending exhaustion. *See*, *e.g.*, Blain v. Bassett, No. 7:07-cv-00552, 2007 U.S. Dist. LEXIS 86167, at *6–7 (W.D. Va. Nov. 21, 2007) (*unpublished*) (refusing to order delay of new prison rule pending plaintiff's exhaustion and dismissing action).

180. Jones v. Bock, 549 U.S. 199, 212–14, 127 S. Ct. 910, 919–20, 166 L. Ed. 798, 810–12 (2007) (stating that courts should generally not depart from the usual practice under the Federal Rules of Civil Procedure on the basis of perceived policy concerns). Injunctions, including preliminary injunctions, are governed by Fed. R. Civ. P. 65.

181. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2385–86, 165 L. Ed. 2d. 368, 378 (2006).

182. *See* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (holding that PRLA required inmate to make use of all the administrative remedies available to him and that his failure to do so prevented him from going forth with his lawsuit); White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (affirming dismissal for failing to appeal denial of grievance). *See also* Lopez v. Smiley, No. 3:02CV1020 (RNC), 2003 U.S. Dist. LEXIS 16724, at *4 (D. Conn. Sept. 22, 2003) (*unpublished*) (holding that a prisoner who appealed, but whose appeal was not received and was told it was too late to file another, had exhausted).

183. Johnson v. Jones, 340 F.3d 624, 627–28 (8th Cir. 2003) (stating that by the time of the filing of the lawsuit, inmates must have exhausted their administrative remedies); Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001) (stating that it is mandatory to exhaust administrative remedies prior to the commencement of an action). Some courts have held that prisoners cannot add additional claims by amending their complaints unless the new claims were exhausted before the initial complaint was filed. *See*, *e.g.*, Harbin-Bey v. Rutter, 420 F.3d 571, 580 (6th Cir. 2005) (holding that an inmate could not add claims that were filed after the original complaint and for which the administrative remedies had been exhausted after the filing of the original complaint). Most courts, however, have said that as long as the new issues were exhausted before you try to add them to the case, you can amend to add them. *See* Cannon v. Washington, 418 F.3d 714, 719–20 (7th Cir. 2005) (rejecting defendants' argument that new claims could not be added by amendment even if the administrative remedies had been exhausted). That view is consistent with Jones v. Bock, 549 U.S. 199, 210–12, 127 S. Ct. 910, 918–19, 166 L. Ed. 2d. 798, 810–11 (2007) (endorsing the view of the majority of courts that the failure to exhaust is an affirmative defense) The free amendment of complaints is part of normal federal procedural practice. *See* Fed. R. Civ. P. 15(a).

184. Whitington v. Ortiz, 472 F.3d 804, 807–08 (10th Cir. 2007) (when prison officials fail to timely respond to a grievance, the prisoner has exhausted "available" administrative remedies under the PLRA), *dismissed on other grounds*, 2007 U.S. Dist. LEXIS 30561 (D. Colo. Apr. 25, 2007); Powe v. Ennis, 177 F.3d 393, 393 (5th Cir. 1999) (per curiam) ("A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the state's time for responding thereto has expired.").

185. *See*, *e.g.*, Magee v. Chavez, No. 1:05-cv-01563-OWW-DLB PC, 2008 WL 2283133, at *3 (E.D. Cal. May 30, 2008) (*unpublished*) (holding that inmate had exhausted his administrative remedies even though he had not received a response to his administrative grievance because the period to response had lapsed), *dismissed on other grounds,* 2009 U.S. Dist. LEXIS 17972 (E.D. Cal. Mar. 10, 2009) (*unpublished*) (adopting the magistrate's recommendation to dismiss without prejudice upon finding that inmate had indeed filed the lawsuit prior to the expiration of the 30-day time allowed for a response). *But see* Sergent v. Norris, 330 F.3d 1084, 1085–86 (8th Cir. 2003) (affirming dismissal for non-exhaustion where time for response had passed before suit was filed, and prisoner had not made that clear to the district court).

have to wait if the system has no deadline for deciding your final appeal.[186] A number of decisions have said that if you do not get a response to your initial grievance, you have exhausted.[187] However, other courts have said that if the grievance system allows you to treat a non-response as a denial and appeal it, you must do so.[188] When in doubt, try to appeal, even if officials have failed to respond. Prison officials cannot keep you out of court by ignoring your grievances,[189] but once you bring suit, they may argue that you did not try hard enough to exhaust your remedies.

Courts have said that if you *win* your grievance before the final stage and do not appeal, you have exhausted, since it makes no sense to appeal if you win.[190] You are best advised not to rely on that statement, however, because some courts have also held that if you do not win all possible relief in the grievance, you have not exhausted all available remedies.[191] Prison officials and their lawyers will almost always be able to think of some relief you could possibly have obtained, and the court may accept their arguments.[192] Courts have held that if you have been "reliably informed by an administrator that no remedies are available," you are not required to pursue the process any further.[193] If you do not have such an

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186. *See* McNeal v. Cook County Sheriff's Dept., 282 F. Supp. 2d 865, 868 n.3 (N.D. Ill. 2003) (holding 11 months is long enough to wait and citing cases holding that seven months is long enough but one month is not). However, the Seventh Circuit said, in connection with a grievance system that called for appeal decisions within 60 days "whenever possible," that the remedy did not become "unavailable" because it took six months to get a decision. Ford v. Johnson, 362 F.3d 395, 400 (7th Cir. 2004).

187. *See*, *e.g.*, Brengettcy v. Horton, 423 F.3d 674, 682 (7th Cir. 2005) (holding prisoner who received no decision had exhausted his remedies where the grievance policy did not say what to do absent a decision); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 996 (6th Cir. 2004) (holding that "administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance," though distinguishing a case where the prisoner could proceed without a decision).

188. *See* Turner v. Burnside, 541 F.3d 1077, 1083–84 (11th Cir. 2008) (where prisoner alleged that the warden tore up his grievance, he would have been obliged to file an appeal from the lack of a decision, except that the warden also threatened him); Cox v. Mayer, 332 F.3d 422, 425 n.2 (6th Cir. 2003); Clarke v. Thornton, 515 F. Supp. 2d 435, 438–41 (S.D.N.Y. 2007). The New York State grievance rules provide that issues not decided within the prescribed time limits can be appealed unless the prisoner has consented to an extension of time. State of New York, Department of Correctional Services, Directive No. 4040 § V(G), Inmate Grievance Program (1998) (*as revised* Aug. 22, 2003); N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8 (2001). The New York City grievance rules say essentially the same thing. *See* City of New York, Department of Corrections, Directive No. 3375R § III.6, Inmate Grievance Program (1998) (*as revised* Mar. 4, 1985).

189. *See* Duke v. Hardin County, No. 3:05CV-496-S, 2008 U.S. Dist. LEXIS 25701, at *4–5 (W.D. Ky. Mar. 31, 2008) (holding prisoner exhausted remedies where he received a response stating the matter had been investigated and turned over to the Jailer, and the Jailer never responded); John v. N.Y.C. Dept. of Corr., 183 F. Supp. 2d 619, 625 (S.D.N.Y. 2002) (rejecting argument that after three years, prisoner must continue waiting for a decision). In *Dole v. Chandler*, 438 F.3d 804, 811–12 (7th Cir. 2006), the court held a prisoner had exhausted remedies when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what, if anything, to do about it.

190. *See* Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding "a prisoner need not press on to exhaust further levels of review once he has either received all 'available' remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available."); Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004) (holding a prisoner who repeatedly got favorable decisions that later were not carried out had exhausted despite failure to appeal the favorable decisions); Sulton v. Wright, 265 F. Supp. 2d 292, 298–99 (S.D.N.Y. 2003) (prisoner not required to complain after his grievance has been addressed but not corrected).

191. Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910 (2007) ("Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to "properly exhaust." The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.") (emphasis in original); *see also* Rivera v. Pataki, No. 01 civ. 5179 (MBM), 2003 U.S. Dist. LEXIS 11266, at *27 (S.D.N.Y. Feb. 14, 2005) (noting it "made sense" for a prisoner to appeal when prisoner had been granted partial relief but the relief did not change the challenged policy).

192. *See*, *e.g.*, Macias v. Zenk, 495 F.3d 37, 44 (2d Cir. 2007) (holding that notice alone is insufficient because "[t]he benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance" and "[t]he prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules) (emphasis in original); *accord* Ruggiero v. County of Orange, 467 F.3d 170, 178 (2d Cir. 2006) (holding prisoner who prevailed informally needed to exhaust grievances because of "the larger interests at stake"). Another circuit has rejected this idea, stating that "we do not think it [is the prisoner's] responsibility to notify persons higher in the chain when this notification would be solely for the benefit of the prison administration." Thornton v. Snyder, 428 F.3d 690, 696–97 (7th Cir. 2005).

193. Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005); Cahill v. Arpaio, No. CV 05-0741-PHX-MHM (JCG), 2006 U.S. Dist. LEXIS 80772, at *7–8 (D. Ariz. Nov. 2, 2006) (*unpublished*) (holding plaintiff reasonably relied on grievance

assurance and you want to bring suit, you should probably appeal any decision all the way up, no matter what. If you have to explain why you are appealing a positive decision, you could say something like "to exhaust my administrative remedies by calling this problem to the attention of high-level officials so they can take whatever action is necessary to make sure it never happens again."[194]

Exhaustion generally means using whatever formal complaint procedure is available (usually a grievance system or administrative appeal). You must follow all the rules of the prison procedure ("proper exhaustion").[195] If you do that, courts cannot require you to do more.[196] Letters and other informal means of complaint, such as participating in an internal affairs or inspector general investigation, generally will not be considered exhaustion[197] unless the prison rules identify them as an alternative means of complaint,[198] or unless there are "special circumstances" justifying your failure to exhaust properly.[199] In a few cases, courts have held that non-grievance complaints that were in fact reviewed at the highest levels of the agency satisfied the exhaustion requirement in the particular circumstances of those cases,[200] though it is not clear whether these cases are good law after the *Woodford* "proper exhaustion" holding.

The Second Circuit has questioned the idea of informal exhaustion. It has held that a prisoner who got what he asked for in an informal process should have filed a formal grievance anyway because that process could have provided other relief, like changes in policy or discipline of staff.[201] So, if you solve your problem

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hearing officer telling him that "(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court," notwithstanding that the preprinted decision form said it could be appealed). Similarly, courts have held that if a prisoner's grievance is rejected on the ground that the prisoner has already received the relief sought, he has exhausted. Elkins v. Schrubbe, No. 04-C-85, 2006 U.S. Dist. LEXIS 43157, at *154–55 (E.D. Wis. June 15, 2006) (*unpublished*) (holding prisoner had no remaining "available" remedy where grievances were rejected as moot because the issue had already been resolved in his favor in that he received the requested relief).

194. *See* Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding prisoner who obtained what he wanted informally was still required to exhaust because a grievance "still would have allowed prison officials to reconsider their policies and discipline any officer who had failed to follow existing policies").

195. Woodford v. Ngo, 548 U.S. 81, 106, 126 S. Ct. 2378, 2394, 165 L. Ed. 2d 368, 387 (2006) ("[T]he Court concludes that the 'PLRA exhaustion requirement requires proper exhaustion.'") (Stevens, J., dissenting).

196. Jones v. Bock, 549 U.S. 199, 217–19, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures ... is all that is required by the PLRA to 'properly exhaust.'")

197. *See* Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding that talking with Sheriff's Department investigators rather than filing a jail grievance did not satisfy the exhaustion requirement); Panaro v. City of North Las Vegas, 432 F.3d 949, 953 (9th Cir. 2005) (holding that participation in an internal affairs investigation did not exhaust because it did not provide a remedy for the prisoner, even though the officer was disciplined); Scott v. Gardner. 287 F. Supp. 2d 477, 488 (S.D.N.Y. 2003) (holding that letters of complaint are not part of the grievance process).

198. In *Pavey v. Conley*, 170 F. App'x 4, 8, (7th Cir. 2006), the plaintiff alleged that prison staff had broken his arm and he couldn't write, and the grievance rules said that prisoners who couldn't write could be assisted by staff. The court held that any memorialization of his complaint by investigating prison staff might qualify as a grievance—and even if they did not write it down, he might have "reasonably believed that he had done all that was necessary to comply with" the policy. *See also* Carter v. Symmes, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *8 (D. Mass. Feb. 4, 2008) (*unpublished*) (holding that a timely letter from counsel served to exhaust remedies where grievance rules did not specify use of a form, and the letter was considered as part of prisoners' grievance raising other issues); Shaheed-Muhammad v. Dipaolo, 393 F. Supp. 2d 80, 96–7 (D. Mass. 2005) (concluding that letters to officials are considered grievances under state law).

199. For information about what counts as a "special circumstance," see Part E(5) of this Chapter, "What if You Make a Mistake Trying to Exhaust?"

200. *See* Camp v. Brennan, 219 F.3d 279, 280 (3d Cir. 2000) (holding that use of force allegation reportedly investigated and rejected by Secretary of Correction's office needed no further exhaustion) If you are in the position where you must argue that another kind of complaint meets the exhaustion requirement, be sure to remind the court that the Supreme Court has said that "Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Porter v. Nussle, 534 U.S. 516, 525, 122 S. Ct. 983, 988, L. Ed. 2d. 12, 22 (2002). You can then argue that if prison officials actually reviewed your complaint, they had the opportunity to address the complaint internally, and exhaustion was therefore satisfied. The likelihood of success with this argument is not good and you should not bypass normal exhaustion procedures. *See*, *e.g.*, Macias v. Zenk, 495 F.3d 37, 43–44 (2d Cir. 2007) (holding "after Woodford, notice alone is insufficient"; the PLRA requires both "substantive exhaustion" (notice to officials) and "procedural exhaustion" (following the rules)).

201. Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding prisoner beaten in jail, who talked to Sheriff's Department investigators and then was transferred, did not exhaust).

informally but still want to bring suit about what happened, you should file a grievance and pursue it all the way to the top.

The Second Circuit has held if a prisoner uses the wrong remedy through a reasonable misunderstanding of the rules, the prisoner is justified in failing to exhaust correctly. If the correct administrative remedy is still available, the prisoner must try to use it, but if it is no longer available, the prisoner's case may go forward without exhaustion.[202] A prisoner may also be justified in failing to exhaust the correct procedures because of threats or intimidation by prison staff.[203] These rules appear to still be good law after the *Woodford* "proper exhaustion" ruling, since they address fact situations different than those before the Supreme Court in *Woodford*. But the Second Circuit has not yet ruled on that question.[204]

The exhaustion requirement refers only to administrative remedies; you do not need to exhaust judicial remedies (i.e., go to state court) before you go to federal court. That means you do not have to appeal to the judiciary from administrative decisions in states that have such procedures.[205] The administrative remedies Congress had in mind when it passed the PLRA are internal prison grievance procedures.[206] A prisoner is not required to exhaust state or federal tort claim procedures, unless the prisoner wishes to sue under the tort claims system.[207] Several New York federal courts have held that prisoners making disability-related complaints must exhaust the U.S. Department of Justice's disability complaint procedure in addition to the prison grievance procedure.[208] At least one court has disagreed.[209] The New York state prison system has rejected that additional requirement,[210] although other state agencies continue to support it.[211]

2. What Are Prison Conditions?

The exhaustion requirement applies to cases filed by prisoners about "prison conditions." The Supreme Court has said the phrase applies "to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[212] In other words, if it happened to you in prison, it is probably covered by the exhaustion requirement.[213] One

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202. Giano v. Goord, 380 F.3d 670, 678–80 (2d Cir. 2004) (holding that prisoner who used a disciplinary appeal rather than a grievance for his issues did so reasonably, and had therefore exhausted).

203. Hemphill v. New York, 380 F.3d 680, 688, 690 (2d Cir. 2004) (noting that a prisoner afraid to file an internal grievance but not to appeal "directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts" might have been justified in failing to exhaust).

204. Other courts, however, have endorsed the *Hemphill* holding in post-*Woodford* decisions. *See* Kaba v. Stepp, 458 F.3d 678, 684–85 (7th Cir. 2006) (adopting *Hemphill* analysis); Stanley v. Rich, No. CV 605-075, 2006 U.S. Dist. LEXIS 35916, at *5 (S.D. Ga. June 1, 2006) (*unpublished*) (stating "threats of violent reprisal may, in some circumstances, render administrative remedies 'unavailable' or otherwise justify an inmate's failure to pursue them").

205. *See* Jenkins v. Morton, 148 F.3d 257, 259–60 (3d Cir. 1998) (finding prisoner not required to exhaust his state judicial remedies prior to bringing an action covered by PLRA). New York does not have that kind of judicial review procedure. Instead, New York permits review of administrative decisions by Article 78 proceedings. For more information on Article 78 proceedings, see *JLM*, Chapter 22.

206. *See* Jones v. Bock, 549 U.S. 199, 217–19, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to 'properly exhaust.'"); Porter v. Nussle, 534 U.S. 516, 524–25, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (stating the exhaustion requirement was intended to give *corrections officials* the opportunity to solve problems before suit was filed).

207. *See* Macias v. Zenk, 495 F.3d 37, 42–44 (2d Cir. 2007). For information on tort claims generally, review Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

208. William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *20 (S.D.N.Y. Aug. 12, 2005) (*unpublished*); Burgess v. Garvin, No. 01 Civ. 10994 (GEL), 2003 U.S. Dist. LEXIS 14419, at *8 (S.D.N.Y. Aug. 19, 2003) (*unpublished*), *on reconsideration*, 2004 U.S. Dist. LEXIS 4122, at *2 (S.D.N.Y. March 16, 2004) (*unpublished*).

209. Veloz v. State of New York, 339 F. Supp. 2d 505, 517–519 (S.D.N.Y. Sept. 30, 2004).

210. Rosario v. Goord, 400 F.3d 108 (2d Cir. 2005) (per curiam).

211. William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (accepting argument in action defended by state Division of Parole and Office of Mental Health).

212. Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 992, 152 L. Ed. 2d 12, 26 (2002).

213. *See* Krilich v. Fed. Bureau of Prisons, 346 F.3d 157, 159 (6th Cir. 2003) (holding that intrusions on attorney-client correspondence and telephone conversations are prison conditions notwithstanding argument that attorney-client relationship "transcends the conditions of time and place"); United States v. Carmichael, 343 F.3d 756, 762 (5th Cir. 2003) (holding that statutorily required DNA collection is a prison condition); Castano v. Neb. Dept. of Corr., 201 F.3d 1023, 1024 (8th Cir. 2000) (failure to provide interpreters for Spanish-speaking prisoners is a prison condition); *but see* Ayyad v. Gonzales, 2008 U.S. Dist. LEXIS 62863 (D. Colo. July 31, 2008) (*unpublished*) (holding that denial of a prisoner's ability to meet with clinical law students was not a matter of prison conditions because the administrative

major exception for New York City prisoners is use-of-force cases. You cannot bring "complaints pertaining to an alleged assault" under that system's grievance procedure, and therefore you do not need to exhaust use-of-force or prisoner assault claims.[214] However, you would need to exhaust other claims arising out of those incidents, like prison staff preventing you from receiving medical care for injuries.

Actions of persons or agencies outside the prison system are generally not prison conditions.[215] Occurrences or conditions in police custody are generally not prison conditions.[216] The same might be true of medical facilities outside the prison.[217] Disputes over whether you should be in prison at all are not about prison conditions.[218] Courts have reached differing decisions on matters related to parole release or revocation.[219] Complaints that arise in halfway houses or residential treatment programs are likely to be considered as being about prison conditions as long as you are there because of a criminal conviction or charge and you are not free to leave.[220] However, courts have held issues about placement in or removal from such programs are not about prison conditions.[221] For example, one court has held that a claim that prisoners with mental illness were discharged without receiving psychiatric medication and referrals is not about prison conditions.[222]

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dictates were made by the Attorney General, not the Bureau of Prisons).

214. City of New York, Department of Corrections, Directive No. 3375R § II.B, Inmate Grievance Program (1998) (*as revised* Mar. 4, 1985). This directive has recently been revised but the substance of this point is unchanged: "Inmate allegations of assault or harassment by either staff or inmates are not grievable under the grievance mechanism." City of New York, Department of Corrections, Directive 3375R-A, Inmate Grievance Resolution Program at § II.C.2 (Mar. 13, 2008), *available at* http://www.nyc.gov/html/doc/downloads/pdf/3375R-A.pdf. If a complaint is not grievable, and there is no other applicable administrative remedy, then there is no exhaustion requirement.

215. For example, one court held that the Department of Homeland Security's placement of a prisoner on a "watch list" was not a prison condition requiring exhaustion; however, the prison's actions in placing him in segregation or depriving him of telephone privileges required exhaustion. Almahdi v. Ridge, No. 04-3120, 201 F. App'x 865, 868, 2006 U.S. App. LEXIS 26938, at *6 (3d Cir. Oct. 27, 2006) (*unpublished*). *See* Johnson v. Quinn, No. 96 C 6598, 1999 U.S. Dist. LEXIS 2434, at *8 (N.D. Ill. Feb. 26, 1999) (*unpublished*) (holding that prisoner who alleged that prosecutors and investigators were conspiring to harm him in jail because he had information about official corruption did not have to exhaust because claim was not about prison conditions).

216. *See* Bowers v. City of Philadelphia, No. 06-CV-3229, 2007 U.S. Dist. LEXIS 5804, at *116, n.40 (E.D. Pa. Jan. 25, 2007) (*unpublished*) (holding police holding cells were not prisons for purpose of prisoner release provisions of PLRA).

217. In Borges v. Adm'r for Strong Mem. Hosp., No. 99-CV-6351Fe, 2002 U.S. Dist. LEXIS 18596, at *11 (W.D.N.Y. Sept. 30, 2002) (*unpublished*), the court expressed doubt that a claim made by prisoners injured by dentists at an outside hospital involved prison conditions, since the grievance system probably could not take any action against defendants. The court reached the opposite conclusion in Abdur-Raqiyb v. Erie County Med. Ctr., 536 F. Supp. 2d 299, 304 (W.D.N.Y. 2008), reasoning that the statute is supposed to be read broadly and the plaintiff was clearly a prisoner.

218. Fuller v. Kansas, No. 04-2457-CM, 2005 U.S. Dist. LEXIS 18977, at *5 (D. Kan. Aug. 8, 2005) (*unpublished*) (holding claims of false arrest and imprisonment are not prison conditions claims under the statute), *aff'd*, 175 F. App'x 234 (10th Cir. 2006); Wishom v. Hill, No. 02-2291-KHV, 2004 U.S. Dist. LEXIS 2172, at *34 (D. Kan. Feb. 13, 2004) (*unpublished*) (holding detention without probable cause not a prison condition); Monahan v. Winn, 276 F. Supp. 2d 196, 204 (D. Mass. 2003) (holding a Bureau of Prisons rule revision abolishing its discretion to designate some offenders to community confinement facilities did not involve prison conditions).

219. *Compare* L.H. v. Schwarzenegger, 519 F. Supp. 2d 1072, 1081 n.9 (E.D. Cal. Sept. 19, 2007) (holding parole violation procedures are not prison conditions) *with* Morgan v. Messenger, No. 02-319-M, 2003 U.S. Dist. LEXIS 14892, at *8 (D.N.H. Aug. 27, 2003) (*unpublished*) (holding sex offender treatment director's disclosure of private information from plaintiff's treatment file to parole authorities and prosecutor involved prison conditions, since the director was a prison employee and the action affected the duration of his prison confinement)

220. Ruggiero v. County of Orange, 467 F.3d 170, 174–75 (2d Cir. 2006) (holding that a "drug treatment campus" was a "jail, prison, or other correctional facility" and that term "includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law"); William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *11 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (holding that thequestion whether persons incarcerated pending parole revocation proceedings were entitled to be placed in less restrictive residential treatment programs for mental illness and chemical addition involved prison conditions).

221. *See* Monahan v. Winn, 276 F. Supp. 2d 196, 204 (D. Mass. 2003) (holding that a Bureau of Prisons rule revision that abolished its discretion to designate certain offenders to community confinement facilities did not involve prison conditions).

222. *See* Bolden v. Stroger, No. 03 C 5617, 2005 U.S. Dist. LEXIS 7473, at *4 (N.D. Ill. Feb. 1, 2005) (*unpublished*) (holding that a claim of exclusion of persons with mental illness from pre-release programs was about conditions).

3. What Are "Available" Remedies?

The PLRA says you must exhaust "available" remedies. A remedy is "available" if it has any "authority to provide any relief or to take any action whatsoever in response to a complaint."[223] You may believe that the grievance system in your prison is unfair or a complete waste of time, but you still must exhaust your administrative remedies. [224]

The "available" remedy that you must exhaust will usually be the prison grievance procedure.[225] However, if an issue is not "grievable" under grievance rules, you should not be required to exhaust the grievance system because it is not available for your issue.[226] For example, the New York State grievance directive states

(1) An individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review to outside the facility shall be considered non-grievable.
(2) An individual decision or disposition of the temporary release committee, time allowance committee, family reunion program or media review committee is not grievable. Likewise, an individual decision or disposition resulting from a disciplinary proceeding, inmate property claim (of any amount), central monitoring case review or records review (freedom of information request, expunction) is not grievable.
(3) The policies, rules, and procedures of any program or procedure, including those above, are grievable.[227]

So, for example, your complaint about the denial of temporary release would not be grievable, but your complaint that the Temporary Release Committee used unfair procedures would be grievable.

The New York City jail grievance directive lists the following "non-grievable issues:"

(1) matters under investigation by the Inspector General;
(2) complaints pertaining to an alleged assault or verbal harassment;
(3) complaints pertaining to matters in litigation;
(4) complaints where there is already an existing appeal mechanism within the Department of Correction (that is, determinations of disciplinary hearings and classification);
(5) matters outside the jurisdiction of the Department of Correction; and
(6) complaints that do not directly affect the prisoner.[228]

If no remedies are available from the grievance system, then the PLRA does not require exhaustion.[229] Also, an issue may be grievable on paper but non-grievable in reality because of how the grievance system operates.[230]

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223. Booth v. Churner, 532 U.S. 731, 736, 121 S. Ct. 1819, 1823, 149 L. Ed. 2d 958, 963 (2001).

224. Booth v. Churner, 532 U.S. 731, 741 n.6, 121 S. Ct. 1819, 1825 n.6, 149 L. Ed. 2d 958, 966 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). This means, for example, that if another prisoner has just grieved the same issue and lost, you still need to grieve it yourself, even though you are certain that you will get the same ruling. *See* Hattie v. Hallock, 16 F. Supp. 2d 834. 836 (N.D. Ohio June 23, 1998) (dismissing prisoner's action because he had not exhausted his remedies before filing).

225. Acosta v. United States Marshals Serv., 445 F.3d 509, 512–13 (1st Cir. 2006) (prisoner must use the administrative procedure of the institution or system where his or her problem arose).

226. *See* Owens v. Keeling, 461 F.3d 763, 769 (6th Cir. 2006) (holding grievance system was not an available remedy for classification complaint where prison required use of a separate classification appeal procedure); Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003) (courts must establish that the prisoner's claim does not fall into an exception to the administrative remedy).

However, if you think that you do not have to exhaust, but you turn out to be wrong, your case will likely be dismissed for lack of exhaustion. So, if you have any doubts whatsoever that your issue is grievable, file the appropriate grievance. *See* Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1214 (10th Cir. 2003) (quoting Beaudry v. Corr. Corp. of Am., 331 F.3d 1164, 1166 (10th Cir. 2003)).

227. State of New York, Department of Correctional Services, Directive No. 4040 § 701.3(e), Inmate Grievance Program (2003) (*as revised* July 1, 2006). The state regulations say the same thing. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3 (2006).

228. City of New York, Department of Corrections, Directive No. 3375R § II(B) Inmate Grievance Program (1998) (*as revised* Mar. 4, 1985). This directive has recently been revised, but the list of non-grievable issues remains substantially the same. *See* New York City, Deparment of Corrections, Directive 3375R-A, Inmate Grievance Resolution Program at § II.C. (Mar. 13, 2008), *available at* http://www.nyc.gov/html/doc/downloads/pdf/3375R-A.pdf.

Often, there is a separate, specialized remedy for a non-grievable issue. If so, you must use it.[231] This is most often an issue with disciplinary proceedings and issues related to them: to satisfy the "proper exhaustion" requirement,[232] you must choose correctly between appealing a disciplinary action and filing a separate grievance—and sometimes you may need to do both.

Generally, a suit that attacks the conduct of the disciplinary hearing itself is exhausted by a disciplinary appeal.[233] A suit about the incident that leads to disciplinary charges against you will generally not be exhausted by a disciplinary appeal and will require a separate grievance.[234] However, in all cases it is the prison's rules governing grievances and appeals that will determine which remedy is the correct remedy.[235] The problem is that prison rules are often unclear to the point where even prison officials cannot keep them straight. For example, in one New York State case, the defendants argued that a prisoner who alleged that evidence used against him at a disciplinary hearing was falsely created should have filed a separate grievance and not a disciplinary appeal to exhaust that issue. The Second Circuit held that the prisoner was justified by special circumstances[236] in filing only a disciplinary appeal because the rule was unclear and he had a reasonable belief that his complaint could only be pursued by appeal.[237] New York state not only failed to clarify the rule,[238] but also in a later case made exactly the opposite argument: the prisoner *had* filed a

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229. *See* Farnworth v. Craven, No. CV05-493-S-MHW, 2007 U.S. Dist. LEXIS 19412, at *14 (D. Idaho Mar. 14, 2007) (*unpublished*) (holding prisoner seeking a new parole hearing need not exhaust the grievance system because it had no authority over the Parole Commission); Bumgarden v. Wackenhut Corrections Corp., 645 So. 2d 655, 657-658 (3d Cir. 1994) (holding the exhaustion of grievance procedures is only required when the procedures have a realistic chance of resolving the dispute); Handberry v. Thompson, 92 F. Supp. 2d 244, 247–48 (S.D.N.Y. 2000) (holding that prisoners need not grieve failure to deliver educational services).

230. *See* Marshall v. Knight, No. 3:03-CV-460 RM, 2006 U.S. Dist. LEXIS 84040, at *7 (N.D. Ind. Nov. 17, 2006) (*unpublished*) (holding that instructions to grievance personnel to respond to grievances about law library hours only by sending prisoners a copy of a memo deprived grievance staff of authority to act on those grievances and made the remedy unavailable); Scott v. Gardner, 287 F. Supp. 2d 477, 491 (S.D.N.Y. 2003) (holding that allegations that grievance staff refused to process and file grievances about occurrences at other prisons, claiming they were not grievable, sufficiently alleged lack of an available remedy).

231. *See* Owens v. Keeling, 461 F.3d 763, 769–72 (6th Cir. 2006) (holding prisoner who filed classification appeal exhausted, notwithstanding failure to complete inapplicable grievance procedure); Timley v. Nelson, No. 99-3038-JWL, 2001 U.S. Dist. LEXIS 10117, at *4–5 (D. Kan. Feb. 16, 2001) (*unpublished*) (prisoner's failure to pursue "religious accommodation" exception procedure meant that administrative remedies were not exhausted); Wallace v. Burbury 305 F. Supp. 2d 801, (N.D. Ohio 2003) (holding where a prisoner is notified that a document relating to his grievance has been lost or misfiled, failure to refile is considered a failure to exhaust the administrative remedy).

232. This rule is discussed in Part E(5), "What If You Make a Mistake Trying To Exhaust?"

233. Jenkins v. Haubert, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that disciplinary appeals exhausted plaintiff's challenge to the resulting disciplinary sanctions); Portley-El v. Steinbeck, No. 06-cv-02096-MSK-MJW, 2008 U.S. Dist. LEXIS 20236, at *2 (D. Colo. Mar. 14, 2008) (*unpublished*) (holding that a disciplinary appeal exhausted due process claims under rule stating that grievance procedure may not be used to seek review of disciplinary convictions).

234. Rodney v. Goord, 00 Civ. 3724 (WK), 2003 U.S. Dist. LEXIS 8176, at *19 (S.D.N.Y. May 5, 2003) (*unpublished*) (holding an allegation of false disciplinary charges had to be grieved in addition to appealing the disciplinary conviction); *but see* Mitchell v. Horn, 318 F.3d 523, 531 (3d Cir. 2003) (holding that a prisoner who claimed retaliatory discipline exhausted by appealing the disciplinary decision to the highest level.

235. Woodford v. Ngo, 548 U.S. 81, 90, 126 S. Ct. 2378, 2385, 165 L. Ed. 2d 368, 378 (2006)(holding that under the Prison Litigation Reform Act, prisoners must exhaust all available remedies, even if the relief sought cannot be granted by the administrative process). If the designated remedy is a disciplinary appeal, but the prisoner cannot appeal because he pled guilty to the offense, the remedy is not available. Marr v. Fields, No. 1:07-cv-494, 2008 U.S. Dist. LEXIS 24993, at *1 (W.D. Mich. Mar. 27, 2008) (*unpublished*).

236. In the Second Circuit, such a finding means the prisoner has not exhausted, but must seek to exhaust remedies if they remain available. If the remedies are no longer available, the prisoner may proceed with the litigation. Giano v. Goord, 380 F.3d 670, 680 (2d Cir. 2004)(holding that special circumstances may excuse a prisoner's failure to exhaust, but in the absence of any justification for not pursuing available remedies, dismissal with prejudice is required.); Hemphill v. New York, 380 F.3d 680, 690–91 (2d Cir. 2004)(holding that where a prisoner lacked available administrative remedies, the exhaustion requirement of Prison Litigation Reform Act (PLRA) does not apply).

237. Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (stating that even if the plaintiff was wrong, "his interpretation was hardly unreasonable;" the regulations "do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the 'decisions or dispositions' of such proceedings"); *accord* Johnson v. Testman, 380 F.3d 691, 696–97 (2d Cir. 2004) (remanding claim when [plaintiff] reasonably believed that raising his complaints during his disciplinary appeal sufficed to exhaust his available administrative remedies," since it "cannot be dismissed out of hand, especially since the district court has not had the opportunity to examine it").

238. New York has, seemingly, attempted to shift the cost of unclear rules to the prisoners. The most recent

grievance about retaliatory false discipline, and the defendants argued he should have pursued a disciplinary appeal.[239] In some cases, prison officials appear to have stretched the rules to reject grievances that were related to disciplinary proceedings even though the rules did not actually require such rejection.[240] In some prison systems, the rules *do* bar grievances that have any relationship to a disciplinary incident.[241] The bottom line is that you must read the rules very carefully to determine whether a particular issue calls for a grievance or a disciplinary appeal. In some cases both will be required if you wish to raise multiple issues.[242] If the rules are not absolutely clear, it may be wise to file both a grievance and a disciplinary appeal to protect yourself from an argument later that whatever you did was wrong. If prison officials reject your use of a particular remedy, it is harder for them to say later that you should have used it.

A remedy may not be available because of circumstances peculiar to a particular case. For example, a prisoner may be unable to file a grievance because of a medical condition.[243] Courts have made a number of decisions concerning mental illness or retardation, some favoring prisoners[244] and some favoring prison officials,[245] without settling on any clear standard for such cases. Courts have also not taken any consistent position concerning prisoners who may be unable to use the grievance system properly because of other disabilities,[246] illiteracy or lack of education,[247] inability to speak or write English,[248] or youth.[249]

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revision to its grievance policy states: "Note: If an inmate is unsure whether an issue is grievable, he/she should file a grievance and the question will be decided through the grievance process in accordance with section 701.5, below." Appendix D, New York State, Department of Correctional Services, Directive 4040, Inmate Grievance Program at § 701.3(e) (July 1, 2006). This provision, however, does not deal with the situation addressed in *Giano* where the prisoner reasonably believes the issue is *not* grievable.

239. Larkins v. Selsky, No. 04 Civ. 5900 (RMB) (DF), 2006 U.S. Dist. LEXIS 89057, at *24 (S.D.N.Y. Dec. 6, 2006) (*unpublished*) (stating that *Giano* "nearly mirrors this case").

240. Woods v. Lozer, No. 3:05-1080, 2007 LEXIS 4923, at *3 (M.D. Tenn. Jan. 18, 2007) (*unpublished*) (holding a prisoner exhausted when he appealed a decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); Livingston v. Piskor, 215 F.R.D. 84, 86–87 (W.D.N.Y. 2003) (holding that evidence of grievance personnel refusal to process grievances where a disciplinary report had been filed covering the same events created a factual issue preventing summary judgment).
The above cited cases involved misapplication of prison policy, or prison staff making up an unauthorized rule. In some prison systems, any overlap with a disciplinary proceeding makes the matter non-grievable or not immediately grievable.

241. *See* Vasquez v. Hilbert, No. 07-cv-00723-bbc, 2008 U.S. Dist. LEXIS 42011, at *9 (W.D. Wis. May 28, 2008) (*unpublished*) (citing rule that a grievance raising "any issue related to the conduct report" must await completion of the disciplinary process).

242. For example, in some prison systems, appealing a disciplinary conviction and challenging the rule under which you were convicted require, respectively, a disciplinary appeal and separate grievance. *See* Singh v. Goord, 520 F. Supp. 2d 487, 497–98 (S.D.N.Y. 2007) (holding successful disciplinary appeal challenging discipline for refusing work contrary to religious beliefs did not exhaust plaintiff's challenge to the underlying disciplinary rule; a separate grievance was required).

243. Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (noting that "one's personal ability to access the grievance system could render the system unavailable"). *But see* Ferrington v. La. Dept. of Corr., 315 F.3d 529, 532 (5th Cir. 2002) (holding plaintiff's near blindness did not exempt him from exhausting, since he had managed to file the lawsuit).

244. *See, e.g.*, Whitington v. Sokol, 491 F. Supp. 2d 1012, 1019 (D. Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had no remedies because he was mentally incapacitated and was transferred to a mental institution shortly after the incident he sued about).

245. *See* Fleming v. Dettloff, No. 07-12511, 2008 U.S. Dist. LEXIS 48258, at *4–5 (E.D. Mich. June 24, 2008) (*unpublished*) (dismissing for non-exhaustion despite plaintiff's allegation of mental incompetence and his participation in the prison Mental Health Program, since he presented "no evidence of mental incompetency beyond allegations and conclusory statements in the pleadings").

246. *See* Elliott v. Monroe Corr. Complex, No. C06-0474RSL, 2007 U.S. Dist. LEXIS 5242, at *10–11 (W.D. Wash. Jan. 23, 2007) (*unpublished*) (dismissing for non-exhaustion where plaintiff with cerebral palsy was provided with assistance and had filed numerous grievances, though none of which was exhausted).

247. Langford v. Ifediora, No. 5:05CV00216WRW/HLJ, 2007 LEXIS 34915, at *1 (E.D. Ark. May 11, 2007) (*unpublished*) (holding plaintiff's age, deteriorating health, and lack of general education, combined with failure to provide him assistance in preparing grievances, raised a factual issue concerning the availability of the remedy to him). *See also* Ramos v. Smith, No. 05-5278, 187 F. App'x 152, 154 (3d Cir. June 2, 2006) (*unpublished*) (rejecting claim of illiteracy, since federal regulations require assistance to illiterate prisoners, and he did not allege that he asked for such assistance).

248. Several courts have denied summary judgment to prison officials where a monolingual Spanish-speaking plaintiff alleged he could not understand or follow the grievance procedures because he could not get them, or get help with them, in Spanish. *See* Ramos v. Rosevthal, No. 4:06cv3158, 2007 U.S. Dist. LEXIS 37360, at *3 n.1 (D. Neb. May

A remedy may be unavailable because the prisoner has been transferred out of the particular prison or jail system,[250] unless the system provides a way to pursue grievances after transfer.[251] Also, if a prisoner had time to file a grievance before transfer and failed to do so, he or she will probably be considered to not have exhausted this option.[252] Be careful with this issue. Courts sometimes assume that a remedy remains available after transfer whether or not there is any evidence that the remedy was actually available.[253] If you get transferred before you can file a grievance, or while a grievance is pending, you should do your best to pursue the grievance. Maybe you will succeed. If you do not succeed, you will be able to demonstrate that the remedy was not available to you. In any case, you will need to show the court good reasons why you could not exhaust the remedies available after transfer.[254]

A remedy may be made unavailable by the acts or omissions of prison personnel. The Second Circuit, along with other courts, has held that if prison personnel threaten or assault you in order to prevent you from complaining, this can make remedies unavailable, even if remedies and the ability to complain are technically available. The governing standard is the same as that applied to allegations of retaliation for First Amendment-protected activity: "[whether] 'a similarly situated individual of ordinary firmness' [would] have deemed [the remedy] available."[255]

Remedies may be made unavailable by other forms of obstruction by prison staff, whether the prison staff is deliberately making it hard for you to access a remedy or not.[256] For example, a rule denying postage

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17, 2007) (*unpublished*); Gonzalez v. Lantz, No. 3:03-cv-2264 (SRU)(WIG), 2005 U.S. Dist. LEXIS 14702, at *8–10 (D. Conn. July 20, 2005) (*unpublished*).

249. One appeals court has rejected the argument that a juvenile prisoner complaining of excessive force should be excused from failure to use the grievance process in part because he was a juvenile. Brock v. Kenyon County, Ky., No. 02-5442, 2004 LEXIS 5984, at *4 (6th Cir. Mar. 23, 2004) (*unpublished*). By contrast, in Lewis v. Gagne, 281 F. Supp. 2d 429, 433–35 (N.D.N.Y. 2003), the court held that a juvenile detainee's mother, who had complained to facility staff and contacted an attorney, family court, and the state Child Abuse and Maltreatment Register, and whose complaints were known to the facility director and agency counsel, had made sufficient "reasonable efforts" to exhaust his remedies

250. Rodriguez v. Westchester County Jail Corr. Dept., 372 F.3d 485, 488 (2d Cir. 2004) (holding that failure to exhaust may sometimes be excused); Ammouri v. Adappt House, Inc., No. 05-3867, 2008 U.S. Dist. LEXIS 47129, at *10–12 (E.D. Pa. June 12, 2008) (*unpublished*) (noting that plaintiff was repeatedly told he could not file a grievance about matters from his previous institution).

251. Soto v. Belcher, 339 F. Supp. 2d 592, 595 (S.D.N.Y. 2004) (holding transfer did not excuse exhaustion since regulations permit grievances after transfer).

In *Brownell v. Krom*, 446 F.3d 305, 312–13 (2d Cir. 2006), the court found special circumstances justifying the plaintiff's failure to exhaust correctly where grievance regulations did prescribe the handling of grievances following a transfer, but prison staff did not follow their own rules.

252. James v. Williams, No. 1:04CV69-1-MU, 2005 U.S. Dist. LEXIS 10076, at *6 (W.D.N.C. May 24, 2005) (*unpublished*) (noting prisoner had 11 days to file a new grievance after his first was rejected and under the grievance policy he could have filed it at the new prison too).

253. Blakey v. Beckstrom, No. 06-163-HRW, 2007 U.S. Dist. LEXIS 5181, at *4 (E.D. Ky. Jan. 24, 2007) (*unpublished*) (holding that transfer did not make grievance procedures unavailable if the plaintiff did not take advantage of the administrative remedies); Mills v. United States, No. CV-02-5597 SJF LB, *2006 U.S. Dist. LEXIS 82903*, at *7 (E.D.N.Y. Oct. 26, 2006) (holding transfer "does not relieve [prisoner] of the obligation to pursue the grievance procedures available in the facility where the conduct occurred").

254. *See* Mellender v. Dane County, No. 06-C-298-C, 2006 U.S. Dist. LEXIS 80103, at *7–12 (W.D. Wis. Oct. 27, 2006) (*unpublished*) (noting that after transfer, plaintiff tried to mail a grievance from prison to the jail and then to use the prison's grievance system to complain about the jail).

255. Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004) (stating that it is possible for the threat of retaliation to make administrative remedies unavailable); *accord* Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008) ("Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes, and so are not available"; following *Hemphill* and *Kaba*); Kaba v. Stepp, 458 F.3d 678, 684–85 (7th Cir. 2006) (adopting *Hemphill* analysis and stating that if administrative remedies are not "available" to a prisoner, then the prisoner cannot be required to exhaust them).

Threats or intimidation "may well deter a prisoner of 'ordinary firmness' from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts." Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004); *accord* Turner v. Burnside, 541 F.3d 1077, 1084–85 (11th Cir. 2008). Thus, the fact that a prisoner has, for example, written a letter of complaint to the Superintendent (as in *Hemphill*) does not establish that he was not deterred from filing an ordinary grievance.

256. Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006) ("Prison officials may not take unfair advantage of the exhaustion requirement, ... and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting"; prisoner whose properly filed

to prisoners who can not afford to mail a grievance appeal may make the appeal unavailable,[257] as may refusing to give the prisoners writing materials or documentation to prisoners in a segregation unit.[258] Sometimes prisoners in a particular status or situation are simply excluded from using the grievance system.[259] Rules specifically designed to limit prisoners' use of the grievance system may make the remedy unavailable for some prisoners, depending on the severity of the limit.[260] A system of "modified grievance access," in which the prison administration requires the prisoner to receive prior permission in order to file a grievance, makes the remedy unavailable if permission is not granted.[261] Remedies may also be not available because of actions by supervisors or grievance staff with respect to particular grievances or individuals who have a grievance,[262] purposeful misconduct,[263] neglect or accident,[264] or events that are merely

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grievance simply vanished, and who received no instructions what to do about it, did "all that was reasonable to exhaust"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a) ..."). Frost v. McCaughtry, No. 99-2061, 2000 U.S. App. LEXIS 14702, at *2–4 (7th Cir. June 12, 2000) (*unpublished*) (holding allegation that no grievance appeal was available to plaintiff because of ongoing administrative changes during the relevant time period raised a factual question as to availability); Brookins v. Vogel, No. 1:05-CV-0413-0WW-DLB-P, 2006 U.S. Dist. LEXIS 86252, at *7–9 (E.D. Cal. Nov. 28, 2006) (*unpublished*) (holding that defendants prevented plaintiff from exhausting the administrative remedies and therefore the situation was an exception to the exhaustion rule.).

257. Cordova v. Frank, No. 07-C-172-C, 2007 U.S. Dist. LEXIS 54789, at *15–16 (W.D. Wis. July 26, 2007) (*unpublished*) (noting that "insofar as defendants have devised a grievance system that prevents indigent prisoners from filing appeals of their inmate grievances, they have made the grievance process unavailable to those inmates").

258. Woods v. Carey, No. CIV S-04-1225 LKK GGH P, 2007 U.S. Dist. LEXIS 69832, at *1–2 (E.D. Cal. Sept. 13, 2007) (*unpublished*) (vacating recommendation for exhaustion dismissal pending inquiry into plaintiff's access to his legal property, which he said impeded his timely appeal).

259. Daker v. Ferrero, No. 1:03-CV-2526-RWS, 2004 U.S. Dist. LEXIS 30591, at *6–7 (N.D. Ga. Nov. 24, 2004) (*unpublished*) (prisoner placed in "sleeper" status, meaning he remained officially assigned to another prison and was not allowed to file grievances where he was actually located, lacked an available remedy); *see* Sease v. Phillips, No. 06 Civ. 3663 (PKC), 2008 U.S. Dist. LEXIS 60994, at *16 (S.D.N.Y. July 25, 2008) (*unpublished*) (summary judgment denied where prisoner in "transient status" was told his grievance could not be processed, and when he filed one it was never processed).

If the available remedy is a disciplinary appeal, but the prisoner cannot appeal because he pled guilty to the offense, the remedy is not available. Marr v. Fields, No. 1:07-cv-4942008, 2008 U.S. Dist. LEXIS 24993, at *5–7 (W.D. Mich. Mar. 27, 2008) (*unpublished*); Flory v. Claussen, No. C06-1046-RSL-JPD, 2006 U.S. Dist. LEXIS 85705, at *4 (W.D. Wash. Nov. 21, 2006) (holding that prisoner's efforts to exhaust with the wrong entity deemed to be proper exhaustion where prison policy was unclear and prisoner relied on defendants' advice).

260. Rules limiting prisoners to a certain number of grievances may make the remedy unavailable for prisoners who are over the limit. Rhodan v. Schofield, No. 1:04-CV-2158-TWT, 2007 U.S. Dist. LEXIS 44593, at *19–20 (N.D. Ga. June 19, 2007) (*unpublished*) (holding prisoner who said he was told he could not have two grievances pending at once raised a factual issue as to availability of remedies); Wood v. Idaho Dept. of Corr., No. CV-04-99-C-BLW, 2006 U.S. Dist. LEXIS 14711, at *21 (D. Idaho Mar. 16, 2006) (*unpublished*) (holding that a prisoner whose grievance was returned because he was only allowed to have three pending at one time had exhausted).

261. Dawson v. Norwood, No. 1:06-cv-914, 2007 U.S. Dist. LEXIS 82205, at *9 (W.D. Mich. Nov. 6, 2007) (*unpublished*) (holding that a prisoner placed on modified access to the grievance procedure, who then attempts to file a grievance later deemed to be non-meritorious, has exhausted his 'available' administrative remedies as required by § 1997e(a)). A rule requiring prisoners on modified grievance status to submit a notarized affidavit with a grievance may make the remedy unavailable if the prisoner cannot get access to a notary. Thomas v. Guffy, No. CIV-07-823-W, 2008 U.S. Dist. LEXIS 56901, at *7 (W.D. Okla. July 25, 2008) (*unpublished*).

262. Howard v. Hill, 156 F. App'x 886, 886 (9th Cir. Nov. 21, 2005) (*unpublished*) (holding that a prisoner who had been told he would not receive responses to his grievances had no remedy available); Baylis v. Taylor, 475 F. Supp. 2d 484, 488 (D. Del. 2007) (holding officials' withdrawal of plaintiff's grievances because of litigation meant that he had exhausted, since no further remedies were available).

263. Smith v. Westchester County Dept. of Corr., No. 07 Civ. 1803(SAS), 2008 U.S. Dist. LEXIS 11049, at *10 (S.D.N.Y. Feb. 7, 2008) (*unpublished*) (remedies were unavailable if supervisors refused to accept plaintiff's grievance); Collins v. Goord, 438 F. Supp. 2d 399, 415 (S.D.N.Y. 2006) (holding allegations that facility personnel invented a screening procedure and did not allow him to file his grievance raised a material issue under "an exception to the PLRA's exhaustion requirement where prison authorities actively obstruct an inmate's ability to 'properly' file a prison grievance).

264. Pavey v. Conley, 170 F. App'x 4, 9 (7th Cir. Mar. 3, 2006) (*unpublished*) (holding that isolating and failing to assist a prisoner who couldn't write could render the remedy unavailable); Warren v. Purcell, No. 03 Civ. 8736(GEL), 2004 U.S. Dist. LEXIS 17792, at *20 (S.D.N.Y. Sept. 3, 2004) (*unpublished*) (holding "baffling" grievance response that left prisoner with no clue what to do next barred defendants from claiming the non-exhaustion defense).

unexplained.[265] However, courts are unlikely to be persuaded by vague claims of obstruction, unless clearly supported by facts.[266] In complaints where a prisoner alleges that he was denied necessary grievance forms, though, many courts have refused to dismiss because of non-exhaustion of remedies.[267] Still, courts are suspicious of such claims. Courts may dismiss if the claim is not supported by facts, if there is no evidence that the prisoner tried to get the forms,[268] or if the prisoner filed other grievances around the same time.[269]

A remedy is unavailable, and you cannot be penalized for not exhausting that remedy, if officials failed to tell you that the remedy or rules exist.[270] If you were misinformed about the availability or operation of a remedy by a prison official, that may make the remedy unavailable as well.[271] Some courts have denied dismissal of claims for non-exhaustion of remedies where a prisoner relied on a statement by a prison official that his issue was not grievable.[272] However, if a prisoner had some way to know about the remedy (for example, like in an inmate handbook), the prisoner cannot claim he did not know the remedy existed.[273]

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265. Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006) (holding prisoner whose properly filed grievance simply vanished, and who received no instructions about what else to do, did "all that was reasonable to exhaust").

266. *See*, *e.g.*, Stine v. Wiley, No. CIVA 06CV-02105-BNB, 2007 U.S. Dist. LEXIS 2113, at *3–4 (D. Colo. Jan. 10, 2007) (*unpublished*) (requiring further information regarding complainant's failure to exhaust administrative remedies); Djukic v. Arpaio, No. CV 05-4042-PHX-MHM (MEA), 2006 U.S. Dist. LEXIS 72239, at *6–7 (D. Ariz. Sept. 26, 2006) (*unpublished*) (dismissing for lack of evidence that the grievance system was unavailable).

267. Pavey v. Conley, 170 Fed. App'x. 4, 9 (7th Cir. 2006) (denying dismissal where plaintiff, who could not write, reasonably relied on assurances that his oral complaint would be investigated); Dale v. Lappin, 376 F.3d 652, 654–56 (7th Cir. 2004) (per curiam) (not dismissing for failure to exhaust when prison officials "made administrative remedies so unavailable as to deprive Dale of his rightful access to the grievance process."); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (noting that a claim was improperly dismissed where allegations that the plaintiff was denied grievance forms had not been considered); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (holding that a remedy is unavailable if a prisoner is prevented from using it).

268. *See*, *e.g.*, Beasley v. Kontek, No. 3:05CV7262, 2007 U.S. Dist. LEXIS 96302, at *4 (N.D. Ohio Nov. 5, 2007) (*unpublished*) ("A prisoner may not be excused from exhausting internal remedies if his failure resulted from a form not being provided to him, unless he alleges that there was no other source for the form or that he can prove that he made other attempts to 'obtain a form or file a grievance.'"), *quoting* Jones v. Smith, 266 F.3d 399, 400 (6th Cir.2001).

269. *See*, *e.g.*, Guel v. Larkin, No. 06-5091, 2008 U.S. Dist. LEXIS 37145, at *13–14 (W.D. Ark. May 6, 2008) (*unpublished*) (rejecting a denial of form defense when the complainant filed separate grievances one and two days after the incident in question).

270. Goebert v. Lee County, 510 F.3d 1312, 1322–23 (11th Cir. 2007) (holding that an appeal procedure not described in the inmate handbook but only in the operating procedures the inmates did not have access to, was not an available remedy); Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (holding that defendants did not show remedies were available where there was no "clear route" for challenging certain decisions); Jackson v. Ivens, 244 F. App'x 508, 514 (3d Cir. 2007) (*unpublished*) (denying an exhaustion defense when claimant failed to comply with "unwritten or 'implied' requirements."), citing Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004).

271. Pavey v. Conley, 170 F. Appx. 4, 8–9 (7th Cir. 2006) (holding that plaintiff, who could not write, reasonably relied on assurances that his oral complaint would be investigated; "inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies .... [P]rison officials will be bound by their oral representations to inmates concerning compliance with the grievance process"); Brown v. Croak, 312 F.3d 109, 112–13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him).

272. Flory v. Claussen, No. C06-1046-RSL-JPD, 2006 U.S. Dist. LEXIS 85705, at *4 (W.D. Wash. Nov. 21, 2006) (prisoner's efforts to exhaust with the wrong entity deemed to be proper exhaustion where prison policy was unclear and prisoner relied on defendants' advice); Lane v. Doan, 287 F. Supp. 2d 210, 212 (W.D.N.Y. 2003) (holding that exhaustion is excused where the plaintiff is led to believe the complaint is not a grievance matter or would otherwise be investigated, or that administrative remedies are unavailable). *But see* Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that even if prison personnel "made it clear" that prisoners should make medical complaints informally to medical personnel, this did not excuse the prisoners from failing to exhaust a grievance procedure they admitted having been informed of); Singh v. Goord, 520 F. Supp. 2d 487, 496 (S.D.N.Y. 2007) (denying plaintiff's claim that the designation of a particular staff member to deal with his concerns established an "'idiosyncratic' grievance system" that excused non-exhaustion when plaintiff was not instructed otherwise).

273. Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that prisoners who admitted receiving a guidebook that explained a grievance procedure were not excused from following the procedure even if prison personnel had "made it clear" that they should instead voice complaints informally to medical personnel); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 999 (6th Cir. 2004) (rejecting a plaintiff's argument that he was unaware of the appropriate grievance procedure when it was set forth in the inmate handbook).

Prison officials' statements that do not directly misrepresent the operation of the grievance system generally are not held to excuse the failure to exhaust, even if a prisoner relies on them.[274]

If there is some reason outside your control that you cannot exhaust in a timely and procedurally correct manner, you might think this means that the remedy is not available to you and you therefore do not have to exhaust. Do *not* assume this. A number of courts have held, for example, that if prisoners are prevented from filing grievances at the correct time, they must file them whenever they can, even if the grievances will be denied for not being on time.[275] This might not make sense under the "proper exhaustion" rule, but courts do it anyway, so do not fall into the trap. Some courts have held that if your grievance or appeal just "disappears," it's not enough just to say that when you go to court; you must take some action to follow up on the grievance that has gone missing.[276] One federal appeals court has recently held that if the failure to exhaust was "innocent," the prisoner "must be given another chance to exhaust (provided that remedies exist that prison authorities will permit him to exhaust)."[277]

Courts will be very skeptical of a claim that you have exhausted your remedies or of a claim that you were not informed or were misinformed about the grievance process when there is no evidence that you have exhausted your remedies or that you were misinformed.[278] You are therefore best advised to do everything you can to exhaust even if you know the effort is going to fail—and keep records so you can prove you tried. For example, if prison staff refuses to provide you with grievance forms, write your grievance on a sheet of paper, explain that you cannot get the forms, and appeal if they reject the grievance for not being on the right form.[279] If prison staff tells you that you do not need to file a grievance, file a grievance anyway; if they tell you that the issue is not "grievable"—that is, if the grievance system is not available to you for that issue—file the grievance anyway, so that you will get a decision in writing telling you that it isn't grievable.[280] If they refuse to accept your grievance, write to the Warden or Superintendent, tell him or her that you were not allowed to file your grievance, and ask that it either be investigated as a non-grievance complaint or treated as a grievance in case you were misinformed by the lower-level staff. You should also file a grievance about a refusal to accept your grievance. It is extremely important to keep copies of everything that you file so that you can later prove that you did in fact file those documents.

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274. Overton v. Davis, 460 F. Supp. 2d 1008, 1009–10 (S.D. Iowa 2006) (holding that a Grievance Officer's declaration that a matter was non-grievable did not excuse failure to exhaust the grievance process); Lyon v. Vande Krol, 305 F.3d 806, 809 (8th Cir. 2002) (holding that warden's statement that a decision about religious matters rested in the hands of "Jewish experts" did not excuse non-exhaustion, but was at most a prediction that the plaintiff would lose; courts will not consider prisoners' subjective beliefs in determining whether procedures are "available"); Jackson v. District of Columbia, 254 F.3d 262, 269–70 (D.C. Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted).

275. For more information about time limits, see Part E(6) of this Chapter.

276. Boyer v. Farlin, No. 04-1042, 2006 U.S. Dist. LEXIS 88940, at *10–12 (C.D. Ill. Dec. 8, 2006) (holding that a prisoner didn't exhaust because he failed to explain why he didn't take any action for two months when he didn't receive a notice that his appeal had been received). However, the Seventh Circuit has held that a remedy becomes "unavailable" if prison employees take unfair advantage of the exhaustion requirement by not responding to a grievance or otherwise preventing a prisoner from exhausting. Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006).

277. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

278. *See* Gaughan v. U.S. Bureau of Prisons, No. 02-C-0740, 2003 U.S. Dist. LEXIS 23297, at *3–5 (N.D. Ill. Dec 30, 2003) (*unpublished*) (rejecting claim that prisoner had exhausted but defendants had not made a record of it); Thomas v. N.Y. State Dept. of Corr. Servs., No. 00 Civ. 7163 (NRB), 2003 U.S. Dist. LEXIS 20286, at *13 (S.D.N.Y. Nov. 10, 2003) (*unpublished*) (dismissing case for failure to exhaust remedies where prison staff told the prisoner a grievance was unnecessary, but did not tell him he could not file a grievance).

279. Kendall v. Kittles, No. 03 Civ. 628 (GEL), 2003 U.S. Dist. LEXIS 16129, at *10–13 (S.D.N.Y. Sept. 15, 2003) (*unpublished*) (declining to dismiss where prisoner said he could not get grievance forms; the fact that he filed grievances at other times showed only that forms were available on the dates those grievances were filed, and not that such forms were always available). This is not an issue in the New York State grievance system. The directive states that if forms are not available, the grievance can be submitted on plain paper. *See* State of New York, Department of Correctional Services, Directive No. 4040 § 701.5(a)(1), Inmate Grievance Program (2003) (*as revised* July 1, 2006); N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(a)(1) (2009). The New York City grievance directive does not address this issue.

280. Some courts have refused to accept prisoners' statements that an unidentified person told them that their issues were not grievable. *See*, *e.g.*, Perez v. Arpaio, No. CV 06-0038-PHX-SMM (ECV), 2006 U.S. Dist. LEXIS 86559, at *5–6 (D. Ariz. Nov. 21, 2006) (*unpublished*).

4. What Must You Put in Your Grievance or Administrative Appeal?

Exhausting requires you to raise all of the issues that you intend to raise in a lawsuit. Issues you do not include in your grievance or appeal cannot be litigated.[281] Sometimes you have to use more than one remedy to exhaust all your issues.[282]

How specific and detailed must you be in a grievance or appeal to satisfy the exhaustion requirement? The Supreme Court recently held that courts could not require prisoners to have named all the defendants in their grievances that they later named in their court complaints if the grievance system itself did not have such a requirement.[283] The Court said: "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."[284] So if the prison *does* require you to name the responsible employees in a grievance, you have to do it to the extent that you have the information.

Currently, most grievance systems do not have such specific requirements. Either they say nothing about the level of detail required in grievances, or the requirement is very general.[285] One court has said that if the policy does not have more specific requirements, a "grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming."[286] This makes sense because the purpose of the PLRA exhaustion requirement is to give prison officials time and opportunity to resolve problems before they turn into lawsuits.[287] An example of a grievance that meets the "object intelligibly" standard (though just barely) is found in a sexual assault case where the prisoner said only: "[T]he administration don't do there [sic] job. [A sexual assault] should've never happen [sic] again," and requested that the assailant be criminally prosecuted.[288]

Even courts that do not cite the "object intelligibly" standard have generally not required grievances to be very specific or detailed,[289] and have not accepted prison officials' overly technical arguments that grievances were inadequate.[290] They have held grievances inadequate, at least in part, when they were so

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281. Jones v. Bock, 549 U.S. 199, 218–19, 127 S. Ct. 910, 923, 166 L. Ed. 2d 798, 816 (2007); *see* Johnson v. Johnson, 385 F.3d 503, 517–19 (5th Cir. 2004) (holding a prisoner who complained of sexual assault and referred to his sexual orientation in his grievance, but said nothing about his race, did not exhaust his racial discrimination claim).

282. This is most often the case in connection with disciplinary proceedings.

283. Jones v. Bock, 549 U.S. 199, 211; 127 S. Ct. 910, 919; 166 L. Ed. 2d 798, 811 (2007).

284. Jones v. Bock, 549 U.S. 199, 218-19, 127 S. Ct. 910, 923; 166 L. Ed. 798, 815 (2007).

285. For example, the New York State grievance system requires only that prisoners include a "concise, specific description of the problem and the action requested and indicate what actions the grievant has taken to resolve the complaint, i.e., specific persons/areas contacted and responses received." State of New York, Department of Correctional Services, Directive No. 4040, at § 701.5(a)(2) (July 1, 2006); N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(a)(2) (2008).

286. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002); *accord* Kikumura v. Osagie, 461 F.3d 1269, 1283 (10th Cir. 2006); Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004).

287. Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004).

288. Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004); *see* Westefer v. Snyder, 422 F.3d 570, 580–81 (7th Cir. 2005) (holding that plaintiffs sufficiently exhausted complaints about transfers to a high-security prison by listing "Transfer from Tamms" as a requested remedy, or by expressing concern about not being given a reason for the transfer, in grievances about the conditions at that prison).

289. *See*, *e.g.*, McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (per curiam) (treating claim that two defendants failed to treat plaintiff's dental grievances as emergency matters and others refused to escort him to the infirmary for emergency treatment as a single exhausted claim of denial of emergency dental treatment); Kikumura v. Hurley, 242 F.3d 950, 956 (10th Cir. 2001) (holding complaint sufficient to meet the exhaustion requirement where the plaintiff complained that he was denied Christian pastoral visits, though the defendants said his claim should be dismissed because he had not stated in the grievance process that his religious beliefs include elements of both the Buddhist and Christian religions); Carter v. Symmes, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *9 (D.Mass. Feb. 4, 2008) (*unpublished*) (adopting administrative law rule that "claims not enumerated in an initial grievance are allowed notwithstanding the exhaustion requirement if they 'are like or reasonably related to the substance of charges timely brought before [the agency]'").

290. *See*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 517–18 (5th Cir. 2004) (agreeing legal theories need not be presented in grievances); Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (holding grievance need not "allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory").

vague that prison officials could not reasonably have been expected to understand what the prisoner was complaining about.[291]

There are exceptions. Some courts have required much greater detail and specificity in grievances even if the policy did not require it. For example, one recent decision said it was not sufficient for the prisoner to have claimed that he was denied treatment for his injured finger at every prison he had been at. The court said he should have told them he was denied access to an orthopedic surgeon around a particular date, then transferred two months later and denied medical care.[292] In particular, a number of courts have held grievances inadequate because they failed to specifically mention claims of denial of First Amendment rights,[293] unlawful retaliation,[294] discrimination contrary to the Equal Protection Clause,[295] or conspiracy that they later asserted in their lawsuits, even if they stated the underlying facts in their grievances.[296] It is difficult to explain these decisions in light of the rule that prisoners do not have to plead legal theories in their grievances. To be safe, you might want to outline your legal theory in your grievance.

If the grievance system actually investigates and addresses your complaint on the merits, rather than throwing it out for not being specific or detailed enough, you should be deemed to have exhausted, even if the defendants' lawyers later claim that you should have said more in the grievance.[297]

You can expect prison officials to attack your grievance as inadequate. Here are some things you can do to protect yourself. If your grievance system requires you to name all the individuals involved, you will not necessarily know who they all are. Make it clear in your grievance that you do not know their names. For example, if you were beaten by several officers while others looked on, you might write in your grievance that, "Officers Smith and Jones beat me, along with the other officers present who beat me or who stood by and did not intervene to stop the beating, and whose names I do not know." If you think there is a practice of beating prisoners that higher-ups in the prison are responsible for, you might add something like: "Sergeant Black, Lieutenant White, Deputy Superintendent Green and Superintendent Red, and any other supervisors unknown to me who fail to train and supervise the security staff and keep them from using excessive and unnecessary force." Or, if you are denied a book you have ordered by the mail room officer who tells you only "it's not allowed," your grievance might say it was against "Officer Jones in the mail room, and any other person unknown to me who made the policy (if any) resulting in this book being denied to me, or if there is no such policy, the supervisor of the mail room operation, unknown to me, who allows mail room staff to deny books to prisoners in the absence of a policy permitting such denial."

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291. *See*, *e.g.*, Beltran v. O'Mara, 405 F. Supp. 2d 140, 152 (D.N.H. 2005) (holding that allegations the plaintiff was "being punished for no reason" and isolated from other prisoners were "too vague" to allow officials to make any response); Aguirre v. Feinerman, No. 3:02 cv 60 JPG, 2005 U.S. Dist. LEXIS 45520, at *20 (S.D. Ill. May 10, 2005) (*unpublished*) (holding that a grievance that specifically mentioned physical therapy, but mentioned other medical care only generally, did not exhaust a claim concerning failure to diagnose the plaintiff's congestive heart failure; "While specifically identifying the ailment would not be required, there must be some indication as to what medical issues the plaintiff was complaining about.").

292. Davis v. Knowles, No. CIV S-04-0821 LKK KJM P, 2007 U.S. Dist. LEXIS 6159, at *7–8 (E.D. Cal. Jan. 25, 2007) (*unpublished*), *aff'd*, 2007 U.S. Dist. LEXIS 28294 (E.D. Cal. Apr. 16, 2007).

293. *See* Dye v. Kingston, 130 F. App'x 52, 56 (7th Cir. 2005) (*unpublished*) (holding that a prisoner who complained in his grievance of missing property items, including his Bibles, failed to exhaust his 1st Amendment claim by failing to state that the Bibles' loss was "infringing on his religious practice").

294. *See, e.g.*, Griffin v. Miner, No. 1:06 CV 1889, 2006 U.S. Dist. LEXIS 79764, at *2–3 (N.D. Ohio Oct. 31, 2006) (*unpublished*) (plaintiff, who did not mention his retaliation theory in his grievance, did not exhaust with respect to retaliation).

295. Johnson v. Johnson, 385 F.3d 503, 518 (5th Cir. 2004) (holding that a prisoner who complained of sexual assault, made repeated reference to his sexual orientation, but said nothing about his race had exhausted his sexual orientation discrimination claim but not his racial discrimination claim).

296. Brownell v. Krom, 446 F.3d 305, 310–11 (2d Cir. 2006) (holding grievance inadequate for failing to mention allegation that loss of property was intentional); Lindell v. Frank, Slip Op., No. 05-C-003-C, 2005 U.S. Dist. LEXIS 21300, at *4 (W.D. Wis. Sep 23, 2005) (*unpublished*) (holding failure to mention conspiracy allegations in grievance appeal meant that claim was not exhausted). *But see* Kitchen-Bey v. Hoskins, No. 2:06-cv-251, 2006 U.S. Dist. LEXIS 84090, at *4 (W.D. Mich. Nov. 20, 2006) (*unpublished*) (declining to dismiss because plaintiff had not mentioned conspiracy in his grievance).

297. *See, e.g.*, Freeman v. Salopek, No. 2:06-cv-496-FtM-34SPC, 2008 U.S. Dist. LEXIS 21452, at *10 (M.D. Fla. Mar. 19, 2008) (*unpublished*) (rejecting claim that grievance was "undated, unclear, and vague" where final decisionmaker gave response addressing the precise issue raised in the grievance); Carter v. Symmes, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *8 (D. Mass. Feb. 4, 2008) (*unpublished*) (issue not raised in the grievance, but spelled out in a timely letter from counsel, and actually investigated by defendants, was exhausted).

Even if your prison's grievance policy does not require the naming of all involved individuals, you are well advised to think about the different events and policies that are or might be involved in the problem you are grieving, and mention them. For instance, in the use of force example above, if the grievance policy requires only a "concise, specific statement of the problem," you might say: "I was beaten without justification by Officers Smith and Jones and others, while other officers stood by and did not intervene, and I am also complaining about the lack of training and supervision that allows security staff to use excessive and unnecessary force and get away with it."[298] In the book seizure example, you might say: "I was denied the book A Time to Die about the 1971 Attica disturbance, and I am also complaining about the policies and practices that allow the denial to prisoners of books without good reason and without clear written criteria and procedures." (Or, if they do have clear criteria and procedures that you may wish to challenge, mention those in the grievance too.)

Similarly, if you get more information about a problem after you have filed a grievance about it (or more information about the people responsible, if the system requires that), you should consider filing a separate grievance reflecting the new information.[299] If you discover new information after the grievance deadline has passed, explain that you couldn't file it within the deadline because you didn't have the information. For example, if you file a grievance stating that you have been denied certain medical care by the prison's medical director, and then later on you learn that your care was denied by a "utilization review" process in the prison system's central office, you might wish to file and exhaust a new grievance about the utilization review decision. Courts have disagreed about whether such grievances are effective to exhaust, but it is the best way to protect yourself when you learn new information after filing an initial grievance.[300]

Prison officials and their lawyers have strong incentives to try to get cases thrown out for non-exhaustion rather than have to face the merits. So, you should do your best to make your grievance reflect all aspects of the problem that you may wish to bring suit about, so the judge will see that you did your best to bring everything to prison officials' attention before suing.

5. What If You Make a Mistake Trying to Exhaust?

Prisoners not only must exhaust, they must do it correctly. The Supreme Court has held that "the PLRA exhaustion requirement requires proper exhaustion," which "demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."[301] If your administrative complaint is rejected because you did not follow the procedures, your lawsuit will be barred because of non-exhaustion.[302]

This does *not* mean that you should just give up if you fail to follow a procedural rule. You should pursue your grievance, request that your error be excused or that you be permitted to re-file your grievance and start over, and explain any circumstances that might have caused you to make a mistake. Sometimes

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298. *See* Kozohorsky v. Harmon, 332 F.3d 1141, 1143 (8th Cir. 2003) (holding a grievance complaining of excessive force by line staff did not exhaust plaintiff's claim that a supervisor failed to supervise and take action against them).

299. If the grievance system contains a "name all responsible persons" rule, courts might require new grievances reflecting newly identified defendants or other information. In *Brownell v. Krom*, 446 F.3d 305, 312 (2d Cir. 2006), the court rejected the argument that the plaintiff should have filed a new grievance reflecting new information, but only because the system did not seem to provide for supplementing or re-filing existing grievances to reflect new information.

300. *Compare* Sullivan v. Caruso, No. 1:07cv367, 2008 U.S. Dist. LEXIS 9090 (W.D. Mich. Feb. 7, 2008) (*unpublished*) (holding defendants improperly rejected a grievance as duplicative where it named a defendant not named in a previous grievance) *with* Laster v. Pramstaller, No. 06-13508, 2008 U.S. Dist. LEXIS 11435 (E.D. Mich. Feb. 15, 2008) (*unpublished*) (holding that a grievance naming a defendant that is dismissed because it duplicates an earlier grievance that did not name that defendant fails to exhaust).

In Dunbar v. Jones, No. 1:05-CV-1594, 2007 U.S. Dist. LEXIS 49278, at *21–22 (M.D. Pa. July 9, 2007) (*unpublished*), the court rejected the argument that the plaintiff should have amended his grievance to name a defendant whose identity he did not initially know, since the rules did not provide for such amended grievances, but dismissed the claim against that defendant because the plaintiff didn't add her name in his grievance appeals—without citing anything in the grievance policy that permits adding new material in grievance appeals. Another district court *accepted* the argument that the plaintiff was obliged to file a late and duplicative grievance upon learning who was responsible for the action he complained of, without any discussion of whether the rules provided for such a grievance. Fulgham v. Snyder, No. 2:07-CV-88, 2008 U.S. Dist. LEXIS 22590 (W.D. Mich. Mar. 21, 2008) (*unpublished*).

301. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368, 387 (2006); *see also* Jones v. Bock, 549 U.S. 199, 217–19, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures ... is all that is required by the PLRA to properly exhaust.").

302. Woodford v. Ngo, 548 U.S. 81, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006).

grievance systems allow correction and re-filing (in fact, sometimes they instruct prisoners to do so[303]). Also, grievance systems sometimes overlook procedural mistakes, and courts have held that if prison officials decide the merits of a grievance rather than reject it for procedural noncompliance, they cannot later claim non-exhaustion based on a procedural flaw that they let go earlier.[304] Courts have disagreed over whether a grievance is exhausted if it is rejected both on the merits and for procedural reasons.[305] Since the purpose of the "proper exhaustion" rule is to preserve the system's ability to "function effectively,"[306] it would seem that a decision on the merits is a good indication that the system *has* functioned effectively, and dismissal serves no useful purpose. You should argue this if the issue arises in your case. In any event, the harder you have tried to exhaust, the more likely the court is to rule in your favor in a close case.

There is also a potential trap in the proper exhaustion rule. Sometimes you might not able to follow the rules for reasons outside your control—for example, you miss a deadline because you are out of the institution and have no access to the grievance process. You might think that such circumstances mean that the administrative remedy was not available for you. However, a number of courts have held that prisoners who are prevented from exhausting properly must try to exhaust improperly—for example, if they cannot file a timely grievance, they should file a late grievance when they can, or else their cases could be dismissed for non-exhaustion. Therefore, you should protect yourself against such a dismissal by filing and pursuing the late or otherwise improper grievance.

It is unclear exactly how necessary proper exhaustion is in all cases. The Supreme Court said it was not ruling on the possibility that prisons might "create procedural requirements for the purpose of tripping up all but the most skillful prisoners," since the case did not present that situation.[307] Several post-*Woodford* decisions have cited that statement in holding that prisoners who didn't fully comply with procedural requirements, but who were arguably "tripped up" by them, should not have their cases dismissed for non-exhaustion.[308] In *Woodford*, the Supreme Court also said that it was relying on exhaustion law from administrative law and habeas corpus. Justice Breyer, in a concurring opinion, observed that administrative law "contains well established exceptions to exhaustion," and so does habeas corpus.[309] Several decisions have cited these observations in allowing claims to go forward despite failures to exhaust in complete compliance with grievance rules.[310]

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303. If they do, you should follow the directions even if you disagree with them.

304. *See*, *e.g.*, Gates v. Cook, 376 F.3d 323, 331 n.6 (5th Cir. 2004) (noting that the plaintiff sent a form to the Commissioner rather than the Legal Adjudicator but defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner's lawyer and not by the prisoner, as the rules specify); Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004).

305. *Compare* Cobb v. Berghuis, No. 1:06-CV-773, 2007 U.S. Dist. LEXIS 93890, at *3–4 (W.D. Mich. Dec. 21, 2007) (*unpublished*) (holding that a grievance rejected for both reasons does not exhaust) *with* McCarroll v. Sigman, No. 1:07-cv-513, 2008 U.S. Dist. LEXIS 17254, at *10 (W.D. Mich. Mar. 6, 2008) (*unpublished*) (finding exhaustion on those facts), *reconsideration granted on other grounds*, No. 1:07-CV-513, 2008 U.S. Dist. LEXIS 38710 (W.D. Mich. May 13, 2008) (*unpublished*).

306. Woodford v. Ngo, 548 U.S. 81, 90, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368, 387 (2006).

307. Woodford v. Ngo, 548 U.S. 81, 102, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 385 (2006). This is a concern that has been expressed by other courts. *See*, *e.g.*, Hooks v. Rich, No. CV 605-065, 2006 U.S. Dist. LEXIS 12951, at *18–19 (S.D. Ga. Jan. 17, 2006) (*unpublished*) ("The exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*."); Campbell v. Chaves, 402 F. Supp. 2d 1101, 1106 n.3 (D. Ariz. 2005) (voicing concern that grievance systems might become "a series of stalling tactics, and dead-ends without resolution").

308. Timberlake v. Buss, No. 1:06-cv-1859-RLY-WTL, 2007 U.S. Dist. LEXIS 32306, at *8 (S.D. Ind. May 1, 2007) (*unpublished*) (declining to dismiss challenge to execution protocols where they were not disclosed to plaintiff and he had no reason to have known about them), *vacated as moot*, No. 07-1086, No. 07-3228, 2007 U.S. App. LEXIS 28412 (7th Cir. 2007) (*unpublished*); Lampkins v. Roberts, No. 1:06-cv-639-DFH-TAB, 2007 U.S. Dist. LEXIS 22695, at *7 (S.D. Ind. Mar. 27, 2007) (*unpublished*) (declining to dismiss for missing a five-day deadline that was not shown to have been made known to prisoners).

309. Woodford v. Ngo, 548 U.S. 81, 103–104, 126 S. Ct. 2378, 2393, 165 L. Ed. 2d 368, 386 (2006) (Breyer, J., concurring in judgment). Justice Breyer's assertions are contrary at least in part to the Court's earlier observation in *Booth v. Churner* that the PLRA rendered inapplicable "traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has 'no power to decree ... relief,' or need not exhaust where doing so would otherwise be futile." Booth v. Churner, 532 U.S. 731, 741 n.6, 121 S. Ct. 1819, 1825 n.6, 149 L. Ed. 2d 958, 967 n.6 (2001). On the other hand, the *Woodford* majority's assertion that exhaustion means the same thing under the PLRA that it does in administrative law appears equally inconsistent with the *Booth* observation.

310. Parker v. Robinson, No. 04-214-B-W, 2006 U.S. Dist. LEXIS 64107, at *33–34 (D. Me. Oct. 10, 2006)

Before the *Woodford* decision, the Second Circuit had set out circumstances under which failure to exhaust according to prison procedures would not bar litigation:

> First, the court must ask: whether administrative remedies were in fact "available" to the prisoner. [Second], [t]he court should also inquire ... whether the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense. [Third], [i]f the court finds that administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether special circumstances have been plausibly alleged that justify the prisoner's failure to comply with administrative procedural requirements ... . What constitutes justification in the PLRA context "must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."[311]

The Second Circuit analysis probably remains good law, even after *Woodford*. The first district court to address the question stated that *Woodford* left "open the question of whether exhaustion applies in situations such as those identified in *Hemphill* ...."[312] Other courts have also adopted the *Hemphill* framework for determining when prison officials' threats or intimidation make remedies "unavailable" after the *Woodford* decision.[313] Another recent New York decision applying the Second Circuit "special circumstances" rule also distinguished *Woodford* on the ground that the prisoner had not "bypass[ed] prison grievance procedures" or "attempt[ed] to circumvent the exhaustion requirements."[314] Rather, the prisoner had tried hard and in multiple ways to bring his complaint to the attention of responsible officials.[315]

The Second Circuit has yet to authoritatively resolve this issue,[316] but it has held that after Woodford, it is not enough that a prisoner's informal complaints gave prison officials enough notice to investigate a problem. It stated that the PLRA requires both "substantive exhaustion" (notice to officials) and "procedural exhaustion" (following the rules).[317] The court did not address its earlier decision that a prisoner's

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(*unpublished*) (refusing to dismiss where the prisoner sent his appeal to the Commissioner who was supposed to decide it, not the person who was supposed to forward it to the Commissioner under the rules); Collins v. Goord, 438 F. Supp. 2d 399, 411 n.13 (S.D.N.Y. 2006) (*unpublished*) (applying Breyer's *Woodford* concurrence to state that district courts should consider "'any challenges that [the prisoner' may have concerning whether his case falls into a traditional exception that the [PLRA] implicitly incorporates"') (quoting Woodford v. Ngo, 548 U.S. 81, 104, 126 S. Ct. 2378, 2393, 165 L. Ed. 2d 368, 386 (2006) (Breyer, J., concurring in judgment).

311. Brownell v. Krom, 446 F.3d 305, 311 (2d Cir. 2006) (quoting Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004)).

312. Collins v. Goord, 438 F. Supp. 2d 399, 411 n.13 (S.D.N.Y. 2006); Bester v. Dixion, No. 9:03-CV-1041, 2007 U.S. Dist. LEXIS 21714, at *10–11 (N.D.N.Y. Mar. 27, 2007) (*unpublished*) (considering whether prisoner was relieved of exhaustion requirements under a *Hemphill* analysis).

313. Turner v. Burnside, 541 F.3d 1077, 1084–85 (11th Cir. 2008) (stating "it is possible for retaliation or the threat of retaliation to make administrative remedies unavailable to an inmate"); Kaba v. Stepp, 458 F.3d 678, 684–86 (7th Cir. 2006) (holding that a remedy becomes unavailable if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting).

314. Hairston v. LaMarche, No. 05 Civ. 6642 (KMW) (AJP), 2006 U.S. Dist. LEXIS 55436, at *30, 40 (S.D.N.Y. Aug. 10, 2006) (*unpublished*).

315. Hairston v. LaMarche, No. 05 Civ. 6642 (KMW) (AJP), 2006 U.S. Dist. LEXIS 55436, at *30, (S.D.N.Y. Aug. 10, 2006) (*unpublished*) ("[A]lthough each of his efforts, alone, may not have fully complied, together his efforts sufficiently informed prison officials of his grievance and led to a thorough investigation of the grievance as to satisfy the purpose of the PLRA or to constitute 'special circumstances' [to] justify any failure to fully comply with DOCS' exhaustion requirements.").

316 *See* Reynoso v. Swezey, 238 F. App'x 660, 662 (2d Cir. June 25, 2007) (*unpublished*), *cert. denied*, 128 S. Ct. 1278 (2008) (declining to consider effect of *Woodford* on circuit precedent where plaintiff could not prevail under that precedent anyway).

317. Macias v. Zenk, 495 F.3d 37, 43–44 (2d Cir. 2007) ("after *Woodford* notice alone is insufficient").

reasonable interpretation of confusing grievance rules may justify the failure to follow procedural rules correctly.[318]

More specific questions remaining after *Woodford* include the following:

(1) What if procedural requirements are not clear? Before *Woodford*, courts (including the Second Circuit) held that a prisoner who acted reasonably when the rules were not clear presented special circumstances justifying his failure to exhaust properly, even if he turned out to be wrong and other courts agreed.[319] So far, courts have continued to hold that prisoners' cases cannot be dismissed for non-exhaustion where it was unclear what they had to do to exhaust, either because the rules were not clear,[320] or because the actions or instructions of officials (often in violation of their own rules) created confusion in a particular case,[321] or both[322] (though some courts have ruled against prisoners in situations where they simply guessed wrong in a confusing situation).[323] There are situations where the prisoner lacks sufficient knowledge of the facts to comply with the grievance rules.[324] In some cases an unsettled legal situation concerning the exhaustion requirement itself has been held to constitute special circumstances justifying failure to exhaust correctly.[325]

(2) What if you are misled or prison officials obstruct your exhaustion efforts? Numerous cases hold that non-exhaustion caused by such actions by prison staff do not bar the prisoner from proceeding with a subsequent lawsuit. *Woodford* did not address the question, and there is no good reason to think it this body of law has been disturbed by *Woodford*.

(3) What if you are threatened or intimidated by prison staff into not following the grievance procedure? The Second Circuit has held that threats or other intimidating conduct may make the usual grievance remedy unavailable to a prisoner, may prevent the defendants from asserting the exhaustion defense, or may constitute justification for not exhausting or not exhausting consistently

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318. Macias v. Zenk, 495 F.3d 37, 43 n.1 (2d Cir. 2007) (*citing* Hemphill v. New York, *380 F.3d 680, 690 (2d Cir. 2004)).*

319. Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (stating that prison rules "do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the 'decisions or dispositions' of such proceedings," and that a "learned" district judge had recently interpreted the prison administrative rules in the same way as the plaintiff). *See also* Dole v. Chandler, 438 F.3d 804, 811–12 (7th Cir. 2006) (holding a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it).

320. Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2008 U.S. Dist. LEXIS 59098, at *19–20 (S.D.N.Y. Aug. 5, 2008) (*unpublished*) (where allowance for late grievances was limited to 45 days after an "alleged occurrence," and the plaintiff thought the "occurrence" was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him).

321. Lawyer v. Gatto, No. 03 Civ. 7577 (RPP), 2007 U.S. Dist. LEXIS 15406, at *25 (S.D.N.Y. Feb. 21, 2007) (*unpublished*) (holding prisoner whose grievance was referred to the Inspector General's office was not obliged to wait until the IG's investigation was concluded since the rules did not say otherwise; it was the prison system's responsibility to make such a requirement clear).

322. Turner v. Burnside, 541 F.3d 1077, 1083–84 (11th Cir. 2008) (holding a prisoner whose grievance was torn up by the warden was not required to file another one or grieve the warden's action; "[n]othing in [the rules] requires an inmate to grieve a breakdown in the grievance process").

323. For example, a prisoner who alleged that he had been retaliated against in classification and disciplinary matters did not file a grievance because classification and disciplinary matters are excluded from the grievance system. The court held that he had failed to exhaust because retaliation claims might be grievable. *Marshall v. Knight*, No. 3:03-CV-460 RM, 2006 U.S. Dist. LEXIS 90478, at *1–3 (N.D. Ind. Dec. 14, 2006) (*unpublished*). The decision gave no consideration to the reasonableness of Mr. Marshall's interpretation of the rules.

324. Thomas v. Hickman, No. CV F 06-0215 AWI SMS, 2006 U.S. Dist. LEXIS 72988, at *26 (E.D. Cal. Oct. 6, 2006) (declining to dismiss where the prisoner's grievance was untimely but the prisoner did not know about the violation until long after the deadline had passed).

325. In *Rodriguez v. Westchester County Jail Corr. Dept.*, 372 F.3d 485, 487 (2d Cir. 2004), the court held that the plaintiff's belief that he did not have to exhaust an excessive force claim was reasonable, since the court had adopted the same view until reversed by the Supreme Court in *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002).

with the grievance rules.[326] This body of law should be viewed as unaffected by *Woodford*. Indeed, other courts have adopted the Second Circuit's approach to such circumstances after *Woodford*.[327]

(4) What, if any, limits are there to the rule that procedural rules must be properly exhausted? The Seventh Circuit stated:

> The only constraint is that no prison system may establish a requirement inconsistent with the federal policy underlying Section 1983 and Section 1997e(a) ... . Thus, for example, no administrative system may demand that the prisoner specify each remedy later sought in litigation—for *Booth v. Churner*, 532 U.S. 731 (2001), holds that [§] 1997e(a) requires each prisoner to exhaust a *process* and not a *remedy*.[328]

Woodford itself states that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules."[329] This implies that there are some procedural rules that are not "critical" and whose violation does not threaten the system's functioning.[330] This view is consistent with the earlier holding of the Third Circuit that, even under a proper exhaustion rule, compliance need only be "substantial,"[331] which it said meant the same as its later statement that "procedural requirements must ... not be imposed in a way that offends the Federal Constitution or the federal policy embodied in Section 1997e(a)."[332] The risk posed by *Woodford*'s holding is that prison officials will reject prisoners' grievances for the most trivial of rules violations,[333] or will spread rules designed to trip prisoners up,[334] or having that effect.[335] Another risk, little explored by

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326. Hemphill v. New York, 380 F.3d 680, 686–90 (2d Cir. 2004). In *Hemphill*, the plaintiff, who alleged he was threatened and physically assaulted to prevent him from complaining, wrote a letter to the Superintendent rather than filing a grievance.

327. Kaba v. Stepp, 458 F.3d 678, 684–86 (7th Cir. 2006).

328. Strong v. David, 297 F.3d 646, 649–50 (7th Cir. 2002).

329. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2386 (2006). However, the 10th Circuit has found that substantial compliance is not enough, and an inmate must comply with all grievance procedures in order to exhaust administrative remedies. *See* Fields v. Okla. State Penitentiary, 511 F.3d 1109, 1112, (10th Cir, 2007); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir, 2002).

330. The Court does not suggest what these might be or how a lower court is to determine what is "critical." So far there is little development of this issue in the lower courts. One district court has suggested that if the administrative body reaches the merits despite the violation of a procedural rule, it must not have been critical. Jones v. Stewart, 457 F. Supp. 2d 1131, 1136 (D. Nev. 2006).

331. Nyhuis v. Reno, 204 F.3d 65, 77–78 (3d Cir. 2000). However, the 10th Circuit has found that substantial compliance is not enough, and an inmate must comply with all grievance procedures in order to exhaust administrative remedies. *See* Fields v. Okla. State Penitentiary, 511 F.3d 1109, 1112, (10th Cir, 2007); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir, 2002).

332. Spruill v. Gillis, 372 F.3d 218, 232 (3d Cir. 2004).

333. There is no lack of recent examples of prisoners tripped up by trivial rules violations. *See, e.g.*, Whitener v. Buss, 268 F. App'x 477, 478 (7th Cir. Mar. 13, 2008) (*unpublished*) (dismissing claim of prisoner who missed a 48-hour grievance deadline because he needed the relevant officers' names and it took a week to get them, and he didn't ask for waiver of the time limit); Whitney v. Simonson, No. CIV S-06-1488 FCD GGH P, 2007 U.S. Dist. LEXIS 81995, at *5 (E.D. Cal. Nov. 5, 2007) (*unpublished*) (dismissing because plaintiff filed a new grievance rather than seeking reinstatement of his existing grievance; court admitted defendants' approach is "hyper-technical" but held *Woodford* requires dismissal), *report and recommendation adopted*, No. CIV S-06-1488 FCD GGH P, 2007 U.S. Dist. LEXIS 94910 (E.D. Cal. Dec. 28, 2007) (*unpublished*); Cadogan v. Vittitow, No. 06-CV-15235, 2007 U.S. Dist. LEXIS 72999, at *5–9 (E.D. Mich. Sept. 30, 2007) (*unpublished*) (dismissing where grievance was rejected for "including extraneous information, going beyond the scope of the issue being grieved"—by attaching seven pages of information relating to requests for dental care, medical information, and dental care standards, apparently relevant to claim). .

334. A recent example of a rule that appears designed to trip prisoners up is Oklahoma's rule that prisoners on "grievance restriction" must list in any grievance all their other grievances within the preceding calendar year, by grievance number, date, description, and disposition at each level. One prisoner's complaint that he did not have that information and officials refused to provide him a copy of the grievance log so he could obtain it was brushed off by the court. Tigert v. Jones, No. CIV-07-791-M, 2008 U.S. Dist. LEXIS 55047, at *2 (W.D. Okla. July 21, 2008) (*unpublished*).

335. A recent decision upheld the application of the Bureau of Prisons' regulation defining a grievance appeal as filed when it is logged as received, holding that even if the plaintiff's assertion that he mailed his appeal and it never arrived was true, the "prison mailbox" rule is inapplicable and he failed to exhaust. Williams v. Burgos, No. CV206-104, 2007 U.S. Dist. LEXIS 58889, at *1-2 (S.D. Ga. Aug. 13, 2007) (*unpublished*).

the courts, is that grievance rules may make it impossible for prisoners to frame the claims they wish to litigate.[336]

The most thoughtful discussion of this problem is in a recent district court decision that contrasts these excessively technical grievance rules with the Supreme Court's statement that "the creation of an additional procedural technicality ... [is] particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[337] It then went on to analyze the issue before it—the rejection of plaintiff's grievances under a rule prohibiting "multiple issues" in a single grievance—under the rule requiring restrictions on prisoners' constitutional rights to be reasonably related to legitimate prison management or rehabilitation purposes.[338] Though the District Court upheld the grievance rule at issue,[339] the Sixth Circuit overturned that ruling, stating that "[a]n administrative remedy may not be considered "available" where very technical procedural requirements make compliance difficult for all but the most sophisticated inmate."[340]

Before *Woodford*, courts applying a procedural default rule held that if prison officials decide the merits of a grievance rather than rejecting it for procedural noncompliance, they cannot rely on that noncompliance to seek dismissal of future litigation for non-exhaustion.[341] Nothing in *Woodford* affects those holdings, and they are still good law.[342] Courts have disagreed over whether a grievance is exhausted if it is rejected both on the merits and for procedural reasons.[343]

(5) Can federal courts overrule a grievance system's procedural rejection of a grievance? Some courts have said that they are without power to re-examine prison officials' decisions rejecting grievances for procedural reasons, an approach which has led to extreme results.[344] Other federal courts have

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336. In one case, the court held that the plaintiff had properly exhausted, even though his grievance was rejected for including "more than one issue," because his complaint was about "being punished in various ways for conduct he had never been informed of or charged with. Under these circumstances, requiring the prisoner to grieve each of the alleged components of his punishment separately would have prevented him from fairly presenting his claim in its entirety." The court upheld the dismissal of other claims for which his grievance was dismissed for including more than one issue, even though the plaintiff claimed that both issues were examples of a pattern of inadequate medical care. Moore v. Bennette, 517 F.3d 717, 729 (4th Cir. 2008)..

337. Lafountain v. Martin, No. 1:07-cv-076, 2008 WL 1923262, at *15 (W.D. Mich. Apr. 28, 2008) (*unpublished*), *quoting* Love v. Pullman Co., 404 U.S. 522, 526–27 (1972).

338. *See* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Lafountain v. Martin, No. 1:07-cv-076, 2008 WL 1923262, at *15 (W.D. Mich. Apr. 28, 2008) (*unpublished*) (citations omitted), said:

> Rubber-stamping unlimited administrative restrictions would permit state prisons to adopt grievance procedures solely for the purpose of requiring impossible compliance in order to terminate prisoners' access to the courts, in violation of the first prong of the Turner test (requiring the governmental objective to be both legitimate and neutral). Such uncritical acceptance of prison restrictions also would permit prisons to effectively eliminate all means for prisoners to exercise their rights to challenge prison conditions, in violation of the second prong of *Turner* (requiring that prison limitations on constitutional rights leave "alternative means of exercising the right [ ] open to prison inmates").

339. *See* Lafountain v. Martin, No. 1:07-cv-076, 2008 U.S. Dist. LEXIS 34456, at *16 (W.D. Mich. Apr. 28, 2008) (*unpublished*) (finding that a "no multiple issues" rule can be applied so as to make remedies unavailable).

340. Lafountain v. Martin, No. 08-1796, 2009 U.S. App. LEXIS 12045, at *7–9 (6th Cir, Jun. 3, 2009) (*unpublished*) (Where grievance policy was unclear and the prisoner followed a grievance counselor's advice, prisoner's efforts are considered exhaustion even where he filed new grievances instead of re-filing the original grievance).

341. Gates v. Cook, 376 F.3d 323, 331 n.6 (5th Cir. 2004) (noting that the plaintiff sent a form to the Commissioner rather than the Legal Adjudicator but defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner's lawyer and not by the prisoner, as the rules specify); Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004) (noting that prisoner did fail to follow the prison procedures for grievances when the prison policy had nothing about putting money damages in the grievance.).

342. Subil v. U.S. Marshal, No. 2:04-CV-0257 PS, 2008 U.S. Dist. LEXIS 23813, at *14 (N.D. Ind. Mar. 24, 2008) (*unpublished*) (declining to dismiss for non-exhaustion where grievance was not filed in the normal channels, but the final reviewing authority accepted and responded to it); Broder v. Corr. Med. Servs., Inc., No. 03-75106, 2008 U.S. Dist. LEXIS 19949, at *4–6 (E.D. Mich. Mar. 14, 2008) (*unpublished*) (finding that because the Michigan Department of Corrections decided the merits of the grievance, without rejecting them as untimely, the grievances cannot be considered unexhausted).

343. *Compare* Cobb v. Berghuis, No. 1:06-CV-773, 2007 U.S. Dist. LEXIS 93890, at *2–4 (W.D. Mich. Dec. 21, 2007) (*unpublished*) (holding that a grievance rejected for both reasons does not exhaust) *with* Harris v. West, No. 2:06-cv-268, 2008 U.S. Dist. LEXIS 22163, at *3 (W.D. Mich. Mar. 11, 2008) (finding exhaustion where prisoner's step II grievance was rejected as untimely but his final appeal was addressed on the merits).

344. For example, in one case, the plaintiff claimed that he had not received notice that a letter had been

assumed that they do have the power to review such conclusions, both before and after *Woodford*.[345] One recent district court decision has suggested that the habeas corpus doctrine of procedural default can be helpful in looking at proper exhaustion questions. Specifically, it said that "the contours of the procedural default doctrine would require the Court to consider whether the last administrative decisionmaker relied on an established procedural rule and whether a reasonable reviewer could have determined that the prisoner actually violated the established rule."[346] This suggests an independent judgment by the court. The court further observed that instructions by grievance officials that go against the relevant state regulations may make the remedy unavailable.[347] Several decisions have refused to dismiss for non-exhaustion where a prisoner's grievance had been rejected because it duplicated an earlier grievance.[348]

(6) What if the prisoner fails to follow directions from prison staff with respect to a particular grievance? Numerous decisions have held that a prisoner who does not follow instructions by grievance personnel fails to exhaust his administrative remedies.349 However, some courts have refused to find non-exhaustion where the instructions or the grievance body's dismissal were not supported by the written grievance policy.[350] Some courts have found exhaustion where the instructions or the grievance body's dismissal were not supported by the written grievance policy,[351]but other courts have insisted that it is the prisoner's obligation to follow incorrect instructions.[352]

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confiscated until almost a year afterward; when he tried to complain, his grievance was dismissed as time-barred, even though it was impossible for him to file in a timely manner because of the lack of notice. The court said that it could not review the administrative determination, and found additional claims defaulted. *See* Lindell v. O'Donnell, No. 05-C-04-C, 2005 U.S. Dist. LEXIS 24767, at *50–51, 62–63, 73 (W.D. Wis. Oct. 21, 2005) (*unpublished*). The appeals court for that circuit has subsequently stated: "As long as the state's application of its own procedural rules is not arbitrary or capricious, we will not substitute our judgment for the state's." Hoeft v. Wisher, 181 F. App'x 549, 550 (7th Cir. May 8, 2006) (*unpublished*).

345. In *Moore v. Bennette*, 517 F.3d 717, 722, 729–730 (4th Cir. 2008), the court approved dismissal of some claims for non-exhaustion because the prisoner violated a rule against complaining about more than one incident in a grievance, but reversed dismissal of another claim where it said that requiring him to grieve each of multiple incidents separately "would have prevented him from fairly presenting his claim in its entirety."

For other decisions refusing to honor procedural rejections of grievances, *see* Price v. Kozak, 569 F. Supp. 2d 398, 406–07 (D. Del. July 28, 2008) (holding plaintiff's grievances timely despite the defendant rejecting them as late); Moton v. Cowart, No. 8:06-CV-2163-T-30EAJ, 2008 U.S. Dist. LEXIS 40419, at *15–18 (M.D. Fla. May 19, 2008) (*unpublished*) (rejecting decision that plaintiff's complaint was not grievable, and an appeal decision that it must be re-filed at the facility, as contrary to prison system's own policy).

In *Vasquez v. Hilbert*, No. 07-cv-00723-bbc, 2008 U.S. Dist. LEXIS 42011, at *6-8 (W.D. Wis. May 27, 2008) (*unpublished*), the defendants agreed that grievance officials had interpreted their own rules incorrectly, but argued that the plaintiff failed to exhaust because he should have done a better job of showing the officials that they were wrong. The court did not agree, holding that the argument was "unreasonable, unfair and inconsistent with circuit precedent."

346. Lafountain v. Martin, No. 1:07-cv-076, 2008 U.S. Dist. LEXIS 34456, at *16 (W.D. Mich. Apr. 28, 2008).

347. Lafountain v. Martin, No. 1:07-cv-076, 2008 U.S. Dist. LEXIS 34456, at *16 (W.D. Mich. Apr. 28, 2008).

348. Some decisions have held that dismissal of a grievance as duplicative did not mean that the plaintiff had not exhausted, but suggested that he exhausted in an earlier grievance. Broyles v. Corr. Med. Servs., Inc., No. 1:07-CV-690, 2008 U.S. Dist. LEXIS 30214, at *7 (W.D. Mich. Apr. 14, 2008) (*unpublished*), *rev'd on other grounds*, No. 08-1638, 2009 U.S. App. LEXIS 5494 (6th Cir. Jan. 23, 2009) (*unpublished*); Doyle v. Jones, No. 1:06-cv-628, 2007 U.S. Dist. LEXIS 84570, at *8 (W.D. Mich. Nov. 15, 2007) (*unpublished*). In *Gabby v. Luy*, No. 05-C-0188, 2006 U.S. Dist. LEXIS 4167, at *11 (E.D. Wis. Jan. 23, 2006) (*unpublished*), the prisoner had filed one grievance and failed to appeal, then filed a second grievance which was rejected on the ground that the same issue had been raised in the first grievance. The court found exhaustion, rejecting defendant's argument that if a prisoner tries to exhaust an issue and makes a procedural mistake, he is barred from trying again and doing it right even if the later grievance is otherwise proper.

349. *See* Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005); Jernigan v. Stuchell, 304 F.3d 1030, 1032–33 (10th Cir. 2002) (holding that a prisoner who received no response to a grievance and refused directions from the appeals body to try to get one had failed to exhaust).

350. *See* Young v. Hightower, 395 F. Supp. 2d 583, 586–87 (E.D. Mich. 2005) (holding plaintiff's alleged failure to supply requested documents was not a failure to exhaust where the grievance policy said grievances should not be denied for failure to provide documentation).

351. *See* Young v. Hightower, 395 F. Supp. 2d 583, 588 (E.D. Mich. 2005) (holding plaintiff's alleged failure to supply requested documents was not a failure to exhaust where the grievance policy said grievances should not be denied for failure to provide documentation); Vega v. Alameida, No. S021977MCEKJMPC, 2005 WL 1501531 (E.D. Cal. June 20, 2005) (*unpublished*) (declining to dismiss where a prisoner's grievance and appeal were "cancelled" because he was "incorporative," citing defendants' failure to provide facts supporting the cancellation of the grievance).

352. Starks v. Lewis, No. CIV-06-512-M, 2008 WL 2570960, at *5 (W.D. Okla. June 24, 2008) ("Even when prison

(7) How does the proper exhaustion/procedural default rule interact with the statutory requirement that remedies be "available"? The rulings of some courts have created a procedural trap in addition to the procedural default requirement. If a prisoner is unable to exhaust timely and properly for some legitimate reason (for example, missing a deadline because of absence from the prison and no access to the grievance process), one would think the remedy is not available to that prisoner. However, a number of courts have held that prisoners who are prevented from exhausting properly must try to exhaust improperly, notwithstanding the *Woodford* "proper exhaustion" requirement. Therefore, if you cannot file a timely grievance, you should file a late grievance when you can, or the court might not even consider your arguments explaining why you couldn't file in a timely manner.[353]

6. What If You Miss a Time Limit?

The Supreme Court's ruling requiring "proper exhaustion" requires that you comply with time limits in the grievance system.[354] It is not clear how strict the *Woodford* rule is with respect to time limits,[355] nor is it clear whether federal courts are free to re-examine the untimeliness of administrative determinations.[356]

Here is some practical advice. Obviously, you want to learn the rules and meet the deadlines. But if you miss a grievance deadline, do not give up. Proceed with your grievance as quickly as possible. Name any provision in the grievance system for late grievances, explain why you were late, and take all the available appeals if the grievance officials reject your grievance for lateness anyway. If they deal with the merits of your grievance, then its lateness will not matter. If they do not, you will still be in a position to argue in court that you were justified in failing to file a grievance on time, that circumstances prevented you from filing on time and the remedy was therefore unavailable, or that your lateness does not matter because prison officials still had the opportunity to address your problem. You should *not* assume that if prison officials' actions or other circumstances beyond your control keep you from exhausting in a timely manner, you can just argue that the remedy was not "available" and you are excused from exhausting. A number of courts have said that under those circumstances, you must file a grievance when you are no longer subject to whatever obstacle that kept you from exhausting,[357] though some courts have disagreed.[358]

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authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it. ... An inmate's disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available process ... .").

353. *See* Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have timely exhausted all administrative proceedings and returned to court had they been mentioned by the defense in a timely manner); Hightower v. Nassau County Sheriff's Dept., 325 F. Supp. 2d 199, 205 (E.D.N.Y. 2004) (holding defense waived an affirmative defense that came into law after filing their answer by failing to do so with 23 months' delay and resulting in plaintiffs' loss of opportunity to take discovery), *vacated in part on other grounds*, 343 F. Supp. 2d 191 (E.D.N.Y. Nov. 1, 2004). Some circuits have required a showing of prejudice for waiver. *See* Curtis v. Timberlake, 436 F.3d 709, 711 (7th Cir. 2005)(explaining that a delay to assert an affirmative defense waives the defense only if the plaintiff was harmed as as result); Panaro v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005)(stating that a defendant may raise an affirmative defense at the summary judgment stage as long as the plaintiff does not suffer prejudice.).

354. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2389, 165 L. Ed. 2d 368, 381–82 (2006).

355. See preceding Section for discussion of possible exceptions and limits to the "proper exhaustion" rule.

356. For an example of a decision where a court refused to re-examine questionable prison timeliness decisions, *see* Wall v. Holt, No. 1:CV-06-0194, 2006 U.S. Dist. LEXIS 94573, at *9–10 (M.D. Pa. Jan. 9, 2007) (*unpublished)* (holding timeliness is measured by when grievance appeal arrives under Bureau of Prisons' regulation, notwithstanding "prison mailbox" rule and claim that the appeal was mailed on time). For a decision where a court exercised independent judgment about timeliness, *see* Price v. Kozak, 569 F. Supp. 2d 398, 407 (D. Del. July 28, 2008) (holding plaintiff's grievances timely despite their inexplicable rejection as late). You should do your best to follow what the grievance policy says, even if the prison does not provide a strict deadline for grievances, but only recommends when you should file your grievance.

357. Bryant v. Rich, 530 F.3d 1368, 1373 (11th Cir. June 20, 2007) (holding prisoner who said he could not submit a grievance for fear of assault at his place of detention should have exhausted that ability after transfer to another facility); Green v. McBride, No. 5:04-cv-01181, 2007 U.S. Dist. LEXIS 71189, at *7–9 (S.D. W.Va. Sept. 25, 2007) (*unpublished)* (holding prisoner who was kept on suicide watch without necessary materials until past the grievance deadline should have done so as soon as he was released from suicide watch and his failure to do so without justification means he failed to properly exhaust his administrative remedies).

358. *See* Cotton-Schrichte v. Peate, No. 07-4052-CV-C-NKL, 2008 WL 3200775, at *4 (W.D. Mo. Aug. 5, 2008) (holding that a prisoner who was raped by a staff member exercising a position of authority over the prisoner and who had been threatened into silence was not required to file a grievance after the threats were removed as it could not have been said that she had administrative procedures available to her at the appropriate time any filing would have been

The Second Circuit has addressed compliance with time limits in a similar manner as issues of following grievance rules, holding that failure to exhaust or to exhaust properly can be justified under "circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."[359] This includes prisoners' misunderstanding of the exhaustion requirement[360] or of the relevant prison regulations,[361] though courts have noted that those were not necessarily the only circumstances to excuse the failure to exhaust.[362] As noted in Section 5 above, this approach still appears valid after *Woodford*, since the kinds of fact patterns addressed in Second Circuit law were not before the Court in *Woodford*. In addition, circumstances that prevent a prisoner from filing in a timely manner would mean that the grievance system was not an "available" remedy for purposes of the exhaustion rule;[363] *Woodford* did not address the meaning of the statutory term "available." Nor did *Woodford* disturb the holdings of lower courts, including the Second Circuit, that under some circumstances prison officials may be prevented from raising a defense of non-exhaustion.[364]

Some grievance systems build in discretion to waive time limits. For example, the New York State grievance system permits late grievances for "mitigating circumstances,"[365] which include "attempts to resolve informally by the inmate."[366] In order to take advantage of such a provision, you have to ask for it—you cannot just argue later in court that your grievance was not untimely because they *could* have given you an extension.[367] The next question is whether the court is bound by prison personnel's disposition of such a

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futile in any case.); Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2008 U.S. Dist. LEXIS 59098, at *19-20 (S.D.N.Y. Aug. 5, 2008) (*unpublished*) (declining to dismiss where prisoner believed that the "alleged occurrence" was his surgery and not his knowledge of the side-effects, and accordingly, he reasonably, but mistakenly believed that he was time barred because he was not aware of his need to file a grievance).

359. Williams v. Comstock, 425 F.3d 175, 176-177 (2d Cir. 2005) (*per curiam*) (holding that while plaintiff's stroke left him physically and mentally unable to file his petition within the deadline, his failure to explain a nearly two year delay in doing so amounts to a "failure to timely file the grievance in accordance with IGP rules amounted to a failure to exhaust administrative remedies in this case.").

360. Williams v. Comstock, 425 F.3d 175, 177 (2d Cir. 2005) (*citing* Rodriguez v. Westchester County Jail Corr. Dept., 372 F.3d 485 (2d Cir. 2004)) (explaining that the Court held that plaintiff's understanding that exhaustion was not required was a valid justification for not exhausting remedies because, subsequent to defendant's failure to exhaust, [the Court] had entertained the same understanding in a separate case.)

361. Williams v. Comstock, 425 F.3d 175, 177 (2d Cir. 2005) (*citing* Giano v Goord, 380 F.3d 670, 677 (2d Cir. 2004)); Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2008 U.S. Dist. LEXIS 59098, at *12–14 (S.D.N.Y. Aug. 5, 2008) (*unpublished*) (holding that while plaintiff's stroke left him physically and mentally unable to file his petition within the deadline, his failure to explain a nearly two year delay in doing so amounts to a "failure to timely file the grievance in accordance with IGP rules amounted to a failure to exhaust administrative remedies in this case").

A reasonable if mistaken appreciation of the facts may also justify lack of timely exhaustion or result in a holding that the remedy was unavailable. In Borges v. Piatkowski, 337 F. Supp. 2d 424, 427 (W.D.N.Y. 2004), the prisoner missed the 14-day grievance deadline because he had no reason to know he had a medical problem until after it had expired and he had been transferred to another prison. The court did not dismiss his suit for lack of timely exhaustion; it held that as he had no way to know of the existing condition he could not be said to have had an available remedy, and therefore was justified by special circumstances in not exhausting.

362. Williams v. Comstock, 425 F.3d 175, 176 (2d Cir. 2005). One of the court's other decisions holds that a prisoner who was deterred from timely exhaustion by threats or other coercion by prison staff might also be justified in having failed to exhaust, or the court might find that remedies were unavailable to that prisoner, depending on the severity of the circumstances. *See* Hemphill v. New York, 380 F.3d 680, 690–91 (2d Cir. 2004).

363. Days v. Johnson, 322 F.3d 863, 867–68 (5th Cir. 2003)(narrowly holding that administrative remedies are deemed unavailable when (1) an inmates untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the inmates subsequent attempt to exhaust his remedies based on the untimely application of his grievance); Thorns v. Ryan, No. 07-CV-0218 H (AJB), 2008 U.S. Dist. LEXIS 14215, at *11–12 (S.D. Cal. Feb. 26, 2008) (*unpublished*) (refusing to dismiss where grievance appeal was untimely because of delay in receiving the decision; appeal was timely measured from when plaintiff received it). Some courts have held that this rule does not excuse you from having to exhaust when you are prevented from complying with a grievance deadline. However, it means that when you exhaust late, the lateness may be excused if it was for reasons beyond your control. *See* Part D, Section 6, below.

364. See above Part D, footnote 301.

365. Graham v. Perez, 121 F. Supp. 2d 317, 322 (S.D.N.Y. 2000) (quoting N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(a)(1) (2001)).

366. N.Y. Codes R. & Regs. at § 701.6(g)(1)(i)(a) (2008); State of New York, Department of Correctional Services, Directive No. 4040 § 701.6(a), Inmate Grievance Program (2003) (*as revised* July 1, 2006). It provides: "An exception to the time limit may not be granted if the request was made more than 45 days after an alleged occurrence."

367. Patel v. Fleming, 415 F.3d 1105, 1110–11 (10th Cir. 2005) (holding that the existence of provisions for time extensions did not save the untimely grievance of a prisoner who never officially sought an extension); Harper v. Jenkin,

request. As we have noted earlier, courts are divided on the question whether they can overrule grievance officials' decisions about whether prisoners have complied with the rules. One New York district court has held that it can decide whether late exhaustion is excused by mitigating circumstances such as transfer to another facility or the unavailability of grievance representatives to prisoners in a segregated unit.[368] When a claim is dismissed for non-exhaustion—whether for simple failure to exhaust at all, an error in using the procedures, or reliance on law that has subsequently changed—the deadline for administrative proceedings will almost always have passed. The Second Circuit has held that where a failure to exhaust or to exhaust correctly was justified by special circumstances, the claim should be dismissed without prejudice if remedies remain available, but if not, the case should go forward (or if the case is dismissed and then remedies prove unavailable, it should be reinstated).[369] In other words, if the prison system will not hear the plaintiff's late grievance, the plaintiff does not need to exhaust. (Whether this rule was overturned by *Woodford v. Ngo* is unclear.) We do not know how often prison systems will accept post-dismissal grievances under discretionary provisions for late filings. Some decisions, however, have directed that grievance officials consider grievances on their merits after dismissal for non-exhaustion.[370]

The doctrine of equitable tolling,[371] which is usually applied to statutes of limitations issues,[372] may excuse late grievance filings under some circumstances. In one case, a prisoner had filed a grievance and been told that it had been referred to "the appropriate investigative authority," at a time when his claim was not required to be grieved under that Circuit's law. After the law changed in response to the Supreme Court decision in *Booth v. Churner*, his case was dismissed for non-exhaustion. The prisoner promptly filed a new grievance, which was dismissed as untimely. The court held that the plaintiff was victimized by extraordinary circumstances, and should have the benefit of equitable tolling. The deadline for filing a grievance was thus extended to twenty days (the grievance time limit) after he received the court's decision dismissing his case.[373]

Untimely filing can also be waived by prison officials in the administrative process: a late grievance that they decide on the merits anyway satisfies the exhaustion requirement.[374] Time limits that are not made known to the prisoners cannot be enforced to bar their suits.[375]

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179 F.3d 1311, 1312 (11th Cir. 1999) (holding that a prisoner whose grievance was dismissed as untimely was obliged to appeal that decision before turning to a court whether or not the prisoner believed his appeal would be heard, since the system provided for waiver of time limits for "good cause"); Soto v. Belcher, 339 F. Supp. 2d 592, 596 (S.D.N.Y. 2004) (holding that a prisoner who learned of his problem after the deadline passed should have sought to file a late grievance).

368. Graham v. Perez, 121 F. Supp. 2d 317, 322 (S.D.N.Y. 2000). *See also* O'Connor v. Featherston, No. 01 Civ. 3251 (HB), 2002 U.S. Dist. LEXIS 7570, at *4–8 (S.D.N.Y. Apr. 29, 2002) (*unpublished*) (refusing to be bound by rejection of request to file a late grievance where the plaintiff had been kept in medical restriction for the 14 days in which he was required to file a timely grievance due to the prison officials lack of cooperation with plaintiff in the filing process); Cardona v. Winn, 170 F. Supp. 2d 131, 132 (D. Mass. 2001) (holding that the grievance appeal deadline should be extended because the prisoner may have missed it out of "excusable confusion").

369. *See* Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006). The Seventh Circuit has recently held similarly. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (holding that if failure to exhaust was "innocent," the prisoner "must be given another chance to exhaust provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround").

370. *See* George v. Morrison-Warden, No. 06 Civ. 3188 (SAS), 2007 U.S. Dist. LEXIS 42640, at *19 (S.D.N.Y. June 4, 2007) (*unpublished*) (dismissing the plaintiff's case for failure to appeal but holding plaintiff's efforts had "earned him a response," directing officials to treat a renewed appeal as timely and respond to it); Hill v. Chalanor, 419 F. Supp. 2d 255, 259 (N.D.N.Y. 2006) (finding appeal was "technically available," failure to appeal resulted from "confusion or miscommunication" and not official misconduct and therefore directing that plaintiff's renewed grievance appeal "shall be deemed timely" and directing prison officials to make sure it reached its destination).

371. For more information about the doctrine of equitable tolling, see footnotes 463–66 of this Chapter.

372. One court has held that it should not be applied to PLRA exhaustion. *See* Diaz v. Rutter, No. 2:05-cv-239, 2005 U.S. Dist. LEXIS 31606, at *11 (W.D. Mich. Nov. 30, 2005) (holding equitable tolling applies to statutes of limitations but not grievance proceedings).

373. *See* Gambina v. Dever, No. 03-cv-00118-REB-BNB, 2006 U.S. Dist. LEXIS 1937, at *9–10 (D. Colo. Mar. 31, 2006) (*unpublished*); *see* Anthony v. Gilman, No. 1:05-cv-426, 2008 U.S. Dist. LEXIS 2011, at *4–7 (W.D. Mich. Jan. 10, 2008) (*unpublished*) (applying equitable tolling to grievance deadline, but ruling against prisoner on the merits because he was deemed to have had adequate time to file); Rivera v. Pataki, No. 04 Civ. 1286 (MBM), 2005 U.S. Dist. LEXIS 2747, at *41–42 (S.D.N.Y. Feb. 7, 2005) (*unpublished*) (noting that "Rivera did the best he could to follow DOCS regulations while responding to an evolving legal framework.").

374. *See* Harris v. Aidala, No. 03CV467, 2006 U.S. Dist. LEXIS 63443, at *5–6 (W.D.N.Y. Sept. 6, 2006)

If a grievance system has no time limit, delay in filing cannot bar a prisoner's claim for non-exhaustion.[376] In that scenario, an unexhausted claim should be dismissed without prejudice, and the litigant will have the opportunity to seek to exhaust.[377]

7. Dealing with Exhaustion in Your Lawsuit

Exhaustion is an "affirmative defence," so you do not have to put it in your complaint—the defendants must raise it.[378] However, if you have properly exhausted, it may be beneficial to put it in the complaint anyway. Then, if the defendants make a motion to dismiss, you can simply refer to the relevant paragraph of your complaint in response, since the court must assume that the facts you allege in your complaint are true for purposes of such a motion.[379] If you did *not* properly exhaust, but you think you have a good argument that administrative remedies were not available to you, or that there are special circumstances that justify your failure to exhaust, you should not put that in the complaint.[380] In that case you are best advised to leave exhaustion out of the complaint and let the defendants raise it. If the defendants do raise the defense, you will then have the opportunity to provide a fuller explanation than you would in a complaint. (Here's the rule of thumb: if you can truthfully write in your complaint, "Plaintiff has exhausted all available administrative remedies for his claims," you should do it. If it's more complicated than that, leave it out.)

Since exhaustion is not a pleading requirement, it cannot be addressed at initial screening or by motion under Federal Rules of Civil Procedure Rule 12(b)(6) to dismiss for failure to state a claim, except in those cases where non-exhaustion is clear. Motions under Fed. R. Civ. P. 12(b)(1) to dismiss for lack of subject matter jurisdiction are equally inappropriate, since failure to exhaust is not jurisdictional.[381]

In most courts, defendants who claim you did not exhaust will generally have to raise that claim in a motion for summary judgment, which requires them to submit admissible factual evidence showing that you didn't exhaust.[382] Sometimes defendants say they are moving to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure but also include factual materials like documents or affidavits. These should not be considered on such a motion to dismiss. The court may then convert the Rule 12(b)(6) motion to a summary judgment motion.[383] Either way, if you are faced with a summary judgment motion, you will

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(*unpublished*) (finding that "Even though the grievance was filed outside the stated time parameters for the filing of grievances, it appears that the grievance was processed and denied based upon the merits," and therefore, the plaintiff exhausted his administrative remedies); *see* Barnes v. Briley, 420 F.3d 673, 679 (7th Cir. 2005) (holding claim was not procedurally defaulted where an initial grievance was rejected as untimely but plaintiff later "restarted" the grievance process and received a decision on the merits).

375. *See* Sims v. Rewerts, No. 07-12646, 2009 U.S. Dist. LEXIS 100585, at *28 (E.D. Mich. Sept. 24, 2009) (*unpublished*) (not dismissing where plaintiff failed to comply with time limit that had been changed without notice).

376. Schonarth v. Robinson, No. 06-cv-151-JM, *2008 U.S. Dist. LEXIS 13596,* at *8–12 (D.N.H., Feb. 22, 2008) (*unpublished*) (finding that a grievance that was filed two years after the jail was demolished, but otherwise in compliance with grievance rules, was exhausted).

377. Alexander v. Dickerson, No. 6:07cv423, 2008 U.S. Dist. LEXIS 32866, at *17 (E.D. Tex. Apr. 22, 2008) (*unpublished*) (indicating that when no deadline for filing grievances exists in the jail's policy, the lawsuit does not have to be dismissed with prejudice, and therefore, dismissing the plaintiff's case without prejudice for failing to exhaust and allowing the plaintiff to refile the suit once he exhausts his administrative remedies).

378. Jones v. Bock, 549 U.S. 199, 211–17, 127 S. Ct. 910, 919–22, *166 L. Ed. 2d 798, 811–13* (2007). This could change. The Court suggested there might be reasons to amend the Federal Rules of Civil Procedure to make exhaustion a pleading requirement, so be sure you check the current rules (the pleading rule is Rule 8 of Federal Rules of Civil Procedure).

379. *See* Wright v. Dee, 54 F. Supp. 2d 199, 206 (S.D.N.Y. 1999) (holding assertion of exhaustion made in response to the defendants' motion to dismiss was sufficient to survive the motion).

380. *See* Jones v. Bock, 549 U.S. 199, 213–15, 127 S. Ct. 910, 920–21, *166 L. Ed. 2d 798, 812–13* (2007) ("Unlike in the typical civil case, defendants do not have to respond to a complaint covered by the PLRA until required to do so by the court, and waiving the right to reply does not constitute an admission of the allegations in the complaint").

381. *See* Woodford v. Ngo, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392 (2006) ("[T]he PLRA exhaustion requirement is not jurisdictional").

382. *See* Rule 56, Federal Rules of Civil Procedure. Most federal courts routinely addressed exhaustion disputes under the summary judgment rule. *See*, *e.g.*, Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006); Brown v. Croak, 312 F.3d 109, 111–12 (3d Cir. 2002); Fields v. Oklahoma State Penitentiary, 511 F.3d 1109, 1111–12 (10th Cir. 2007).

383. *See* McCoy v. Goord, 255 F. Supp. 2d 233, 251 (S.D.N.Y. 2003) (discussing why such a conversion may not fit the goals of exhaustion). Courts are not required to convert such motions to summary judgment motions. *See*, *e.g.*, Perez v. Westchester County Dept. of Corr., No. 05 Civ. 8120(RMB), 2007 U.S. Dist. LEXIS 32638, at *10 n.6 (S.D.N.Y. Apr. 30, 2007) (citing Friedl v. City of New York, 210 F. 3d 79, 83 (2d Cir. 2000), where in a question of exhaustion, the court

have to respond to defendants' factual presentation with your own admissible evidence. This evidence can consist of your declaration or sworn affidavit[384] (not just a statement in a brief or a letter) establishing that you exhausted or were unable to exhaust for some legitimate reason, and/or documentary evidence such as a final grievance decision showing you exhausted. You should also look critically at the defendants' evidence and, if it does not really show that you failed to exhaust, explain why to the court. If the defendants do not show that it is *undisputed* that you have failed to exhaust and you do not have an adequate excuse or explanation, summary judgment will be denied. That usually means that the issue of exhaustion will be determined at trial.[385]

Courts take different approaches to litigating exhaustion. Some have simply held evidentiary hearings to determine factual disputes about exhaustion, without much discussion of why it is appropriate to proceed in that way.[386] The Ninth Circuit has held that failure to exhaust is "a matter in abatement, which is subject to an unenumerated Rule 12(b) motion, rather than a motion for summary judgment."[387] The difference that makes is that courts (not juries) can decide disputed factual issues based on documents, without holding a hearing, under this procedure.[388] Recently, the Eleventh Circuit adopted this approach too.[389] If you are faced with such a motion in a district court in the Ninth or Eleventh Circuit, you should respond to it the same way you would respond to a summary judgment motion, with declarations or sworn affidavits stating relevant facts within your knowledge, and with documents showing relevant facts, such as the prison grievance policy, grievances you filed, decisions or other documents you received in response, etc.

The Seventh Circuit, by contrast, has rejected the matter in abatement approach and has held that whenever exhaustion "is contested," the district court should conduct a hearing on exhaustion, allowing discovery limited to exhaustion, and decide the exhaustion question; only if the court finds the plaintiff has exhausted will the case proceed to discovery on the merits.[390] The court's expressed concern was to avoid presentation of exhaustion to the jury; it stated that "juries do not decide what forum a dispute is to be resolved in .... Until the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to."[391]

The Seventh Circuit approach is arguably contrary to *Jones v. Bock*, which held that the PLRA exhaustion requirement does not alter usual litigation practices governed by the Federal Rules of Civil Procedure or general practice.[392] A rule permitting only exhaustion-related discovery until exhaustion is resolved is not consistent with the Federal Rules' discovery procedures.[393] Further, the court invents a seemingly unprecedented (at least it cites no precedent) means of addressing facts that are essential to the exhaustion decision but are also relevant to the merits of the plaintiff's claim: the jury will hear the facts "without being bound by (or even informed of)" the district court's determinations.[394] This notion of having a court make factual findings, and then ignoring them in the remainder of the case, does not seem like a usual

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decided the 12(b)(6) motion on the complaint alone).

384. *See* Chapter 6, "An Introduction to Legal Documents," for more information on affidavits.

385. Cain v. Dretke, No. C-04-364, 2006 U.S. Dist. LEXIS 42885, at *3 (S.D. Tex. June 13, 2006) (*unpublished*) (holding a factual dispute over exhaustion "must be resolved at trial"); Donahue v. Bennett, No. 02-CV-6430 CJS, 2004 WL 1875019, at *6 (W.D.N.Y. Aug. 17, 2004); Kendall v. Kittles, No. 03 Civ. 628 (GEL), 2004 U.S. Dist. LEXIS 15145, at *14 (S.D.N.Y. Aug. 4, 2004) (*unpublished*) (holding credibility issues about access to grievance forms and whether the plaintiff was told his claim was nongrievable "are properly for a jury.").

386. Peterson v. Roe, No. 05-cv-055-PB, 2007 U.S. Dist. LEXIS 7847, at *4 (D.N.H. Feb. 2, 2007) (*unpublished*) (finding officials credible as to failing to receive appeal, plaintiff credible as to mailing it and as to the unreliability of the internal mail); Johnson v. Garraghty, 57 F. Supp. 2d 321, 329 (E.D. Va. 1999) (holding that disputed claim that defendants obstructed exhaustion merits an evidentiary hearing).

387. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

388. Ritz v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988) (*per curiam*), cited in *Wyatt*, 315 F.3d 1108, 1119–20 (9th Cir. 2003).

389. Bryant v. Rich, 530 F.3d 1368, 1376–77 (11th Cir. 2008).

390. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

391. Pavey v. Conley, 544 F.3d 739, 741 (7th Cir. 2008).

392. Jones v. Bock, 549 U.S. 199, 213, 127 S. Ct. 910, 919–20, 166 L. Ed. 2d 798, 811 (2007).

393. The court qualified this holding by saying "in the ordinary case" discovery on the merits should be put off until exhaustion is resolved, but "there may be exceptional cases in which expeditious resolution of the litigation" calls for some merits-related discovery before exhaustion is decided. Pavey v. Conley, 528 F.3d 494, 497 (7th Cir. 2008).

394. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

litigation practice. Of course, if you are in court in the Seventh Circuit, you will be bound by these rules. In other courts, these arguments may help persuade a court not to adopt the Seventh Circuit approach.

Because exhaustion is an affirmative defense, you will have the burden of proving non-exhaustion as well as pleading it.[395] That means you have to show three things:

(1) That there actually was an available administrative remedy for your problem.[396] The Second Circuit has held that prisoner complaints should not be dismissed for non-exhaustion without the court having "establish[ed] the availability of an administrative remedy from a legally sufficient source."[397] To do that, the court must examine whether the remedy actually will address the kind of claim the prisoner raises, and must look at exceptions to the remedy to be sure the claim does not fall into one of them.[398] Defendants must also show the court exactly what prisoners were required to do to exhaust.[399]

(2) That you were a prisoner and therefore required to exhaust when you filed your complaint. [400]

(3) That you didn't exhaust. Several courts have found prison officials' affidavits and documentation asserting a prisoner didn't exhaust to be insufficient or even inadmissible into evidence because they were completely conclusory (proved nothing),[401] failed to set out how records were searched,[402] rested on hearsay,[403] or otherwise failed to establish a failure to exhaust.[404] In several cases, plaintiffs have produced documentation of grievances that prison officials claimed did not exist.[405]

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395. Roberts v. Barreras, 484 F.3d 1236, 1240–41 (10th Cir. 2007) (citing established rules that the burden of proving affirmative defenses is on the defendant and that burden of proof follows burden of pleading).

396. *See* Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) ("Establishing, as an affirmative defense, the existence of further 'available' administrative remedies requires evidence, not imagination."); Fernandez v. Morris, No. 08-CV-0601 H (PCL), 2008 U.S. Dist. LEXIS 54298, at *9 (S.D. Cal. July 16, 2008) (*unpublished*) (defendants who failed to show availability of remedies in segregation were not entitled to dismissal for non-exhaustion); Ayala v. C.M.S., No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7 (D.N.J. July 2, 2008) (*unpublished*) (defendants who failed to specify what procedures were available were not entitled to dismissal for non-exhaustion).

397. Mojias v. Johnson, 351 F.3d 606, 609 (2d Cir. 2003) (quoting Snider v. Melindez, 199 F.3d 108, 114 (2d Cir. 1999) (noting that a party's admission is not a "legally sufficient source")).

398. Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003); *accord* Anderson v. XYZ Correctional Health Services, 407 F.3d 674, 683 n.5 (4th Cir. 2005). In *Mojias*, the court criticized the lower court for relying on check marks and questionnaire answers on a form complaint to determine exhaustion. Mojias v. Johnson, 351 F.3d 606, 609–10 (2d Cir. 2003). That harmful practice is still alive in some jurisdictions. *See* Winfield v. Soloman, No. CIV S-08-0875 WBS DAD P, 2008 U.S. Dist. LEXIS 46880, at *3 (E.D. Cal. May 23, 2008) (*unpublished*).

399. Ayala v. C.M.S., No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7 (D.N.J. July 2, 2008) (*unpublished*) (where plaintiff said he was unable to pursue administrative remedies, defendants' failure to establish their policy's requirements made it impossible for the court to assess plaintiff's claim).

400. Abner v. County of Saginaw County, 496 F. Supp. 2d 810, 823 (E.D. Mich. 2007).

401. *See* Ray v. Kertes, 130 F. App'x 541, 543 (3d Cir. 2005) (*unpublished*) (holding "conclusory statement" that "does not constitute a factual report describing the steps Ray did or did not take to exhaust his grievances" did not meet defendants' burden); Laws v. Walsh, No. 02-CV-6016, 2003 U.S. Dist. LEXIS 12600, at *10 n.3 (W.D.N.Y. June 27, 2003) (*unpublished*) (holding conclusory affidavit about records search and lack of appeals inadmissible).

402. Livingston v. Piskor, 215 F.R.D. 84, 85–86 (W.D.N.Y. 2003) (holding defendants' affidavits that they had no record of grievances and appeals by the plaintiff were inadequate where they did not respond to his allegations that his grievances were not processed as policy required and gave no detail as to "the nature of the searches ..., their offices' record retention policies, or other facts indicating just how reliable or conclusive the results of those searches are").

403. Donahue v. Bennett, No. 02-CV-6430, 2003 U.S. Dist. LEXIS 12601, at *10 (W.D.N.Y. June 23, 2003) (*unpublished*) (holding counsel's hearsay affirmation about a telephone call with grievance officials did not properly support their motion).

404. *See* Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that defendants did not show that the administrative remedies had been exhausted because they did not claim it in their affadavit); Thixton v. Berge, No. 05-C-620-C, 2006 U.S. Dist. LEXIS 92193, at *7 (W.D. Wis. Dec. 19, 2006) (*unpublished*) (noting that the absence of an appeal about lack of a working toilet and sink did not establish non-exhaustion, since if he prevailed at the first stage he would have not have needed to appeal, and he might have filed an appeal about conditions in general including the sink and toilet issue).

405. Baker v. Schriro, No. CV 07-0353-PHX-SMM (JRI), 2008 U.S. Dist. LEXIS 66284, at *15 (D. Ariz. Aug. 20, 2008) (ruling that prison officials did not meet their burden to demonstrate exhaustion because plaintiff could produce evidence of grievance complaints, even though defendant denied that they existed); Menteer v. Applebee, No. 04-3054-MLB, 2008 U.S. Dist. LEXIS 50207, at *16 (D. Kan. June 27, 2008) (*unpublished*) (finding material issue of fact where defendants said plaintiff filed no grievances but plaintiff produced copies of grievances and decisions on them).

Since exhaustion is an affirmative defense, the defendants failure to raise the defense in a timely manner might mean that they have waived the defense.[406] Your claim that defendants have waived exhaustion will be much stronger if you can show that their failure to raise it on time has hurt you in some way.[407] The exhaustion defense, once technically waived, may be revived procedurally[408] or if the court chooses to do so.[409]

If a court refuses to dismiss your case for non-exhaustion, prison officials cannot appeal immediately; they have to wait until the end of the case.[410] One court has recently allowed the defendants an immediate appeal on the question of whether discovery must be stayed until any dispute over exhaustion is resolved.[411]

8. Exhaustion and Statutes of Limitations

Most courts have held that the statute of limitations is tolled (suspended) while you are exhausting administrative remedies,[412] meaning that the time does not start to run until you get a final administrative decision. However, not every court may accept this idea; plan on getting your complaint in within the usual time limitation if you can.

If your case is dismissed for non-exhaustion and you want to try to exhaust and re-file it,[413] the statute of limitations may have run by then. Ordinarily, your case would be time-barred. However, some states have statutes that toll (suspend) the statute of limitations for various reasons, including dismissals for reasons not involving the merits of the case. (State tolling rules are applied by federal courts in civil rights actions.[414]) For example, a New York statute says that in an action that was timely commenced but was

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406. *See* Handberry v. Thompson, 446 F.3d 335, 342–43 (2d Cir. 2006) (finding waiver); Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 679–80 (4th Cir. 2005); Johnson v. Testman, 380 F.3d 691, 695–96 (2d Cir. 2004) (holding the defense was waived by failure to assert it in the district court); Randolph v. Rodgers, 253 F.3d 342, 348 n.11 (8th Cir. 2001) (finding defendants "waived [PLRA exhaustion] argument on appeal" because it was not raised in the District Court).

407. *See* Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have timely exhausted and returned to court had the defense been timely raised); Hightower v. Nassau County Sheriff's Dept., 325 F. Supp. 2d 199, 205 (E.D.N.Y. 2004) (holding defense waived where raised only after trial, after 23 months' delay and plaintiffs' loss of opportunity to take discovery), *vacated in part on other grounds*, 343 F. Supp. 2d 191 (E.D.N.Y. Nov. 1, 2004). Some circuits have required a showing of prejudice for waiver. *See* Curtis v. Timberlake, 436 F.3d 709, 711 (7th Cir. 2005) (holding that the plaintiff did not suffer any harm from the defendant's delay in asserting the exhaustion defense); Panaro v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005) (holding that the exhaustion defense could be waived because the plaintiff suffered no harm from the delay).

408. *See* Jackson v. District of Columbia, 254 F.3d 262, 267 (D.C. Cir. 2001) (holding it was not an abuse of discretion to construe a "notice" by one party that it would rely on another party's exhaustion defense as an amended answer properly raising the defense); Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (holding that the filing of an amended complaint revives defendants' right to raise exhaustion and other defenses).

409. *See* Stephenson v. Dunford, 320 F. Supp. 2d 44, 48–49 (W.D.N.Y. 2004) (allowing amendment of answer to assert exhaustion 22 months after Supreme Court decision showed the defense was available), *vacated and remanded on other grounds*, 139 Fed. Appx. 311 (2d Cir. 2005). *But see* Abdullah v. Washington, 530 F. Supp. 2d 112, 115 (D.D.C. 2008) (denying amendment to answer asserting exhaustion defense five years after filing; plaintiff would be prejudiced because discovery was closed and plaintiff might have formulated discovery differently if exhaustion had been asserted). In *Panaro v. City of North Las Vegas*, 423 F.3d 949, 952 (9th Cir. 2005), the court held that exhaustion can be raised at the summary judgment stage, even if not pled, as long as the adverse party is not prejudiced.

410. Davis v. Streekstra, 227 F.3d 759, 762–63 (7th Cir. 2000) (holding that the defendant had to wait until the case was decided before appealing on an exhaustion issue).

411. Pavey v. Conley, No. 3:03-CV-662 RM, 2006 U.S. Dist. LEXIS 90523, at *4 (N.D. Ind. Dec. 14, 2006) (*unpublished*), *rev'd*, 544 F.3d 739, (7th Cir. 2008) (granting interlocutory appeal because of the high impact the decision would have).

412. Roberts v. Barreras, 484 F.3d 1236, 1240 (10th Cir. 2007) (holding that state rules govern tolling); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005)("we agree with the uniform holdings of the circuits … that the applicable statute of limitations must be tolled"); Johnson v. Rivera, 272 F.3d 519, 521 (7th Cir. 2001) (following state law that the statue of limitations is tolled); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000) (remanding a case back to the District Court to determine how long the statute of limitations was tolled); Harris v. Hegmann, 198 F.3d 153, 157 (5th Cir. 1999) (following Louisiana law that allows for tolling). Some courts have said or assumed that this question is determined by state tolling law. *See*, *e.g.*, Harris v. Hegmann, 198 F.3d 153, 157 (5th Cir. 1999); Leal v. Ga. Dept. of Corr., 254 F.3d 1276, 1280 (11th Cir. 2001) (remanding a case back to the District Court to determine if tolling should apply).

413. You may not be allowed to do this because your grievance, too, may be time-barred, unless you persuade prison officials there is a reason to hear your late grievance. See Part E(5) of this Chapter for more information.

414. Bd. of Regents v. Tomanio, 446 U.S. 478, 483–86, 100 S. Ct. 1790, 1794–96, 64 L. Ed. 2d 440 (1980) (noting

"terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits," the plaintiff has six months to file a new lawsuit about the subject matter of the dismissed lawsuit.[415] New York state law also appears to toll the statute of limitations during exhaustion of administrative remedies.[416] In addition, some courts have applied the doctrine of equitable tolling so that any time you spend going through an action that is dismissed for non-exhaustion, and any further time spent in exhausting administrative remedies after the dismissal, will not count against the statute of limitations.[417]

A second approach is to hold the statute of limitations equitably tolled during the pendency of the dismissed action and any subsequent state administrative proceedings, as one appeals court has done.[418] That holding was made in a case where the plaintiff had been victimized by a change in law overruling several circuits' holdings that damage claims need not be exhausted where grievance systems did not provide for damages,[419] but other courts have held or suggested that equitable tolling may be applicable more generally.[420]

An alternative approach would be for a court not to dismiss a case that would be time-barred and instead grant a stay pending exhaustion. That option may be foreclosed by case law holding that stays are no longer permitted under the PLRA and that unexhausted claims must be dismissed.[421]

A fourth approach is for the plaintiff, after dismissal and subsequent exhaustion, to file a motion for relief from the judgment of dismissal under Rule 60(b) of the Federal Rules of Civil Procedure, rather than to file a new complaint. That Rule permits relief based, among other things, upon "mistake, inadvertence, surprise, or excusable neglect," an argument that "applying [the judgment] prospectively is no longer equitable," or "any other reason that justifies relief."[422] This rule has been used as a procedural vehicle in a variety of circumstances to permit litigants who timely filed and diligently pursued their cases to revive

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that Congress did not establish a body of tolling laws, so state laws are used instead).

415. N.Y. C.P.L.R. 205(a) (1999). The statute also requires that service of process be completed within the six-month period. However, courts have held that this service requirement is not binding in federal court, since state law governing the method or timing of service of process is not borrowed along with the statute of limitations for federal claims. Allaway v. McGinnis, 362 F. Supp. 2d 390, 395 (W.D.N.Y. 2005) (applying state law to tolling, but not to service of process); Gashi v. County of Westchester, 02 Civ. 6934 (GBD), 2005 U.S. Dist. LEXIS 1215, at *27–30 (S.D.N.Y. Jan. 27, 2005) (*unpublished*) (borrowing state tolling laws in a federal case).

Tolling statutes vary from state to state and may not always be helpful. For example, the Indiana statute applies only if the case is dismissed for reasons other than negligence in prosecuting it. One court has held that failure to exhaust constitutes negligence under the Indiana statute. The statute was not tolled and the claim was time-barred in that case. Thomas v. Timko, 428 F. Supp. 2d 855, 857 (N.D. Ind. 2006).

416. N.Y. C.P.L.R. 204(a) (1999) ("Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced"). The PLRA exhaustion requirement that says you cannot file suit until you have exhausted would appear to be a "statutory prohibition" by the New York statute's standards.

417. Clifford v. Gibbs, 298 F.3d 328, 333 (5th Cir. 2002) (applying equitable tolling because otherwise the plaintiff would be unable to bring his claim); McCoy v. Goord, 255 F. Supp. 2d 233, 253 (S.D.N.Y. 2003) (extending the statute of limitations as a matter of fairness). Courts are more likely to apply equitable tolling if there is some reason it would be unfair to dismiss your case as time-barred, like if you made a technical mistake the first time you tried to exhaust. *But see* Crump v. Darling, No. 1:06-cv-20, 2007 U.S. Dist LEXIS 20000, at *45–47 (W.D. Mich. Mar. 21, 2007) (*unpublished*) (denying equitable tolling to prisoner whose case was dismissed for non-exhaustion).

418. Wright v. Hollingsworth, 260 F.3d 357, 359 (5th Cir. 2001) (granting equitable tolling because the plaintiff had difficulty raising a waiver claim earlier); *see also* Clifford v. Gibbs, 298 F.3d 328, 333 (5th Cir. 2002). See footnotes 463–66, below, for more on equitable tolling.

419. *See* Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001) (requiring administrative proceedings to be exhausted even when monetary relief is requested).

420. *See* Wisenbaker v. Farwell, 341 F. Supp. 2d 1160, 1166–68 (D. Nev. 2004) (applying equitable tolling where prisoner's first suit was filed before he finished exhausting; citing his diligence in pursuing his claim, his *pro se* status, and his probable lack of understanding of exhaustion law); McCoy v. Goord, 255 F. Supp. 2d 233, 253 (S.D.N.Y. 2003) ("Courts may combine a dismissal without prejudice with equitable tolling (when a judicial stay is not available) to extend the statute of limitations 'as a matter of fairness where a plaintiff has ... asserted his rights in the wrong forum.'"; suggesting in dictum that time spent in federal court may also be tolled) (citation omitted).

421. *See* Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001) ("courts must take care not to frustrate the policy concerns … by allowing inmate-plaintiffs to file or proceed with lawsuits before exhausting administrative remedies.").

422. Fed. R. Civ. P. 60(b)(1),(5),(6).

suits that had become time-barred after dismissal. These circumstances include cases in which the plaintiff was unfairly affected by a change or ambiguity in the law[423] as well as cases where the plaintiff made an error of law.[424] The fact that a case has not yet been heard on the merits weighs heavily in favor of granting such relief.[425] Although several courts have held that Rule 60(b) cannot be used to reinstate cases after a dismissal for non-exhaustion, these courts have not addressed these specific issues.[426]

It also would seem logical that a prisoner who has filed an action that will likely be dismissed for failure to exhaust or to exhaust properly should file a second action after the claim has been exhausted and before the limitations period has run. After doing so, the prisoner can move to voluntarily dismiss the first action.[427]

One court has held that courts may consider claims to be exhausted even if the exhaustion occurred outside the limitations period.[428] This holding can only apply if the prisoner is challenging a continuing wrong that persists into the limitations period; if the wrong itself happened and was completed outside the limitations period, the claim will be time-barred.

F. Mental or Emotional Injury

The PLRA provides:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.[429]

A similar requirement was added by the PLRA to the Federal Tort Claims Act ("FTCA"):

> No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States

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423. *See* N.C. Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp., 104 F. Supp. 2d 599, 605–06 (M.D.N.C. 2000) (granting relief from judgment under Rule 60(b)(6) "catchall" provision so a plaintiff could file a timely attorneys' fees motion after being misled by local rules about the time limit; in the alternative, equitably tolling the statutory limitations period); *see* Bridgeway Corp. v. Citibank, N.A., 132 F. Supp. 2d 297, 300–01, 303 (S.D.N.Y. 2001) (granting relief under Rule 60(b)(6) to reinstate claims of litigant whose foreign judgment on the same subject matter was ruled unenforceable; equitable tolling applied; stating "[e]quitable tolling permits a party to sue after the passing of the statute of limitations if the party has acted with reasonable care and diligence").

424. *See* Scott v. U.S. Envtl. Protection Agency, 185 F.R.D. 202, 204–06 (E.D. Pa. 1999) (granting plaintiff relief under Rule 60(b)(1) from voluntary dismissal because plaintiff erroneously believed she could pursue her Federal Tort Claims Act claim with other claims in state court and the court concluded this was "excusable neglect"), *reconsideration denied*, No. 97-6529, 1999 U.S. Dist. LEXIS 8240 (E.D. Pa. June 2, 1999) (*unpublished*).

425. *See* Bridgeway Corp. v. Citibank, N.A., 132 F. Supp. 2d at 301 (stating that "[p]laintiff has not had an opportunity to have its underlying claims considered by this Court ... Thus, to allow the judgment to stand would deny plaintiff the opportunity to have its allegations tested under appropriate standards."); Scott v. U.S. Envtl. Protection Agency, 185 F.R.D. 202, 206 (E.D. Pa. 1999) ("[T]he law favors determination of controversies on the merits."), *reconsideration denied*, No. 97-6529, 1999 U.S. Dist. LEXIS 8240 (E.D. Pa. June 2, 1999) (*unpublished*).

426. Strope v. McKune, No. 05-3344, 2006 U.S. App. LEXIS 2750, at *3–5 (10th Cir. Feb. 2, 2006) (*unpublished*) (declining to allow submission of additional evidence of exhaustion), *cert. granted, judgment vacated*, 127 S. Ct. 1215 (2007); Baggett v. Smith, No. 1:05-cv-804, 2006 U.S. Dist LEXIS 44859, at *1–3 (W.D.Mich. June 29, 2006) (*unpublished*) (holding that plaintiff was not entitled to relief from the Court's judgment dismissing his complaint for failure to demonstrate exhaustion of available administrative remedies when he subsequently exhausted his administrative remedies. However, court held that plaintiff could file a new civil rights action setting forth his exhausted claims).

427. *See* Fed. R. Civ. P. 41(a) concerning voluntary dismissals. While it would be preferable from the prisoner's point of view to file an amended or supplemental complaint after exhaustion, most courts have held that exhaustion must be completed before the initial complaint is filed, *see* Johnson v. Jones, 340 F.3d 624, 627–28 (8th Cir. 2003) ("Under the plain language of section 1997e(a), an inmate must exhaust administrative remedies before filing suit in federal court. Thus, in considering motions to dismiss for failure to exhaust under section 1997e(a), the district court must look to the time of filing, not the time the district court is rendering its decision, to determine if exhaustion has occurred. If exhaustion was not completed at the time of filing, dismissal is mandatory."), and some have explicitly held that an initial failure to exhaust cannot be cured by filing a new complaint in the same case after exhaustion. *See* Cox v. Mayer, 332 F.3d 422, 428 (6th Cir. 2003).

428. Harrison v. Stalder, No. 06-2825, 2006 U.S. Dist. LEXIS 88277 (E.D. La. Dec. 5, 2006) (granting defendants' motion to dismiss for failure to exhaust administrative remedies).

429. 42 U.S.C. § 1997e(e) (2006).

> or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.[430]

Note that this FTCA section applies only to convicted felons and not to detainees or those convicted of misdemeanors, unlike 42 U.S.C. § 1997e(e). So far, the courts have upheld the constitutionality of the mental/emotional injury provision, at least as limited to damage claims.[431]

The statute refers to actions "brought by a prisoner confined in a jail," etc., and most courts say it does not apply to cases filed by persons who sue after they are released from prison.[432] However, a few have disagreed.[433] Courts are divided over whether the provision continues to apply to a person who sues while in prison and then is released.[434] If a case is dismissed because of this statute, dismissal should be without prejudice for refiling once the prisoner is no longer in jail.[435]

The Eleventh Circuit has held that the statute applies to a claim that arose before, and was unrelated to, a prisoner's incarceration.[436] The same circuit has held that in a case removed to federal court from state court, § 1997e(e) does not apply to claims based solely on state law. The court therefore implied, but did not actually hold, that federal claims filed in state court are governed by the statute.[437] This holding is questionable. The statute says that "no Federal civil action *may be brought*" for mental or emotional injury without physical injury.[438] The phrase "may be brought" ties the statute's applicability to the time when the case is filed.[439] If that is the case, a suit filed in state court is not a "Federal civil action" when brought, so §

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430. 28 U.S.C. § 1346(b)(2) (2006).

431. *See* Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C. Cir. 1998) (The prisoner contended that 1997e(e) violated his right to equal protection and unduly burdened his Fifth Amendment right of access to the courts. The court determined that 1997e(e) had no restrictive effect on claims for declaratory or injunctive relief, it merely limited the availability of damages. After conducting a rational basis review, the court concluded that 1997e(e) did not violate the plaintiff's right to equal protection or his right of access to courts); Zehner v. Trigg, 133 F.3d 459, 461–63 (7th Cir. 1997) (explaining that immunity doctrines, like restrictions on damage remedies, are constitutional because a remedy of damages does not need to be available for every constitutional violation).

432. Harris v. Garner, 216 F.3d 970, 976–80 (11th Cir. 2000) (en banc) (holding that 1997e(e) applies to a complaint filed while the plaintiff was detained in a jail, prison, or other correctional facility); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (holding 1997e(e) did not apply to an ex-prisoner who filed a complaint after he was released from prison).

433. Cox v. Malone, 199 F. Supp. 2d 135, 140 (S.D.N.Y. 2002), *aff'd*, Cox v. Malone, 56 Fed. App'x. 43, 44 (2d Cir. February 20, 2003) (*unpublished*) ("Section 1997e(e), on the other hand, is a substantive limitation on the type of actions that can be brought by prisoners. Its purpose is to weed out frivolous claims where only emotional injuries are alleged. This purpose is accomplished whether section 1997e(e) is applied to suits brought by inmates incarcerated at the time of filing or by former inmates incarcerated at the time of the alleged injury but subsequently released. The fortuity of release on parole does not affect the kind of damages that must be alleged in order to survive the gate-keeping function of section 1997e(e). Because plaintiff's suit alleges only emotional injuries, it is barred by the PLRA irrespective of his status as a parolee at the time of filing."). Several recent decisions have rejected the reasoning of *Cox v. Malone*. *See* McBean v. City of New York, 2009 U.S. Dist. Lexis 72690, at *76 (S.D.N.Y 2009) ("[B]ecause intervenor-plaintiffs were not incarcerated at the time this action was commenced, the Court finds that § 1997e(e) is inapplicable and does not preclude them from proceeding with this litigation."); Kelsey v. County of Schoharie, No. 04-CV-299 (LEK/DRH), 2005 U.S. Dist. LEXIS 17057, at *1-10 (N.D.N.Y Aug. 5, 2005) (*unpublished*) ("Because plaintiffs were not incarcerated at the time this action was commenced, § 1997e(e) is inapplicable…").

434. *Compare* Harris v. Garner, 216 F.3d 970, 973–76 (11th Cir. 2000) (en banc) (holding that released plaintiffs remain prisoners for purposes of § 1997e(e) as long as they brought the lawsuit at the time they were still imprisoned but dismissing their claims for monetary relief without prejudice so that they my re-file when they are no longer confined), *with* Prendergast v. Janecka, No. 00-CV-3099, 2001 U.S. Dist. LEXIS 9689, at *2–3 (E.D. Pa. July 10, 2001) (*unpublished*) (holding that the provision ceases to apply when a post-release amended complaint is filed).

435. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008) ("We have interpreted this statute to require the dismissal of several prisoners' complaints for emotional injury 'without prejudice to their being re-filed at a time when the plaintiffs are not confined.'") (citing Harris v. Garner, 216 F.3d 970, 985 (11th Cir.2000) (en banc)). As explained in the next section, dismissal of the entire action may not be appropriate, since some courts hold that the statute restricts only compensatory damages.

436. Napier v. Preslicka, 314 F.3d 528, 532–34 (11th Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003), *cert denied,* 124 S. Ct. 1038 (2004). This interpretation sharply divided both the panel and the court as a whole and produced vigorous dissents.

437. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002).

438. 42 U.S.C. § 1997e(e) (emphasis supplied) (2006).

439. *See* Craig v. Eberly, 164 F.3d 490, 494-95 (10th Cir. 1998) (holding that the §1997e(e) did not apply

1997e(e) should not be applicable to it under any circumstances, and certainly not when the case is in federal court only because of the adverse party. However, the statute has been applied to state law claims filed in federal courts under their supplemental jurisdiction.[440]

1. What Does the Statute Do?

Section 1997e(e) prohibits "action[s] ... for mental or emotional injury."[441] If you have one claim for mental or emotional injury, and another claim for something else entirely, like loss or damage to property, the second claim can go forward.[442] Also, most courts have interpreted the statute to prohibit only awards of compensatory damages for mental or emotional injury. That means you could still get nominal or punitive damages, or an injunction, for mental or emotional injury.[443] (A minority of courts have said that you cannot get punitive damages for such injury.)[444]

The applicability and effect of the statute is typically addressed on motions to dismiss and for summary judgment. A few district courts have refused to decide it on motion, holding, "[t]he amount of damages Plaintiff may be entitled to recover is a determination reserved for the trier of fact, not the Court on a summary judgment motion."[445] The first circuit-level decision to address the question explicitly held that the provision creates an affirmative defense rather than a jurisdictional requirement, meaning that the defendant must raise the issue.[446] If the statute creates an affirmative defense, you do not have to plead the existence of a physical injury in your complaint, but the district court is free to dismiss if the complaint on its face shows that the plaintiff is a prisoner seeking damages for mental or emotional injury without physical injury.[447] However, again by analogy to the exhaustion requirement, courts should not be able to

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retroactively to a complaint that was filed before the PLRA was enacted); Swan v. Banks, 160 F.3d 1258, 1259 (9th Cir. 1998) ("…the plain meaning of [§1997e(e)] is that it applies only to actions that were brought after enactment of the PLRA, and not to actions that had already been filed.").

440. *See* Hines v. Oklahoma, CIV-07-197-R 2007 U.S. Dist. LEXIS 77291, at *16 (W.D. Okla. Oct. 17, 2007) (*unpublished*) ("Plaintiff's claims for compensatory damages for intentional infliction of emotional distress are barred by the Prison Litigation Reform Act (PLRA) because Plaintiff has not alleged that he suffered a physical injury as required by 42 U.S.C. § 1997e(e).").

441. 42 U.S.C. § 1997e(e) (2006).

442. Jones v. Bock, 549 U.S. 199, 222, 127 S. Ct. 910, 925, 166 L. Ed. 2d 798, 814 (2007) ("Section 1997e(e) contains similar language, "[n]o ... action may be brought ... for mental or emotional injury suffered while in custody without a prior showing of physical injury," yet respondents cite no case interpreting this provision to require dismissal of the entire lawsuit if only one claim does not comply, and again we see little reason for such an approach."); Robinson v. Page, 170 F.3d 747, 749 (7th Cir. 1999) ("If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected.").

443. Hutchins v. McDaniels, 512 F.3d 193, 196–98 (5th Cir. 2007) (court held that plaintiff could recover nominal or punitive damages, despite § 1997e(e)); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (because plaintiff's claim did not involve mental or emotional injury, the PLRA did not bar him from seeking nominal damages, punitive damages, and injunctive and declaratory relief); Calhoun v. DeTella, 319 F.3d 936, 941 (7th Cir. 2003) (nominal damages "are awarded to vindicate rights, not to compensate for resulting injuries," and punitive damages "are designed to punish and deter wrongdoers for deprivations of constitutional rights, they are not compensation for emotional and mental injury"); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) (statute restricting prisoner's recovery for in-custody mental or emotional injury did not prevent prisoner from obtaining injunctive and declaratory relief, nominal damages, punitive damages, compensatory damages for loss of property, or return of seized medications).

444. *See* Smith v. Allen, 502 F.3d 1255, 1271–72 (11th Cir. 2007) (stating that compensatory and punitive damages are precluded by PLRA because the plaintiff did not allege he suffered physical harm, however, nominal damages were available because plaintiff alleged a violation of a statutory right); Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (arguing that "much if not all of Congress's evident intent would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages and an assertion that the defendant acted maliciously," though no physical injury occurred).

445. Thomas v. Thomas, 07-CV-154(CDL) 2007 U.S. Dist. LEXIS 83072, at *6 (S.D. Ga. July 25, 2007) (*unpublished*); *accord* Johnson v. Raemisch, 557 F. Supp. 2d 964, 975 (W.D. Wis. May 23, 2008) (*unpublished*) (stating that while 1997e(e) precluded plaintiff from recovering damages for pain and suffering, availability of compensatory and punitive damages had to be determined at trial); Thompson v. Caruso, No. 2:04-CV-204, 2008 U.S. Dist. LEXIS 14725, at *3–5 (W.D. Mich. Feb. 27, 2008) (*unpublished*) (plaintiff in 1st Amendment case would be allowed to present proof and argue for recovery of nominal, compensatory, and punitive damages for all injuries except mental and emotional ones).

446. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008).

447. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008).

dismiss where the plaintiff simply fails to plead a physical injury without otherwise characterizing his injury.

2. What Is Mental or Emotional Injury?

The courts have not completely worked out the meaning of "mental or emotional injury." Some courts have interpreted it narrowly; one court said, for example, "[t]he term 'mental or emotional injury' has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts."[448] Some courts have also recognized a variety of constitutional injuries that are neither physical nor mental or emotional, and therefore are not affected by the statute.[449]

Other courts, however, seem to assume that any violation of your constitutional rights that does not result in physical injury or loss or damage to property is only mental or emotional injury.[450] For example, in *Allah v. Al-Hafeez*,[451] the prisoner complained that prison policies prevented him from attending services of his religion, and the court said he couldn't pursue compensatory damages because the injury for which he sought compensation was a mental or emotional one.[452] Many courts have similarly assumed that other sorts of deprivations of liberty cause only mental or emotional injury, including claims of unlawful arrest and confinement,[453] racial discrimination,[454] and many others.[455] However, you should argue that these types of

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448. Amaker v. Haponik, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999) (*unpublished*) (also noting that requiring physical injury in all cases would make the term "mental or emotional injury" superfluous); *see also* Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) (restricting the domain of the statute to suits in which mental or emotional injury is claimed).

449. Courts have acknowledged that § 1997e(e) does not bar compensatory damages for loss of property. Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002); Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999). Other such interests that at least some courts have acknowledged are neither physical nor emotional in nature include First Amendment rights, *see* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998); Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001); claims of exclusion from an alcohol treatment program in violation of the disability statutes, *see* Parker v. Mich. Dept. of Corr., No. 4:01CV11, 2001 U.S. Dist. LEXIS 18931, at *5–6 (W.D. Mich. Nov. 9, 2001) (*unpublished*); 4th Amendment bodily privacy claim and 8th Amendment conditions of confinement and medical care claims, *see* Waters v. Andrews, No. 97-CV-407, 2000 WL 1611126, at *4 (W.D.N.Y. Oct. 16, 2000) (*unpublished*); and freedom from racial discrimination, *see* Mason v. Schriro, 45 F. Supp. 2d 709, 716–20 (W.D. Mo. 1999). *See also* Lewis v. Sheahan, 35 F. Supp. 2d 633, 637 n.3 (N.D. Ill. 1999) (acknowledging right to access the courts).

450. Worse, there is a persistent tendency in some courts simply to declare, for example: "[A] a prisoner may not maintain an action for monetary damages against state officials based on an alleged constitutional violation absent some showing of a physical injury." Charles v. Nance, 186 F. App'x 494, 495 (5th Cir. 2006) (*unpublished*); *accord*, *e.g.*, Nelis v. Kingston, No. 06-C-1220, 2007 U.S. Dist. LEXIS 86036, at *18 (E.D. Wis. Nov. 20, 2007) (*unpublished*) ("under the Prison Litigation Reform Act (PLRA), recovery in prisoner lawsuits is limited where, as here, there is no showing of physical injury").

451. Allah v. al-Hafeez, 226 F.3d 247, 247–250 (3d Cir. 2000).

452. Allah v. al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("Allah seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.") At this point, there is a very long list of decisions holding deprivations of religious rights amount only to mental or emotional injury. *See*, *e.g.*, Mayfield v. Tex. Dept. of Criminal Justice, 529 F.3d 599, 605–06 (5th Cir. 2008) (applying § 1997e(e) to claims of restricted religious exercise); Sisney v. Reisch, 533 F. Supp. 2d 952, 973–74 (D.S.D. 2008) (applying § 1997e(e) to various religious deprivations).

453. Brown v. Sudduth, 255 F. App'x 803, 808 (5th Cir. 2007) (applying § 1997e(e) to claim of false arrest; plaintiff "sought compensatory damages for the sole alleged injury of liberty deprivation. Having not alleged a physical injury, the district court correctly concluded that Brown's claim for compensatory damages must fail"); Brumett v. Santa Rosa County, No. 3:07cv448/LAC/EMT, 2007 U.S. Dist. LEXIS 89061, at *4–6 (N.D. Fla. Dec. 4, 2007) (*unpublished*) (claim of six months' illegal detention was not sufficient for relief because it failed to demonstrate a physical injury); *Campbell* v. Johnson, No. 3:06cv365/RV/EMT, 2006 U.S. Dist. LEXIS 72146, at *2 (N.D. Fla. Oct. 3, 2006) (refusal to accept paperwork and collateral for release on bond).

454. Jones v. Pancake, No. 3:06CV-P188-H, 2007 U.S. Dist. LEXIS 84309, at *6–8 (W.D. Ky. Aug. 17, 2007) (*unpublished*) (allowing plaintiff to amend a racial discrimination claim to include relief for nominal and punitive damages).

455. Jordan v. Corr. Corp. of Am., No. 4:08-CV-05 (CDL), 2008 U.S. Dist. LEXIS 61846, at *3 (M.D. Ga. Mar. 11, 2008) (*unpublished*) (confiscation of mail); Robinson v. Dept. of Corr., 2007 U.S. Dist. LEXIS 50817, at *10 (N.D. Fla. July 13, 2007) (*unpublished*) (stopping of mail and delaying filing of lawsuits as well as deprivation of religious materials), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 75961 (N.D. Fla. Oct. 12, 2007); Ivy v. New Albany City Police Dept., No. 3:06CV112-P-A, 2006 U.S. Dist. LEXIS 79882 (N.D. Miss. Oct. 31, 2006) (*unpublished*) (being held naked in an isolation cell); Caudell v. Rose, Nos. 7:04CV00557, 7:04CV00558, 2005 U.S. Dist. LEXIS 10251,

constitutional violations are really injuries to your liberty, and not just a matter of mental or emotional injury.

Some courts have also held that complaints of exposure to unconstitutional prison living conditions—that is, living conditions that deny the "minimal civilized measure of life's necessities"[456]—are claims of mental or emotional injury barred by Section 1997e(e) unless they also allege physical injury.[457] These holdings seem inconsistent with the Supreme Court's statements that the objective severity of the conditions, and not their effect on the prisoner, determines whether they are lawful or not.[458] It is questionable whether a claim alleging conditions that are objectively intolerable is really an "action for mental or emotional injury," even if the conditions also lead to such injury. [459]

We agree with the courts who have held that "the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of Section 1997e(e),"[460] completely separate from any mental or emotional injury. Some courts have found the same principle applicable to cases about unconstitutional conditions of confinement or restrictive confinement without due process.[461]

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at *8 (W.D. Va. May 27, 2005) (*unpublished*) (seizure of legal papers), *report and recommendation adopted*, 378 F. Supp. 2d 725 (W.D. Va. 2005); Ashann Ra v. Virginia, 112 F. Supp. 2d 559, 566 (E.D. Va. 2000) (holding that a complaint that a prisoner was routinely viewed in the nude by opposite-sex staff stated a constitutional claim sufficiently established to defeat qualified immunity, but was not actionable because of the mental/emotional injury provision).

456. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (holding that the practice of double celling is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments).

457. *See*, *e.g.*, Harden-Bey v. Rutter, 524 F.3d 789, 796 (6th Cir. 2008) (barring damages for three years in administrative segregation); Merchant v. Hawk-Sawyer, 37 Fed. App'x. 143, 145–6 (6th Cir. 2002) (barring damages because plaintiff did not allege that conditions in a segregated housing unit caused him physical injury); Harper v. Showers, 174 F.3d 716, 719–20 (5th Cir. 1999) (barring damage claims for placement in filthy cells formerly occupied by psychiatric patients and for exposure to deranged behavior of those patients). *But see* Jackson v. Carey, 353 F.3d 750, 758 (9th Cir. 2003) (holding that an allegation of placement in segregation without due process might be saved from the mental/emotional injury bar by allegations of inadequate medical care in the segregation unit).

458. Wilson v. Seiter, 501 U.S. 294, 303, 111 S. Ct. 2321, 2326, 115 L. Ed. 2d 271, 282 (1991); *see* Helling v. McKinney, 509 U.S. 25, 35–37, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33–34 (1993) (instructing as to objective assessment of environmental tobacco smoke exposure); *see also* Fields v. Ruiz, No. 1:03-CV-6364-OWW DLB-P, 2007 U.S. Dist. LEXIS 45981, at *20 (E.D. Cal. June 25, 2007) (*unpublished*) (for 8th Amendment claims, "the issue is the nature of the deprivation, not the injury"), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 66671 (E.D. Cal. Sept. 10, 2007); Armstrong v. Drahos, No. 01 C 2697, 2002 U.S. Dist. LEXIS 1838, at *6 (N.D. Ill. Feb. 6, 2002) (*unpublished*) ("Because the Eighth Amendment is understood to protect not only the individual, but the standards of society, the Eighth Amendment can be violated even when no pain is inflicted, if the punishment offends basic standards of human dignity.").

459. A few decisions make this distinction. In *Nelson v. Cal. Dept. of Corr.*, No. C 02-5476 SI (pr), 2004 U.S. Dist. LEXIS 4521, at *21 (N.D. Cal. Mar. 18, 2004) (*unpublished*), *aff'd*, 131 F. App'x 549 (9th Cir. 2005), the plaintiff complained of being provided only boxer shorts and a T-shirt for outdoor exercise in cold weather. The court said: "Even if Nelson's complaint does include a request for damages for mental and emotional injury, it also includes a claim for an Eighth Amendment violation as to which the § 1997e(e) requirement does not apply. In other words, damages would be available for a violation of his Eighth Amendment rights without regard to his ability to show physical injury." *See* Pippin v. Frank, No. 04-C-582-C, 2005 U.S. Dist. LEXIS 5576, at *4 (W.D. Wis. Mar. 30, 2005) (*unpublished*) (stating that § 1997e(e) precludes claims for mental or emotional injury but not a claim that plaintiff was "falsely confined" in segregation as a result of constitutional violations); *see also* Aldridge v. 4 John Does, No. 5:00-CV-17-J, 2005 U.S. Dist. LEXIS 22113, at *10 (W.D. Ky. Sept. 30, 2005) (*unpublished*) (stating generally that "damages resulting from constitutional violations" are "separate categories of damages" from physical or mental injuries in case where plaintiff alleged medical deprivations, protracted segregation, and denial of access to courts).

460. Shaheed-Muhammad v. Dipaolo, 393 F. Supp. 2d 80, 108 (D. Mass. 2005); *accord* Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Carr v. Whittenburg, 2006 U.S. Dist. LEXIS 24565 at *4 (S.D. Ill. Apr. 28, 2006) (stating that specific 1st Amendment violations may be compensable through "general damages" or "presumed damages" even without proof of injury, though damages cannot be recovered based on the abstract value or importance of the right); Lipton v. County of Orange, NY, 315 F. Supp. 2d 434, 457 (S.D.N.Y. 2004) ("Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury standing alone and the PLRA 'does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.'") (quoting Ford v. McGinnis, 198 F. Supp. 2d 363, 366 (S.D.N.Y. 2001).

461. Aldridge v. 4 John Does, No. 5:00-CV-17-J, 2005 U.S. Dist. LEXIS 22113, at *10 (W.D. Ky. Sept. 30, 2005) (ruling in case involving medical deprivations, protracted segregation, and denial of access to courts); *accord* Mitchell v. Horn, 318 F.3d 523, 534 n. 10 (3d Cir. 2003) (stating that requests for damages for loss of "status, custody level and any chance at commutation" resulting from a disciplinary hearing were "unrelated to mental injury" and "not affected by §

That approach is consistent with tort law, which is supposed to be the basis of the law of damages under 42 U.S.C. § 1983,[462] but which courts seem mostly to have ignored in PLRA cases. Historically, tort law divided damages into six categories: injury to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation.[463] Under that approach, deprivation of your religious freedom or placement in segregation without due process would injure your personal liberty. Those deprivations might inflict mental or emotional injury too, but that injury would be separate and in addition to the deprivation of liberty.

A good example of the proper distinction between mental or emotional injury and deprivation of personal liberty is the Second Circuit decision in *Kerman v. City of New York*.[464] In that case, the plaintiff had been placed in a mental hospital against his will, and he alleged both that he had been seized in violation of the Fourth Amendment and that he had been subjected to the tort of false imprisonment. The court treated mental and emotional injury as a completely separate category of injury from the plaintiff's loss of liberty, stating: "The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty."[465]

You may not be able to get a court to look at your case this way. Some courts have rejected this approach outright.[466] Others have not settled the issue. If you are bringing a case about something that did not cause you physical injury, you should make it very clear that you are seeking damages for something other than mental or emotional injury. For example, if you are suing for being placed in segregation without due process for a long period, and you were not physically injured as a result, do not write in your complaint that "plaintiff seeks damages for mental anguish and psychological torture." You are better off with something like this:

> Plaintiff seeks compensatory damages for the loss of privileges and quality of life in his prison living conditions, and loss of the limited liberty enjoyed by prisoners, resulting from his segregated confinement, in that he was confined for 23 hours a day in a cell roughly 60 feet square, and deprived of most of his personal property as well as the ability to work, attend educational and vocational programs, watch television, associate with other prisoners, attend outdoor recreation in a congregate setting with the ability to engage in sports and other congregate recreational activities, attend meals with other prisoners, attend religious services [and whatever other privileges you may have lost].
>
> Plaintiff does not seek compensatory damages for mental or emotional distress.
>
> Plaintiff seeks punitive damages against defendant(s) [names] for their

1997e(e)'s requirements."); Benge v. Scalzo, No. CV 04-1687-PHX-DGC (CRP), 2008 U.S. Dist. LEXIS 40782, at *28 (D. Ariz. May 21, 2008) (stating that allegation of psychiatric neglect was not subject to § 1997e(e)); Wittkamper v. Arpaio, No. CV 05-2073-PHX-MHM-MHB, 2008 U.S. Dist. LEXIS 37475, at *5 (D. Ariz. May 6, 2008) (holding that allegations of unsanitary conditions were not subject to § 1997e(e)); Davis v. Arpaio, No. CV 07-0424-PHX-DGC (MEA), 2008 U.S. Dist. LEXIS 35288, at *6–7 (D. Ariz. Apr. 23, 2008) (holding allegations of denial of rights with respect to clothing, hygiene, legal calls, recreation, library access, medical problems, sleep deprivation, etc., were not subject to § 1997e(e)); Cockcroft v. Kirkland, No. C 05-1080 MHP (pr), 2008 U.S. Dist. LEXIS 29465, at *19 (N.D. Cal. Mar. 10, 2008) (stating that "the violation of a constitutional right has a compensatory value regardless of what the physical/emotional injuries are." Plaintiff had alleged exposure to waste from back-flushing toilet).

462. Smith v. Wade, 461 U.S. 30, 34, 103 S. Ct. 1625, 1629, 75 L. Ed. 2d 632, 638 (1983); Carey v. Piphus, 435 U.S. 247, 257–58, 98 S. Ct. 1042, 1049, 55 L. Ed. 2d 252, 260–61 (1978).

463. Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 Sedgwick's Treatise on Damages 50–51 (8th ed. 1891).

464. Kerman v. City of New York, 374 F.3d 93 (2d Cir. 2004).

465. Kerman v. City of New York, 374 F.3d 93, 125 (2d Cir. 2004).

466. Pearson v. Welborn, 471 F.3d 732, 744–45 (7th Cir. 2006); Royal v. Kautzky, 375 F.3d 720, 724 (8th Cir. 2004) (declining to award a prisoner who spent 60 days in segregation "some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights").

> willful and malicious conduct in confining the plaintiff to segregation after a hearing in which he was denied basic rights to due process of law.

If you did suffer some physical injury from being in segregation, you should still protect yourself (in case the court does not find your injury serious enough to satisfy the statute) with a damages demand similar to the one above that distinguishes mental and emotional injury from the other injuries you suffered. If you suffered physical injury, you should also substitute "Plaintiff also seeks compensatory damages for the mental or emotional distress resulting from his prolonged confinement in segregation without due process of law" for the second paragraph in the above example.

You would take a similar approach in demanding damages for any other kind of constitutional violation that didn't cause you physical injury, like deprivations of religious freedom, freedom of speech, placement in filthy and disgusting physical conditions, etc.

There is no guarantee of success if you take the above advice. Additionally, constitutional rights are very hard to value (meaning that courts will often just award nominal damages[467]), and the Supreme Court has cautioned that damage awards cannot be based on the "abstract 'importance' of a constitutional right."[468] However, courts have made compensatory awards for violations of First Amendment and other intangible rights based on particular circumstances and without reference to mental or emotional injury.[469] You should call this fact to the court's attention if prison officials argue that you can only recover nominal damages.

3. What is Physical Injury?

Prisoners must show physical injury in order to recover damages for mental or emotional injury, but courts have not fully explained what it takes to satisfy that requirement. The injury "must be more than *de minimis*, but need not be significant."[470] However, courts disagree over where the *de minimis* line is actually drawn. One appeals court has said that injury need not be observable or diagnosable, or require treatment by a medical care professional, to meet the § 1997e(e) standard.[471] But a much-cited district court decision holds that, under § 1997e(e):

> A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks... . [It is] more than the types and kinds of bruises and abrasions about which the Plaintiff complains. Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997e(e).[472]

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467. Williams v. Kaufman County, 352 F.3d 994, 1014-1115 (5th Cir. 2003) (noting frequency of nominal awards under § 1983)*; see also* Carlo v. City of Chino, 105 F.3d 493, 495 (9th Cir. 1997) (noting nominal award for denial of phone access to overnight detainee); Sockwell v. Phelps, 20 F.3d 187, 189 (5th Cir. 1994) (noting nominal award for racial segregation).

468. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310, 106 S. Ct. 2537, 2545, 91 L. Ed. 2d 249, 261 (1986).

469. *See*, *e.g.*, Sallier v. Brooks, 343 F.3d 868, 880 (6th Cir. 2003) (affirming jury award of $750 in compensatory damages for each instance of unlawful opening of legal mail); Goff v. Burton, 91 F.3d 1188, 1192 (8th Cir. 1996), *cert. denied*, 512 U.S. 1209, 114 S. Ct. 2684, 129 L. Ed. 2d 817 (2004) (affirming $2250 award at $10 a day for lost privileges resulting from a retaliatory transfer to a higher security prison); Vanscoy v. Hicks, 691 F. Supp. 1336, 1338 (M.D. Ala. 1988) (awarding $50 for pretextual exclusion from religious service, without evidence of mental anguish or suffering).

470. Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997). A "*de minimis*" injury is one where the harm is very minimal.

471. Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002); *accord* Mansoori v. Shaw, No. 99 C 6155, 2002 U.S. Dist. LEXIS 11670, at *11 (N.D. Ill. June 28, 2002) (stating that injury need not be shown by objective evidence). Another court has rejected an effort to read "long-term" into the physical injury requirement. Glenn v. Copeland, No. 5:02cv158-RS/WCS, 2006 U.S. Dist. LEXIS 38466, at *11 (N.D. Fla. June 9, 2006) (*unpublished*) ("Presumably ... *any* physical injury, even if short-term, is sufficient" to meet the statutory threshold).

472. Luong v. Hatt, 979 F. Supp. 481, 485–86 (N.D. Tex. 1997). *But see* Pierce v. County of Orange, 526 F.3d 1190, 1224 (9th Cir. 2008) ("Our court has rejected as overly restrictive the standard for *de minimis* injuries espoused by the Northern District of Texas in *Luong v. Hatt* ... ."; noting that bedsores and bladder infections resulting from inadequate accommodation of paraplegic's disabilities met *Luong* standard).

Not surprisingly, several courts have dismissed identifiable traumatic injuries as *de minimis*.[473] But others have found relatively superficial injuries to be actionable under § 1997e(e).[474]

Several courts have held that the physical manifestations of emotional distress are not physical injuries for purposes of this provision.[475] Decisions are split on the question of whether the risk of future injury meets the Section 1997e(e) standard.[476] Decisions are also split over how closely physical injury must be connected to mental or emotional injury for the latter to be actionable.[477]

A variety of injuries short of visible damage to body parts have been held to satisfy Section 1997e(e). Most courts (but not all) have held that sexual assault is a physical injury.[478] Other injuries that at least some courts have held satisfy the physical injury requirement include: bodily disturbances resulting from medication withdrawal, overdose or error;[479] the consequences of failure to treat illness or injury, both

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473. *See*, *e.g.*, Griggs v. Horton, No. 7:05-CV-220-R, 2008 U.S. Dist. LEXIS 24888, at *2–3 (N.D. Tex. Mar. 28, 2008) (*unpublished*) (holding that wrist abrasion and tenderness to rib cage were *de minimis* injuries); Diggs v. Emfinger, No. 07-1807 SECTION P, 2008 U.S. Dist. LEXIS 19140, at *9 (W.D. La. Jan. 10, 2008) (*unpublished*) (holding that allegation of an "open wound" causing "severe pain" was *de minimis* injury).

474. *See*, *e.g.*, Sanders v. Day, No. 5:06-CV-280(HL), 2008 U.S. Dist. LEXIS 21713, at *4 (M.D. Ga. Mar. 19, 2008) (*unpublished*) (holding allegation of kicking and using pepper spray on a handcuffed suspect was not *de minimis*); Edwards v. Miller, No. 06-cv-00933-MSK-MEH, 2007 U.S. Dist. LEXIS 22639, at *4 (D. Colo. Mar. 28, 2007) (*unpublished*) (holding that allegation of being punched in the face and bitten on the arm over a 10-minute period, causing damage to forehead and facial injuries, and leaving a lasting effect in the form of severe headaches, is more than *de minimis*); Cotney v. Bowers, No. 2:03-cv-1181-WKW (WO), 2006 U.S. Dist. LEXIS 69523, at *25 (M.D. Ala. Sept. 26, 2006) (*unpublished*) (holding bruised ribs that took weeks to heal could be found not *de minimis*).

475. Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998); Darvie v. Countryman, No. 9:08-CV-0715 (GLS/GHL), 2008 U.S. Dist. LEXIS 52797, at *23 (N.D.N.Y. July 10, 2008) (*unpublished*) (characterizing "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.," as "essentially emotional in nature"); Minifield v. Butikofer, et al.,, 298 F. Supp. 2d 900, 905 (N.D. Cal. 2004) ("Physical symptoms that are not sufficiently distinct from a plaintiff's allegations of emotional distress do not qualify as a prior showing of physical injury."); Todd v. Graves, 217 F. Supp. 2d 958, 960 (S.D. Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia and loss of appetite were not actionable). *But see* Montemayor v. Fed. Bureau of Prisons, No. 02-1283 (GK), 2005 U.S. Dist. LEXIS 18039, at *17 (D.D.C. Aug. 25, 2005) (*unpublished*) (holding that a heart attack resulting from physical and emotional stress caused by treatment in prison would meet the physical injury requirement).

476. *Compare* Zehner v. Trigg, 133 F.3d 459, 462–63 (7th Cir. 1997) (holding exposure to asbestos without claim of damages for physical injury is not actionable); *with* Pack v. Artuz, 348 F. Supp. 2d 63, 74 n.12 (S.D.N.Y. 2004) (holding proof of asbestos exposure posing a serious risk of harm would establish an 8th Amendment violation entitling the plaintiff to nominal damages regardless of present injury). *See also* Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993) (recognizing the possibility of an 8th Amendment claim based on future serious health problems because of a prison smoking policy).

477. *Compare* Noguera v. Hasty, No. 99 Civ. 8786 (KMW)(AJP), 2001 U.S. Dist. LEXIS 2458, at *14–15 (S.D.N.Y. Mar. 12, 2001) (*unpublished*) (holding that allegations of retaliation for reporting a rape by an officer were closely enough related to the rape that a separate physical injury need not be shown), *with* Purvis v. Johnson, 78 F. App'x 377, 380 (5th Cir. 2003) (*unpublished*) (holding that a prisoner alleging assault by a staff member could not also pursue a claim for obstruction of the post-assault investigation); Johnson v. Dallas County Sheriff Dept., No. 3:08-CV-0423-G, 2008 WL 2378269, at *3 (N.D. Tex. June 6, 2008) (*unpublished*) (alleged sexual assault was a physical injury, but conduct of officials after the assault did not inflict injury and was not actionable).

478. *See* Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding that "alleged sexual assaults," also described as "intrusive body searches," "qualify as physical injuries as a matter of common sense" and "would constitute more than de minimis injury"); Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (holding that sexual assault, "even if considered to be *de minimis* from a purely physical perspective, is plainly 'repugnant to the conscience of mankind.' Surely Congress intended the concept of 'physical injury' in § 1997e(e) to cover such a repugnant use of physical force."). *But see* Hancock v. Payne, No. 1:03cv671-JMR-JMR, 2006 U.S. Dist. LEXIS 1648, at *3, 7, 10 (S.D. Miss. Jan. 4, 2006) (*unpublished*) (holding prisoners who alleged they were "sexually battered ... by sodomy" did not satisfy § 1997e(e)). Non-physical sexual harassment is not physical injury. *See* Gillespie v. Smith, No. C07-3033-LRR, 2007 U.S. Dist. LEXIS 48498 , at *1, 4 (N.D. Iowa July 3, 2007) (*unpublished*).

479. Scarver v. Litscher, 371 F. Supp. 2d 986, 997–98 (W.D. Wis. 2005) (citing self-inflicted overdose of Thorazine as well as self-inflicted razor cut in holding prisoner with mental illness had alleged physical injury), *aff'd*, 434 F.3d 972 (7th Cir. 2006); Ziemba v. Armstrong, No. 3:02CV2185(DJS), 2004 U.S. Dist. LEXIS 432, at *7 (D. Conn. Jan. 14, 2004) (*unpublished*) (holding that allegation of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, met the physical injury requirement). *But see* Chatham v. Adcock, No. 3:05-CV-0127-JTC, 2007 U.S. Dist. LEXIS 72523, at *48–49 (N.D. Ga. Sept. 28, 2007) (*unpublished*) (holding hallucinations, anxiety, and nightmares resulting from denial of Xanax did not meet physical injury requirement).

immediate[480] and longer-term or prospective;[481] denial of adequate food;[482] food contamination or poisoning;[483] denial of exercise;[484] exposure to harmful substances;[485] infliction of pain or illness through extreme conditions of confinement,[486] physical abuse,[487] or denial of medical care;[488] and stillbirth or

480. *See* Munn v. Toney, 433 F.3d 1087, 1089, 2006 U.S. App. LEXIS 1073, at *4–5 (8th Cir. 2006) (holding claim of headaches, cramps, nosebleeds, and dizziness resulting from deprivation of blood pressure medication "does not fail ... for lack of physical injury"); DeRoche v. Funkhouse, No. CV 06-1428-PHX-MHM (MEA), 2008 U.S. Dist LEXIS 31166, at *17–19 (D. Ariz. Mar. 28, 2008) (*unpublished*) (further liver damage and daily pain, swelling, nausea and hypertension from lack of treatment for Hepatitis C satisfied the physical injury requirement); Clifton v. Eubank, 418 F. Supp. 2d 1243, 1248, 2006 U.S. Dist. LEXIS 29710, at *16–18 (D. Colo. 2006) (addressing "prolonged" pain attendant upon labor and stillbirth). *But see* Perez v. U.S., No. 1:04-CV-1944, 2008 U.S. Dist. LEXIS 42906, at *5–7 (M.D. Pa. May 30, 2008) (*unpublished*) (holding that temporary dizziness, headaches, weakness, back pain, and nausea resulting from an asthma attack, which did not require medical attention, were *de minimis*); Tuft v. Chaney, No. H-06-2529, 2007 U.S. Dist. LEXIS 83817, at *7–8 (S.D. Tex. Nov. 9, 2007) (*unpublished*) (holding complaints of "generalized 'fatigue' and 'stress'" resulting from MRSA and Hepatitis C were not physical injuries).

481. Young v. Beard, No. 06-160, 2007 WL 1549453, at *4 (W.D. Pa. May 22, 2007) (*unpublished*) (holding allegation that plaintiff sought damages for present and future injury from denial of cholesterol medication, and of testing of blood pressure, diabetes, and cholesterol more often than every six months, sufficed at the pleading stage), *vacated on other grounds*, 2007 WL 2012604 (W.D. Pa. July 3, 2007) (*unpublished*); Mejia v. Goord, No. 9:03-CV-124, 2005 U.S. Dist. LEXIS 32394, at *16–17 (N.D.N.Y. Aug. 16, 2005) (*unpublished*) (denying summary judgment where prisoner was denied a low-fat diet for potentially debilitating coronary condition). *But see* Cotter v. Dallas County Sheriff, No. 3:05-CV-2225-H, 2006 WL 1652714, at *3–4 (N.D. Tex. June 15, 2006) (holding staphylococcus exposure and a "dormant" staph infection were *de minimis*).

482. Williams v. Humphreys, No. CIV A CV504-053, 2005 U.S. Dist. LEXIS 44029, at *7 (S.D. Ga. Sept. 13, 2005) (*unpublished*) (holding allegation of 12-pound weight loss, abdominal pain, and nausea resulting from denial of pork substitute at meals sufficiently alleged physical injury). *But see* Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (holding weight loss resulting from disclosure of HIV-positive status did not meet the physical injury standard); Linehan v. Crosby, No. 4:06-cv-00225-MP-WCS, 2008 U.S. Dist. LEXIS 63738, at *5 (N.D. Fla. Aug. 20, 2008) (*unpublished*) (weight loss from denial of a kosher diet did not meet requirement); Green v. Padula, No. 9:07-0028-CMC-GCK, 2007 U.S. Dist. LEXIS 87038, at *5–9 (D.S.C., Sept. 25, 2007) (*unpublished*) (holding three-day denial of food and several hours' restraint during strip cell placement did not meet the physical injury requirement), *report and recommendation rejected in part on other grounds,* No. 9:07-0028-CMC-GMK, 2007 U.S. Dist. LEXIS 85370 (D.S.C., Nov. 19, 2007) (*unpublished*).

483. Gil v. U.S., No. 5:03-cv-198-Oc-10GRJ, 2006 U.S. Dist. LEXIS 8155, at *8 (M.D. Fla. Feb. 17, 2006) (*unpublished*) (awarding "intangible damages for pain and suffering, inconvenience, and loss of capacity for enjoyment of life" to prisoner who suffered food poisoning from tainted food). *But see* Mayes v. Travis State Jail, No. A-06-CA-709-SS, 2007 U.S. Dist. LEXIS 47317, at *13–14 (W.D. Tex. June 29, 2007) (*unpublished*) (holding diarrhea allegedly caused by spoiled food was *de minimis*).

484. Williams v. Goord, 111 F. Supp. 2d. 280, 291 n.4 (S.D.N.Y. 2000) (holding allegation of 28-day denial of exercise sufficiently alleged physical injury).

485. Smith v. Leonard, 244 F. App'x 583, 584 (5th Cir. 2007) (*unpublished*) (stating headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue, allegedly from exposure to toxic mold, might satisfy § 1997e(e) standard); Enigwe v. Zenk, No. 03-CV-854 (CBA), 2006 U.S. Dist. LEXIS 66022, at *15–20 (E.D.N.Y. Sept. 15, 2006) (*unpublished*) (declining to dismiss emotional injury claims in light of allegation of exposure to environmental tobacco smoke resulting in dizziness, uncontrollable coughing, lack of appetite, runny eyes and high blood pressure). *But see* Thompson v. Joyner, No. 5:06-CT-3013-FL, 2007 U.S. Dist. LEXIS 96515, at *14–15 (E.D.N.C. May 29, 2007) (*unpublished*) (pepper spraying was *de minimis*), *aff'd*, 251 F. App'x 826 (4th Cir. 2007); Hogg v. Johnson, No. 2:04-CV-0024, 2005 U.S. Dist. LEXIS 851, at *3, 7 (N.D. Tex. Jan. 21, 2005) (*unpublished*) (dismissing allegation that plaintiff was "gassed three times for asking for a mattress and standing up for his rights" for lack of physical injury).

486. Rinehart v. Alford, No. 3:02-CV-1565-R, 2003 U.S. Dist. LEXIS 1789, at *4–5 (N.D. Tex. Mar. 3, 2003) (*unpublished*) (holding that severe headaches and back pain, attributed by the jail nurse to bright 24-hour illumination and sleeping on a narrow bench, sufficiently alleged physical injury).

487. Payne v. Parnell, 246 F. App'x 884, 887–88 (5th Cir. 2007) (holding that being jabbed with a cattle prod is not *de minimis*); Lawson v. Hall, No. 2:07-0334, 2009 U.S. Dist. LEXIS 60924, at *10–11 (S.D. W.Va. July 16, 2009) (*unpublished*) (finding that the use of force may have been impermissible "even in the absence of severe injuries"); Zamboroski v. Karr, No. 04-73194, 2007 U.S. Dist. LEXIS 11140, at *15–16 (E.D. Mich. Feb. 16, 2007) (*unpublished*) (holding severe pain resulting from lack of mobility during nine months in restraints, along with rashes and scarring on his arms and inability to raise his arms over his head when released, were not *de minimis*). *But see* Dixon v. Toole, 225 F. App'x 797, 799 (11th Cir. 2007) (per curiam) (holding "mere bruising" from 17.5 hours in restraints was *de minimis*; prisoner actually complained of "welts").

488. Clifton v. Eubank, 418 F. Supp. 2d 1243, 1248 (D. Colo. 2006) (finding that the delay and insufficiency of medical treatment resulted in tangible, physical effects that provide sufficient basis for a cognizable claim); *But see* Leon v. Johnson, 96 F.Supp.2d 244, 248 (W.D.N.Y. 2000) (finding delayed receipt of HIV/AIDS medication did not constitute

miscarriage.[489] However, there are plenty of cases that seem to involve similar or equally serious conditions, but courts have held that these injuries do not satisfy the PLRA's physical injury requirement.[490] For example, some courts have explicitly stated that the alleged infliction of severe physical pain does not satisfy the statute.[491] Even outright torture might not be compensable as long as it is inflicted with sufficient care to leave no marks.[492] In addition, some courts have dismissed visible bodily injuries as *de minimis*.[493]

It is often difficult to understand what satisfies the physical injury requirement of the PLRA because most court decisions do not specifically define what "physical injury" means, other than "more than *de minimis*." One exception is a district court decision that cited dictionary definitions of "physical" and of "injury."[494] The district court found "physical" to mean "of or relating to the body," and "injury" to mean "an act that damages, harms, or hurts; an unjust or undeserved infliction of suffering or harm."[495] The court held that a reasonable jury could find that the statute was satisfied by exposure to noxious odors, including those of human wastes, and "dreadful" conditions of confinement (including inability to keep clean while menstruating, denial of clothing except for a paper gown, and exposure to ogling (staring) by male prison staff and construction workers).[496] This district court case gives a broad interpretation of the language of the statute. but other courts have not given any alternative approach that is helpful in assessing difficult cases.

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physical injury when no adverse health effects from delay were shown); Jones v. Sheahan, 2000 U.S. Dist. LEXIS 14130, at *22–23 (N.D.Ill. Sept. 22, 2000) (*unpublished*) (finding *de minimis* physical injury when plaintiff alleged delay of surgery of tumors resulted in "anguish and worry" that the tumors might be malignant, but no physical effects).

489. Clifton v. Eubank, 418 F. Supp. 2d 1243, 1245–51 (D. Colo. 2006) (holding that losing one's child and the pain attendant upon labor and stillbirth both separately meet the physical injury standard).

490. *See* Darvie v. Countryman, No. 9:08-CV-0715, 2008 U.S. Dist. LEXIS 52797, at *23–24 (N.D.N.Y. July 10, 2008) (*unpublished*) (characterizing "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.," as "essentially emotional in nature"); Trevino v. Johnson, No. 9:05cv171, 2005 U.S. Dist. LEXIS 40438, at *13–14 (E.D. Tex. Dec. 8, 2005) (*unpublished*) (holding a prisoner who was struck twice in the face and had his fingers pulled back had *de minimis* injury where he sustained only an abrasion to the forehead); Abney v. Valdez, No. 3-05-CV-1645-M, 2005 U.S. Dist. LEXIS 44390, at *6–7 (N.D. Tex. Oct. 27, 2005) (*unpublished*) (holding more frequent urination, near-daily migraine headaches, and itchiness and watery eyes did not meet the physical injury requirement).

491. Calderon v. Foster, No. 5:05-cv-00696, 2007 U.S. Dist. LEXIS 24505, at *27 (S.D. W.Va. Mar. 30, 2007) (*unpublished*) (pain, standing alone, is *de minimis*), *aff'd*, 264 F. App'x 286 (4th Cir. 2008) (*unpublished*); Ladd v. Dietz, No. 4:06cv3265, 2007 U.S. Dist. LEXIS 3782, at *1–4 (D. Neb. Jan. 17, 2007) (*unpublished*) (holding pain resulting from placing ear medication in plaintiff's eye was "not enough" to constitute physical injury); Clifton v. Eubank, 418 F. Supp. 2d 1243, 1246 (D. Colo. 2006); Olivas v. Corr. Corp. of Am., 408 F. Supp. 2d 251, 254, 259 (N.D. Tex. 2006) (dismissing as *de minimis* extreme pain resulting from delay in treatment of broken teeth with exposed nerve).

492. For example, in *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 2005), a prisoner complained that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to 10 hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. Jarriett v. Wilson, 414 F.3d 634, 644 (6th Cir. 2005) (dissenting opinion). The appeals court affirmed the dismissal of his claim as *de minimis* on the ground that the plaintiff did not complain about his leg upon release or shortly thereafter when he saw medical staff. Jarriett v. Wilson, 414 F.3d 634, 643 (6th Cir. 2005). *Jarriett* conflicts with *Payne v. Parnell*, 246 F. App'x 884 (5th Cir. 2007) (*unpublished*), in which the court, referring both to § 1997e(e) and the 8th Amendment, held that being jabbed with a cattle prod was not *de minimis*, despite the lack of long-term damage, in part because it was "calculated to produce real physical harm." Payne v. Parnell, No. 05-20687, 246 F. App'x 884, 889 (5th Cir. 2007).

493. *See, e.g.*, Gibson v. Galaza, No. CVF00 5381 AWI WMW P, 2006 U.S. Dist. LEXIS 21679, at *27–28 (E.D. Cal. Mar. 29, 2006) (*unpublished*) (holding multiple abrasions, a small cut on lip, and a bruised right knee are *de minimis*); *Contra* Cotney v. Bowers, No. 2:03-cv-1181-WKW (WO), 2006 U.S. Dist LEXIS 69523, at *25 (M.D. Ala. Sept. 26, 2006) (*unpublished*) (holding bruised ribs that took weeks to heal was not *de minimis*); Hardin v. Fullenkamp, No. 4-99-CV-80723, 2001 U.S. Dist. LEXIS 22335, at *19–21 (S.D. Iowa June 22, 2001) (*unpublished*) (holding evidence prisoner was cut and bruised and other prisoners wrote affidavits that they saw him beaten and limping met the standard).

494. Waters v. Andrews, No. 97-CV-407, 2000 U.S. Dist. LEXIS 16004, at *25 (W.D.N.Y. Oct. 16, 2000) (*unpublished*).

495. Waters v. Andrews, No. 97-CV-407, 2000 U.S. Dist. LEXIS 16004, at *25 (W.D.N.Y. Oct. 16, 2000) (*unpublished*).

496. Waters v. Andrews, No. 97-CV-407, 2000 U.S. Dist. LEXIS 16004, at *25 (W.D.N.Y. Oct. 16, 2000) (*unpublished*). *But see* Alexander v. Tippah County, Miss., 351 F.3d 626, 631 (5th Cir. 2003) (holding that prisoner who vomited as a result of exposure to noxious odors in a filthy holding cell full of raw sewage suffered only a *de minimis* injury, if any); Parter v. Valone, No. 06-CV-10561, 2006 U.S. Dist. LEXIS 96808, at *7–8 (E.D. Mich. Oct. 3, 2006) (*unpublished*) (holding a prisoner who was denied the use of a bathroom and urinated on himself suffered only mental or

There may be a solution to the lack of clarity in defining physical injury under the PLRA. 18 U.S.C. § 242 (2006) is a federal statute that makes it a crime for someone acting under color of state law to deprive another person of their federal civil rights.[497] Section 242 requires a showing of "bodily injury," but does not define "bodily injury" within the statute.[498] However, several other federal criminal statutes define "bodily injury" as meaning: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary."[499] Thus, the definition of "bodily injury" in other federal statues could also be applied in Section 1997e(e).[500] As far as we know, no court has yet considered this idea. If you are faced with a claim that your injury isn't severe enough to satisfy the PLRA, but it falls within the statutory definition of bodily injury, you could highlight the definition of "bodily injury" in 18 U.S.C. §§ 831(f)(5), 1365(g)(4), 1515(a)(5), and 1864(d)(2) (2006), and argue that there is no difference between "bodily injury" and "physical injury" under the PLRA.

G. Attorneys' Fees

The PLRA limits the attorneys' fees prisoners can recover. These limitations do not directly affect you if you are proceeding *pro se*, but they do affect your ability to get a lawyer.

Fees under 42 U.S.C. § 1988[501] are barred in "any action brought by a prisoner"[502] except when the fees are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" under a statute that allows fees to be awarded.[503] It is unclear whether this provision also bars fee awards in cases that are settled, rather than cases that go to trial. Several courts have held injunctive proceedings that are settled may support an award of fees if there are findings of legal violation or a record that suggests there was a violation of plaintiff's rights, but the plaintiff decided to settle the claim without additional litigation.[504] Thus, while a plaintiff does not need to *have proved* a claim to be eligible for fees, the fees must have accrued in the process of *proving* a violation.[505] Fees may also be awarded if they are "directly and reasonably

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emotional injury). *Cf.* Glaspy v. Malicoat, 134 F. Supp. 2d 890, 894–95 (W.D. Mich. 2001) (treating denial of toilet access to a non-prisoner as a deprivation of liberty).

497. 18 U.S.C. § 242 (2006).

498. 18 U.S.C. § 242 (2006) (providing "if bodily injury results from the acts committed in violation of this section ... [the defendant] shall be fined under this title or imprisoned not more than ten years, or both").

499. 18 U.S.C. § 831(f)(5) (2006); *accord* 18 U.S.C. § 1365(g)(4) (2006); 18 U.S.C. § 1515(a)(5) (2006); 18 U.S.C. § 1864(d)(2) (2006).

500. "When Congress uses, but does not define a particular word, it is presumed to have adopted that word's established meaning." United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992) (citing Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 806, 109 S. Ct. 1500, 1503, 103 L. Ed. 2d 891, 899 (1989)). Although § 1997e(e) uses the word "physical" rather than "bodily," it is hard to see what real difference that makes.

501. 42 U.S.C. § 1988 (2010) is the statute that authorizes attorneys' fees for actions filed under 42 U.S.C. § 1983.

502. For purposes of these provisions, ex-prisoners are not prisoners, and a case filed after the plaintiff's release is not governed by the PLRA fees provisions. Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999) (dismissing a former inmate's action because he was no longer considered a "prisoner" as required by the relevant provision); Doe v. Washington County, 150 F.3d 920, 924 (8th Cir. 1998) (PLRA provisions about attorney's fees do not apply to a plaintiff who was not a prisoner at the time of filing his suit). The attorneys' fees provisions are not limited to cases about prison conditions. Robbins v. Chronister, 435 F.3d 1238, 1241–44 (10th Cir. 2006) (en banc) (applying PLRA attorney's fees restrictions to a case about events before prisoner's incarceration); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 794–96 (11th Cir. 2003) (applying PLRA restrictions to case about parole eligibility hearings and the length of his confinement, and not restricting it to lawsuits about prison conditions).

503. 42 U.S.C. § 1997e(d)(1)(A) (2009). *See*, *e.g.*, Armstrong v. Davis, 318 F.3d 965, 973–74 (9th Cir. 2003) (holding that fees in Americans with Disabilities Act and Rehabilitation Act suits are not governed by the PLRA fees limitations).

504. *See* Laube v. Allen, 506 F. Supp. 2d 969, 979–80 (M.D. Ala. Aug. 31, 2007) (holding that fees may be awarded for injunctive settlements to the extent they first satisfy the PLRA's "need-narrowness-intrusiveness" requirement that the prospective relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right); Lozeau v. Lake County, Mont., 98 F. Supp. 2d 1157, 1168, 1170 (D. Mont. 2000) ("Defendants cannot settle a case, promise reform or continued compliance, admit the previous existence of illegal conditions, admit that Plaintiffs' legal action actually brought the illegal conditions to the attention of those in a position to change them, and subsequently allege a failure of proof.").

505. Laube v. Allen, 506 F. Supp. 2d 969, 980 (M.D. Ala. Aug. 31, 2007) ("[T]he PLRA's attorney's-fee language does not require that the fee be incurred in *having proved* an actual violation of the plaintiff's rights, only that the fee be incurred in *proving* a violation.").

incurred in enforcing the relief ordered for the violation."[506] The court will determine fees awarded in proportion to the injunctive relief, because the statute says that fees must be "proportionately related to the court ordered relief for the violation,"[507] but does not specify what "proportionate" means. However, defendants may be required to pay fee awards of up to 150 percent of any damages awarded—but no more.[508]

Hourly rates for lawyers are limited to 150 percent of the Criminal Justice Act ("CJA") rates for criminal defense representation set in 18 U.S.C. § 3006A (2004).[509] Unfortunately, this rate is much lower than the market rates most lawyers usually charge and that are awarded in non-prisoner cases, and they probably discourage many lawyers from taking prisoners' cases.[510]

Prisoners are more directly affected by the provision that says that "up to" twenty-five percent of monetary judgment can be applied to the fee award. If the fee award is not greater than 150 percent of the judgment, defendants must pay the rest.[511] Most courts have held that the term "up to" allows the courts some discretion in determining how much of a winning prisoner-plaintiff's damage award must be given to attorneys' fees.[512] Several courts have mistakenly assumed that the twenty-five percent figure is mandatory, or have applied it without discussing the question.[513]

A majority of courts have rejected arguments that attorney fee restrictions deny prisoners with equal protection.[514]

H. Waiver of Reply

The PLRA provides:

> (g) Waiver of Reply.
> (1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under [42 U.S.C. § 1983] ... or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

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506. 42 U.S.C. § 1997e(d)(1)(B)(ii) (2009)*; see* Ilick v. Miller, 68 F. Supp. 2d 1169, 1173 n. 1 (D. Nev. 1999) (stating that there was sufficient evidence to demonstrate that the post-PLRA fees were "directly and reasonably" incurred in establishing the violation of the prisoner's rights); West v. Manson, 163 F. Supp. 2d 116, 120 (D. Conn. 2001) (holding fees are recoverable for post-judgment monitoring).

507. 42 U.S.C. § 1997e(d)(1)(B)(i) (2009).

508. 42 U.S.C. § 1997e(d)(2) (2009); *see* Pearson v. Welborn, 471 F.3d 732, 742–44 (7th Cir. 2006) (holding fees limited to $1.50 where plaintiff recovered only $1.00 in nominal damages); Boivin v. Black, 225 F.3d 36, 40–46 (1st Cir. 2000) (going through an extensive analysis of the constitutional basis for the fee cap and arriving at the same conclusion, that fees are limited to 150 percent of recovered nominal damages). This 150 percent limit does not apply to cases in which the plaintiff seeks and receives an injunction as well as damages. Walker v. Bain, 257 F.3d 660, 667 n.2 (6th Cir. 2001) (noting that §1997e(d)(2) does not apply if non-monetary relief is granted).

509. 42 U.S.C. § 1997e(d)(3) (2006).

511. Although the hourly rate is higher than the Criminal Justice Act rates (up to 150 percent), lawyers defending clients under the CJA get paid for their time whether they win or lose. 42 U.S.C. § 1997e(d)(3)(2004).

511. 42 U.S.C. § 1997e(d)(2) (2009); *see* Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a case resolved by "so ordered" stipulation was not governed by the 150 percent limit, since there was no "money judgment").

512. *See* Boesing v. Hunter, 540 F.3d 886, 892 (8th Cir. 2008) (affirming district court's application of one percent of $25,000 recovery); Siggers-El v. Barlow, 433 F. Supp. 2d 811, 822–23 (E.D. Mich. 2006) (applying $1.00 of the recovery to attorneys' fees, noting that the jury found that defendants had lied about their conduct and awarded significant damages as punishment and deterrent).

513. *See* Jackson v. Austin, 267 F. Supp. 2d 1059, 1071 (D. Kan. 2003) (holding that "the Court must automatically apply plaintiff's fee award against his damages to the extent that it does not exceed 25 per cent [sic] of the damages"); Beckford v. Irvin, 60 F. Supp. 2d 85, 89–90 (W.D.N.Y. 1999) (applying twenty-five percent without discussion).

514. Johnson v. Daley, 339 F.3d 582, 597 (7th Cir. 2003) (en banc) (finding no constitutional violation of equal protection); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 796–98 (11th Cir. 2003) (holding that §1997e(d) passed the rational basis test and was therefore constitutional); Carbonell v. Acrish, 154 F. Supp. 2d 552, 561–66 (S.D.N.Y. 2001) (upholding 150 percent limit as a rational means to achieve the Congress's end).

> (2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.[515]

This provision means that in prisoners' suits, the defendants do not have to answer the complaint unless the court tells them to answer. Courts can only do this if the plaintiff has a "reasonable opportunity to prevail on the merits."[516] In practice, courts generally direct defendants to answer if the case survives initial screening or motions to dismiss, which means that the complaint states a claim for which relief can be granted.[517]

If you amend the complaint to add parties after the initial screening, the court might not direct the defendants to answer. When you move to amend a complaint, always ask the court to direct the defendants to answer and grant your motion to amend. If you amend the complaint as a matter of course (when no motion is required) and the defendants do not answer, then you may need to move to direct them to answer.[518]

The provision that "[n]o relief shall be granted to the plaintiff unless a reply has been filed" raises a question about default judgments, which ordinarily are granted if a defendant fails to respond to the complaint.[519] Although it is possible to read this provision as saying courts cannot grant default judgments if defendants refuse to reply, generally courts continue to grant default judgments in prison cases.[520] If the defendants in your case do not respond, and the court does not want to enter a default judgment, try moving to hold the defendants in contempt of the order to reply to the complaint, and ask the court for contempt damages equal to what you would get if the case went forward.[521]

I. Hearings by Telecommunication and at Prisons

The PLRA added a new section to the Civil Rights of Institutionalized Persons Act ("CRIPA"):

> (f) Hearings.
> (1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.
>
> (2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the

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515. 42 U.S.C. § 1997e(g) (2009).

516. 42 U.S.C. § 1997e(g) (2009).

517. *See* Daniel v. Power, No. 04-CV-789-DRH, 2005 U.S. Dist. LEXIS 17235, at *6 (S.D. Ill. July 20, 2005) (*unpublished*) (holding that after an initial screening, "[d]efendants are ORDERED to timely file an appropriate responsive pleading to the Amended Complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g)").

518. Amendment by motion and as a matter of course are discussed in Fed. R. Civ. P. 15.

519. Fed. R. Civ. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.").

520. *See* Cameron v. Myers, 569 F. Supp. 2d 762, 762 (N.D. Ind. 2008) (recommending a default judgment in favor of a *pro se* prisoner plaintiff).

521. Concerning contempt damages, *see* Hutto v. Finney, 437 U.S. 678, 691 (1978) ("If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance."); Benjamin v. Sielaff, 752 F. Supp. 140, 148–49 (S.D.N.Y. 1990) (holding a prison accountable for compensatory damages to be paid to any member of the prisoner plaintiff class who, in the future, as a new admission, is held in a non-housing area for more than twenty-four hours; Feliciano v. Colon, 704 F. Supp. 16, 20 (D.P.R. 1988) ("Sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce defendants into compliance with the Court's order, and to compensate the complainant for losses sustained.").

> court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.[522]

For years, many federal courts have been using telephones and videos in court proceedings and holding proceedings at prisons.[523] But, the provision concerning hearings at the prison raises new legal and practical problems. The statute refers to holding "hearings" but not "trials" at the prison, leaving it unclear whether evidentiary proceedings are included.[524] Conducting a trial or evidentiary proceeding by video conferencing raises serious questions of fairness, particularly in jury trials. In *United States v. Baker*,[525] a non-PLRA case, the Fourth Circuit Court of Appeals upheld the constitutionality of holding prisoners' psychiatric commitment hearings by video. However, the court but was careful to note that such decisions are generally based on expert testimony and do not depend either on the demeanor of the witnesses or the "impression" made by the person being committed, and that the proceeding does not involve fact-finding in the usual sense.[526] That description does not fit most evidentiary proceedings in prisoner cases, and courts have traditionally expressed a strong preference for having prisoner plaintiffs physically present in court for trial.[527]

If the court does hold a hearing by telephone or video in your case, it is your responsibility to subpoena any witnesses you wish to present or cross-examine, just as in a live hearing in the courtroom.[528]

J. Revocation of Earned Release Credit

The PLRA adds a new section concerning earned release credit:

> § 1932. Revocation of earned release credit
>
> In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that:
>
> (1) the claim was filed for a malicious purpose;
>
> (2) the claim was filed solely to harass the party against which it was filed; or
>
> (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.[529]

This provision, which applies only to federal prisoners, allows a court to take away good time credit based on what a court thinks about a prisoner's litigation activities. Though it raises substantial questions about due process of law, the statute provides no procedural protections. It is not clear what due process requirements would apply. The only reported decisions applying this provision do not discuss due process.[530]

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522. 42 U.S.C. § 1997e(f) (2000); *see* Moss v. Gomez, No. 97-56234, 1998 U.S. App. LEXIS 27753, at *4 (9th Cir. Oct. 26, 1998) (*unpublished*) (9th Cir. 1998) (holding district court should have considered teleconferencing as an alternative to producing prisoner witness who was a security risk).

523. *See*, *e.g.*, Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991) (noting use of telephone evidentiary hearing to assess frivolousness of claim).

524. *But see* Bickham v. Blair, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*) (noting that an evidentiary hearing was held by telephone); Edwards v. Logan, 38 F. Supp. 2d 463, 466–67 (W.D. Va. 1999) (authorizing video jury trial for Virginia prisoner held in New Mexico; analogizing to PLRA's provisions concerning pretrial proceedings).

525. United States v. Baker, 45 F.3d 837 (4th Cir. 1994).

526. United States v. Baker, 45 F.3d 837, 845 (4th Cir. 1994).

527. Hernandez v. Whiting, 881 F.2d 768, 770–72 (9th Cir. 1989); Muhammad v. Warden, Balt. City Jail, 849 F.2d 107, 113 (4th Cir. 1988); Poole v. Lambert, 819 F.2d 1025, 1029 (11th Cir. 1987).

528. *See* Bickham v. Blair, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*).

529. 28 U.S.C. § 1932 (2006). Note that there is another statute with the same Section number—entitled Judicial Panel on Multidistrict Litigation—but this citation is correct.

530. *See* Rice v. Nat'l Sec. Council, 244 F. Supp. 2d 594, 597 (D.S.C. 2001), *aff'd*, 46 F. App'x 212 (4th Cir. 2002).

This provision of the PLRA governs proceedings in federal court and presumably applies in state court. There appear to be no decisions yet on this issue, however.

K. Diversion of Damage Awards

The PLRA includes two provisions about awarding damages in a successful suit brought by a prisoner:

> Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.
>
> Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of any such compensatory damages.[531]

There is very little case law about these statutes.[532] One important question is whether the phrase "compensatory damages *awarded*" includes settlement of damage claims. As a matter of plain English, it would seem not, but we are not aware of any relevant decisions.

L. Injunctions

The PLRA contains a number of provisions restricting courts' abilities to enter and to maintain "prospective relief" (mostly injunctions, or court orders) in prison cases.[533]

1. Entry of Prospective Relief

Under the PLRA, courts may not enter prospective relief in prison cases unless:

> the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[534]

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531. Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, § 808, 110 Stat. 1321–66, 1321–76 (1996). This provision is not codified, and appears after 18 U.S.C. § 3626 (2000).

532. *See* Loucony v. Kupec, No. 3:98 CV 61(JGM), 2000 U.S. Dist. LEXIS 6620, at *4–5 (D. Conn. Feb. 17, 2000) (*unpublished*) (holding a person sued after release from prison was not a "prisoner" and the statute did not apply to him).

533. One federal appeals court has held that under the PLRA's language, punitive damages are "prospective relief" subject to the PLRA's limitations. Johnson v. Breeden, 280 F.3d 1308, 1325 (11th Cir. 2002). Other courts have mostly ignored this decision. We also think it is wrong because the prospective relief provisions are clearly written to deal with injunctions and make very little sense applied to punitive damages. *See, e.g.*, Tate v. Dragovich, No. 96-4495, 2003 U.S. Dist. LEXIS 14353, at *20 n.7 (E.D. Pa. Aug. 14, 2003) ("At first blush, it seems that one can neither 'narrowly draw' punitive damages, nor adjust them to better 'correct' a violation of rights, nor render them any more or less 'intrusive.'"). One court has gone further than *Breeden* and has held that the PLRA has abolished punitive damages entirely. Margo v. Bedford County, No. 3:04-cv-147-KAP-KRG, 2008 U.S. Dist. LEXIS 25625, at *7 (W.D.Pa. Mar. 31, 2008). We see no basis for this conclusion.

534. 18 U.S.C. § 3626(a) (2006)*; see* Morales Feliciano v. Rullan, 378 F.3d 42, 54–56 (1st Cir. 2004) (finding remedy of privatization of medical care appropriate in light of failure of less intrusive measures; "[d]rastic times call for drastic measures"); Gomez v. Vernon, 255 F.3d 1118, 1130–1131 (9th Cir. 2001) (affirming injunction benefiting named individuals; though an unconstitutional policy had been found, it had been directed at those persons); Morrison v. Garraghty, 239 F.3d 648, 661 (4th Cir. 2001) (affirming injunction prohibiting the defendants from "refusing [the plaintiff] a religious exemption from existing property restrictions *solely* on the basis of his lack of membership in the Native American race.").

This standard is not very different from the law in effect before the PLRA,[535] though the requirement of specific court findings is new. The statute also bars injunctive relief requiring state or local officials to exceed their local authority unless federal law requires such relief, such relief is necessary to fix a federal law violation, and no other relief will correct the violation.[536] This provision also appears to be consistent with prior law.[537] The PLRA does limit federal court to prospective relief which corrects violations of "*federal* rights," which means a court cannot enter an injunction based on a violation of state or local law.[538]

2. Preliminary Injunctions

Preliminary injunctions must meet the same standards as for other prospective relief, and automatically expire after ninety days unless the court makes the order final.[539] But, a court may grant a new preliminary injunction after the first has expired if the plaintiff shows that the conditions justifying the first injunction still exist.[540]

3. Prisoner Release Orders

The PLRA contains special rules for "prisoner release orders," which it defines as "any order ... that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison."[541] Such orders are permitted only if previous, less intrusive relief has failed to remedy the federal law violation in a reasonable time.[542] In other words, population limit is a last resort, not a first step. A release order must be supported by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and no other relief will remedy the violation.[543] One court has held that these requirements for prison release orders do not apply when the prison is trying to modify an order that existed before the PLRA was enacted.[544]

The PLRA requires three-judge courts to issue prisoner release orders, which either the party asking for the order or the district court itself may request.[545] It is not always clear how the three-judge court requirement applies when a person is asking for different kinds of relief.[546] One court refused to convene a three-judge court to consider an individual prisoner's "[m]otion for [his own] Prisoner Release" that failed to

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535. *See* Gilmore v. California, 220 F.3d 987, 998 (9th Cir. 2000) (holding that courts are required to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief ... limiting the courts' power to grant preliminary injunctive relief"); Smith v. Ark. Dept. of Corr., 103 F.3d 637, 647 (8th Cir. 1996) (holding PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction").

536. 18 U.S.C. § 3626(a)(1)(B) (2006); *see* Perez v. Hickman, No. C 05-05241 JSW, 2007 U.S. Dist. LEXIS 44432, at *7–10, 16–17 (N.D. Cal. June 12, 2007) (ordering increase in salaries paid to prison dentists, contrary to state law, and finding PLRA standards met).

537. *See*, *e.g.*, Stone v. City & County of San Francisco, 968 F.2d 850, 861–65 (9th Cir. 1992) (holding, pre-PLRA, that provisions of consent decree that overrode state law were not the least intrusive option available and were thus prohibited). *See also* LaShawn A. v. Barry, 144 F.3d 847, 854 (D.C. Cir. 1998) (stating, pre-PLRA, that "[d]isregarding local law ... is a grave step and should not be taken unless absolutely necessary").

538. Handberry v. Thompson, 446 F.3d 335, 344–46 (2d Cir. 2006) (holding that in prison cases the PLRA overrides federal courts' "supplemental jurisdiction" to enforce state law).

539. 18 U.S.C. § 3626(a)(2) (2006).

540. *See* Mayweathers v. Newland, 258 F.3d 930, 936 (9th Cir. 2001) (upholding an injunction when the defendants were subject to the injunction at the time of appeal, the injunctions were identical, and they raised no new issues unable to be reviewed by the court on appeal).

541. 18 U.S.C. § 3626(g)(4) (2006). Courts disagree on whether a provision that limits the prison population automatically counts as a prisoner release order. *See* Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999) (noting that a maximum population provision is a prisoner release order). *But see* Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 883 (D. Mass.) (holding that a population cap is not a prisoner release order without an order to release), *aff'd as modified and remanded on other grounds*, 129 F.3d 649 (1st Cir. 1997).

542. 18 U.S.C. § 3626(a)(3)(A) (2006).

543. 18 U.S.C. §§ 3626(a)(3)(E)(i)–(ii) (2006).

544. Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999) (citing 18 U.S.C. § 3626(a)(3)(A) (2006) and finding that the modification request could not be based on the PLRA because the order existed before the Act; however, the court found that PLRA rules about *terminating* relief could still apply).

545. 18 U.S.C. §§ 3626(a)(3)(B)–(D) (2006).

546. *See* Tyler v. Murphy, 135 F.3d 594, 598 (8th Cir. 1998) (finding that it is unclear under PLRA whether "findings that will avoid termination of an existing injunction must in all cases be made by a three-judge court if the injunction includes a prisoner release order").

allege, except in conclusory terms, how overcrowding violated his constitutional rights.[547] The prisoner release order procedure is rarely used.

The PLRA permits state and local officials to intervene to oppose prisoner release orders.[548]

4. Termination of Judgments

Under the PLRA, court orders in prison litigation, including consent judgments (a judgment the parties agree to), may be terminated after two years unless the court finds that there is a "current and ongoing violation" of federal law. After this two-year period, orders may be challenged every year.[549] An order may be challenged at any time if it was entered without the court finding that it "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[550] Orders without these findings may be terminated immediately unless a current and ongoing federal law violation is shown. A "violation of the Federal right" means a violation of the federal Constitution, statutes, or regulations. Violation of the court order itself is not enough.[551]

Constitutional challenges asserting that the provision violates the separation of powers, the Equal Protection Clause, and the Due Process Clause have been unsuccessful.[552]

5. Automatic Stay

The PLRA provides that courts must promptly rule on motions to terminate prospective relief. The PLRA also says that such prospective relief is automatically stayed (postponed) on the thirtieth day after the motion is made. The thirty days can be extended to sixty days if good cause is shown. The "general congestion of the court's calendar" is not considered a good cause.[553] The Supreme Court has held that the automatic stay provision does not violate the principle of separation of powers in the Constitution [554]

6. Settlements

Under the PLRA, settlements that include prospective relief must meet the same requirements that the PLRA establishes for other court orders.[555] In other words, the court must find that these settlements are narrowly drawn, necessary to correct federal law violations, and the least intrusive way of doing so. (In practice, parties who are settling agree to these findings, and the court usually approves them.) Parties can enter into "private settlement agreements" that do not meet the PLRA standards, but these agreements cannot be enforced in federal court.[556] In effect, they must be contracts enforceable in state court. The PLRA does not restrict settlements not involving prospective relief (i.e., settlements involving damages, not other relief).

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547. Pangburn v. Goord, No. 98-CV-0309E(H), 1999 U.S. Dist. LEXIS 5143, at *22–23 (W.D.N.Y. Apr. 12, 1999) (*unpublished*).

548. 18 U.S.C. § 3626(a)(3)(F) (2006); *see* Ruiz v. Estelle, 161 F.3d 814, 818–21 (5th Cir. 1998) (holding that PLRA grants individual legislators the right to intervene in prison litigation).

549. 18 U.S.C. § 3626(b)(1)(3) (2006).

550. 18 U.S.C. § 3626(b)(2) (2006); *see* Tyler v. Murphy, 135 F.3d 594, 598 (8th Cir. 1998) (noting that absent the required findings, immediate termination provision rather than two-year provision applies).

551. Plyler v. Moore, 100 F.3d 365, 370 (4th Cir. 1996) (holding that a violation of prisoners' rights under the consent decree were not violations of a "federal right" under the PLRA); Imprisoned Citizens Union v. Sharp, 11 F. Supp. 2d 586, 608–09 (E.D. Pa. 1998) (holding that prisoner-plaintiffs could not stop the prison from terminating the decree simply because the prison had violated that order), *aff'd*, 169 F.3d 178 (3d Cir. 1999).

552. Court of appeals decisions and district court decisions upholding the statute include Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

553. 18 U.S.C. § 3626(e)(3) (2006).

554. Miller v. French, 530 U.S. 327, 348, 120 S. Ct. 2246, 2259 147 L. Ed. 2d 326, 343 (2000).

555. 18 U.S.C. § 3626(c)(1) (2006).

556. 18 U.S.C. § 3626(c)(2) (2006).

M. Conclusion

By passing the Prison Litigation Reform Act, Congress has made it more difficult for you to have your claims heard in federal court. Although you might feel that some of its provisions are unfair, you cannot simply disregard the PLRA's strict requirements. To give yourself the best possible chance of getting your claim into federal court and having it resolved favorably, you will have to familiarize yourself with all the portions of the PLRA that are relevant for your case.

In going back through this Chapter, you should pay special attention to the "three strikes" provisions of the PLRA (see Part C) and to the new administrative procedure exhaustion requirements (see Part E). The three strikes rules should encourage you to consider your decision whether to bring suit very carefully, since if a court decides you have brought a frivolous suit, your ability to bring future suits may be jeopardized. You must also be certain you fully understand the exhaustion requirements, since courts *will not* allow your suit to proceed unless you have made every effort to resolve your grievance through administrative procedures.

A JAILHOUSE LAWYER'S MANUAL

Chapter 15:
Inmate Grievance Procedures

Columbia Human Rights Law Review

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CHAPTER 15

INMATE GRIEVANCE PROCEDURES*

A. Introduction

If you have a complaint concerning your treatment at a state correctional facility, you must consult the state's formal inmate grievance procedures. According to the Prison Litigation Reform Act ("PLRA"), you must exhaust (use up) all of the available grievance procedures before you can take your complaint to court.[1] *Before* filing any type of lawsuit, you should carefully read *JLM*, Chapter 14, "The Prison Litigation Reform Act." In New York, for example, state law and the New York Inmate Grievance Program ("IGP") require the Commissioner of the Department of Correctional Services ("DOCS") to establish a committee in each correctional facility to address prisoner grievances.[2] The purpose of the IGP is to "provide each inmate an orderly, fair, simple, and expeditious method for resolving grievances" and "to promote mediation and conflict reduction in the resolution of grievances."[3] The details of this program appear in DOCS Directives 4040 and 4041,[4] and in Title 7 of the Codes, Rules, and Regulations of the State of New York.[5] Directive 4002 describes the Inmate Liaison Committee ("ILC"), which is concerned with prisoners' general welfare.[6]

This Chapter will help you make an informed decision about how to proceed with your grievance, using New York's IGP as an example. Part B discusses the PLRA requirement that you go through the entire complaint process in your prison before taking your claim to federal court. Part C defines the term "grievance," discusses what kinds of claims are non-grievable (meaning that you cannot use the IGP), and provides you with an overview on how to write your grievance. Part D describes the basic structure of the New York IGP. Part E looks closely at the relevant New York DOCS directives, explaining specific steps to follow when filing a grievance through the New York IGP. Part F discusses the publication of rules for other states' inmate grievance procedures and how to find these rules.

If you are a foreign national (not a U.S. citizen) and are having problems with prison conditions, or need to contact someone in your home country, you may want to contact your consulate. Consult *JLM*, Immigration and Consular Access Supplement, for more information on how to do raise these claims.

B. Exhausting Your Administrative Remedies

The PLRA requires you to go through your prison's entire complaint process before you can bring a federal court claim under 42 U.S.C. § 1983 (a federal law that deals with prisoners' complaints).[7] Therefore,

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* This Chapter was revised by Erin LaFarge based in part on previous versions by Sarah Martinez, Samuel J. Levine, Wendy Lang, Patricia A. Sheehan, and Caroline Lim Starbird.

1. 42 U.S.C. § 1997e(a) (2006) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

2. N.Y. Correct. Law § 139(1) (McKinney 2003). This law was enacted in response to the 1971 Attica Prison uprising. The McKay Commission looked into the cause of that uprising and recommended procedures to resolve prison issues through an administrative process. *See also* Patterson v. Smith, 53 N.Y.2d 98, 101, 423 N.E.2d 23, 25, 440 N.Y.S.2d 600, 602 (1981).

3. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.1(a)–(b) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.1(a)–(b) (2006).

4. See Chapter 7 of the *JLM* to learn how to obtain a copy of these directives through the state Freedom of Information Law ("FOIL") and the federal Freedom of Information Act ("FOIA"). In addition, ask the librarian if your prison law library has copies of the directive.

5. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 701–02 (2010). Ask the librarian if your prison law library has this code.

6. This directive has not yet been codified in the New York Code as of the *JLM* print date. See *JLM*, Chapter 7 to learn how to obtain a copy of this directive through the state Freedom of Information Law ("FOIL") and the federal Freedom of Information Act ("FOIA"). In addition, ask the librarian if your prison law library has a copy of the directive.

7. 42 U.S.C. § 1997e(a) (2006). Note that the PLRA exhaustion requirement applies only to cases filed on or after April 26, 1996 (the effective date of the PLRA), including cases where the actions complained of occurred before the enactment. It does not apply to actions or appeals filed *before* its passage. *See* Ancrum v. St. Barnabas Hosp., 301 A.D.2d 474, 475, 755 N.Y.S.2d 28, 31 (1st Dept. 2003) (holding that the PLRA exhaustion requirement applies to all prisoners who sue while they are incarcerated—including prisoners who are released before a ruling on their suit is issued); White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (finding prisoner's claims were properly dismissed when he had failed to exhaust his administrative remedies). See Chapter 16 of the *JLM* for more information on 42 U.S.C. § 1983 actions.

even if you believe that the grievance system in your prison is unfair or pointless, you still have to go through all of the steps of the process to try to resolve your grievance *before* you file a lawsuit.[8] In New York, for example, the IGP is not considered exhausted until you receive a final decision on your complaint from the highest grievance committee, such as New York's Central Office Review Committee ("CORC"). If you bring a complaint in federal court under 42 U.S.C. § 1983 without first exhausting administrative remedies, your case will be dismissed, and you might be barred from bringing a future case.[9]

In addition to filing your grievance under federal law, some states allow you to file your grievance under state law too. In New York, for example, you may challenge the CORC's decision under Article 78 of New York state law.[10] But just like the federal grievance procedures, you may not bring an Article 78 proceeding until you first pursue all administrative remedies available through the IGP.[11] Even if your grievance is denied by the initial grievance resolution committee, you still may not bring an Article 78 proceeding until you exhaust *all* your administrative remedies. In New York, this means you first have to appeal the Inmate Grievance Resolution Committee's denial to your prison's superintendent. If your grievance is again denied, you must appeal to CORC. Only if the CORC also denies your grievance are you allowed to bring a lawsuit in state court under Article 78, because the CORC is the committee designated to provide final review of your claim under the state administrative grievance procedures. [12]

As you go through the inmate grievance procedures, it is important to bring up right from the beginning any issues you think you might want to raise in a later lawsuit. If you fail to state a particular claim in your original grievance, a court may later consider this claim "unexhausted." As a result, the court may dismiss this unexhausted claim and hear only the claims that you brought up in your original grievance. Courts are required to hear your exhausted claims and are no longer allowed to dismiss the entire action if only some of the claims are unexhausted.[13] Keep in mind that in order to exhaust all of your claims, you may have to use more than one administrative procedure. That is, you may have to go through one review process for one of your claims and a different review process for another of your claims.[14]

When you are ready to file a complaint in federal court, after exhausting your administrative remedies, make sure that your complaint states that you have already exhausted all other remedies.

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8. If you receive a satisfactory remedy from the IGP, then there will be no need to go to court. If you are unsatisfied with the result of the IGP, you may then file a lawsuit in federal court.

9. Dismissal for non-exhaustion is supposed to be "without prejudice," which means that you will be able to come back to court after you have fully pursued your prison's grievance procedures. A dismissal "with prejudice" means that you cannot take that particular issue back to court. *See* Wendell v. Asher, 162 F.3d 887, 892 (5th Cir. 1998) (finding that while prisoner's § 1983 claim was properly dismissed for failure to exhaust administrative remedies, the prisoner can still refile his action in district court once he has exhausted his administrative remedies); Wright v. Morris, 111 F.3d 414, 417 n.3 (6th Cir. 1997) (holding that where alleged violations occur after PLRA's enactment and prisoners have notice that exhaustion is required and have a reasonable opportunity to file administrative complaints, the exhaustion requirement is mandatory). However, if the statute of limitations has run on your claim before you return to court, your claim may be permanently barred. In addition, if you are able to bring your claim back to court, you will probably have to pay another filing fee to re-file your claim in court.

10. See Chapter 22 of the *JLM* on Article 78 proceedings. Article 78 proceedings allow you to challenge decisions made by New York administrative bodies or officers, like the Central Office Review Committee.

11. *See* Patterson v. Smith, 53 N.Y.2d 98, 100–01, 423 N.E.2d 23, 24–25, 440 N.Y.S.2d 600, 601–02 (1981) (dismissing prisoner's Article 78 claim because he failed to exhaust prison's grievance procedures).

12. *See* Symmonds v. Leonardo, 138 A.D.2d 810, 810–11, 526 N.Y.S.2d 44, 45 (3d Dept. 1988) (dismissing prisoner's petition for failing to exhaust administrative remedies); People *ex rel.* Chapman v. Sullivan, 135 A.D.2d 675, 676, 522 N.Y.S.2d 249, 250 (2d Dept. 1987) (holding that petitioners are not entitled to an Article 78 hearing until they have exhausted all administrative remedies).

13. *See* Jones v. Bock, 549 U.S. 199, 201, 127 S. Ct. 910, 913, 166 L. Ed. 2d 798, 804 (2007) (holding that judicial screening of prisoner complaints requiring total exhaustion is not permitted under the Prison Litigation Reform Act of 1995); *see also* Cooper v. Garcia, 55 F. Supp. 2d 1090, 1094–95 (S.D. Cal. 1999) (holding that only those claims that are unexhausted should be dismissed); Jenkins v. Toombs, 32 F. Supp. 2d 955, 959 (W.D. Mich. 1999) (holding that the PLRA does not require prisoners suing for violations of their civil rights under 42 U.S.C. § 1983 to first exhaust all their other options, sometimes referred to as a total exhaustion requirement).

14. For example, in New York, there is a separate claims review process for inmate personal property claims. You need to exhaust this procedure before bringing a personal property claim in court. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 1700 (2010).

C. Grievances in New York

1. What Grievances Can Be Raised?

A grievance is defined by the New York State DOCS as "a complaint ... about the substance application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units, or the lack of a policy, regulation, procedure or rule."[15] You may raise a grievance only if it relates to a situation that affects or will affect you personally.[16] Examples of grievable issues include: prison official retaliation, inadequate medical care, and assignment of prison jobs.[17]

2. Non-Grievable Issues[18]

An issue is "non-grievable" when the grievance system has no remedy for it. Thus, the grievance system cannot be used to resolve such an issue. The PLRA requires that you exhaust the IGP if *any* remedy is available to you.[19] This means that you must still go through the IGP even if it cannot give you the exact remedy you want. If no remedy is available through the IGP, you are not required to exhaust the grievance system.[20] However, if there is some other administrative remedy for your claim, you will be required to pursue that remedy. For example, although an appeal of a temporary release ruling may be considered non-grievable by the IGP, you will still be required to pursue your appeal using the procedures of the temporary release program.[21]

A grievance committee may dismiss and close your grievance as non-grievable if:[22]

(1) you have made no effort to resolve the complaint through procedures and officials at your prison;
(2) you are not or will not be personally affected by the issue in your complaint;
(3) your grievance is about the decision of a program with already established procedures, including temporary release programs,[23] family reunion programs,[24] or media review[25] programs, disciplinary

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15. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(a) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(a) (2006).

16. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(b) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(b) (2006).

17. Examples of cases in which the courts have required prisoners to exhaust administrative remedies include the following: Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998) (prisoner brought § 1983 suit against prison officials alleging they assigned him to jobs that forced him to perform work beyond his physical capabilities and medical work restrictions); White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (prisoner alleged that prison officials retaliated against him after he filed a lawsuit against another prison official); Barry v. Ratelle, 985 F. Supp. 1235, 1238 (S.D. Cal. 1997) (prisoner brought civil rights action against prison officers claiming deliberate indifference to his serious medical needs in violation of his 8th and 14th Amendment rights).

18. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(e) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(e) (2006).

19. Booth v. Churner, 532 U.S. 731, 733–34, 121 S. Ct. 1819, 1821, 149 L. Ed. 2d 958, 962 (2001) (holding that the PLRA requires prisoners to exhaust administrative remedies that are available before suing over prison conditions); *see also* Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) (holding that a prisoner was required to submit his claims for monetary and injunctive relief to available prison grievance program, even if the relief offered by that program was not necessarily plain, speedy, and effective); Sallee v. Joyner, 40 F. Supp. 2d 766, 770 (E.D. Va. 1999) (holding that a prisoner must bring forth confinement-related grievances through the Administrative Remedy Program even if he seeks money damages, which are not available through the Administrative Remedy Program).

20. *See* Davis v. Frazier, No. 98 Civ. 2658 (HB), 1999 U.S. Dist. LEXIS 8911, at *9–10 (S.D.N.Y. Jun. 15, 1999) (*unpublished*) (citing State of New York, Department of Correctional Services, Directive No. 3375R, which states that complaints about alleged assaults or verbal harassment and matters under investigation by the Inspector General are non-grievable); Kearsey v. Williams, No. 99 Civ. 8646, 2004 U.S. Dist. LEXIS 18727, at *9–10 (S.D.N.Y. Sept. 20, 2004) (*unpublished*) (finding that a prisoner was informed by a written decision that, under State of New York, Department of Correctional Services, Directive No. 3375R, his complaint was non-grievable, which is why the prisoner sued in court); *see also* Marcello v. Dept. of Corr., No. 07 Civ. 9665, 2008 U.S. Dist. LEXIS 60895, at *9 (S.D.N.Y. July 30, 2008) (*unpublished*) ("[Prisoners] may overcome the exhaustion requirement only if they are able to show either (1) that administrative remedies were not actually 'available' to them; (2) that defendant should be estopped from raising plaintiffs' failure to exhaust as an affirmative defense; or (3) that special circumstances exist that excuse plaintiffs' non-compliance with official procedural requirements.").

21. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6 (2010).

22. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4)(i) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i) (2006) (amended 2007).

23. N.Y. Comp. Codes R. & Regs. tit. 7, § 1900.6 (2010).

proceedings or time allowance committee proceedings,[26] central monitoring,[27] inmate claims, or records review procedures,[28] or any other program or procedure involving a written appeal which extends review outside of the facility,[29]

(4) your grievance involves issues outside DOCS supervision; or

(5) your grievance relates only to an individual no longer in your facility.

If a majority of the committee (three out of four members) votes that your grievance falls into one of these categories, your grievance will be dismissed as non-grievable.[30] Otherwise, the committee will hear your grievance.[31] If you believe that your grievance was improperly dismissed as non-grievable, you can apply for review directly to the IGP supervisor. You must do so within seven calendar days after receiving the committee's decision to dismiss the grievance.[32]

You cannot use the IGP for complaints concerning the decisions of other committees such as those relating to disciplinary proceedings and records review as listed above.[33] But you can use the IGP to file a grievance concerning the IGP's general policies, rules, and procedures.[34] However, complaints you may have against any policy, regulation, or rule of an *outside* agency, or action taken by an outside agency, are non-grievable under the New York IGP.[35] Outside agencies are those not under the supervision of the DOCS Commissioner, including the Division of Parole, Citizenship and Immigration Services,[36] and the Office of Mental Health.[37] Note that New York City DOC Directive 3375R, Inmate Grievance Resolution Program, sets out non-grievable issues specific to New York City jails.[38]

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24. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.5 (2010).

25. N.Y. Comp. Codes R. & Regs. tit. 7, § 712.3(d) (2010).

26. N.Y. Comp. Codes R. & Regs. tit. 7, § 261 (2010).

27. N.Y. Comp. Codes R. & Regs. tit. 7, § 1000.5 (1995) (repealed 2008).

28. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(e)(2) (2010). Records review includes freedom of information (FOI) requests and expunction (erasing a record). See Chapter 7 of the *JLM*, "Freedom of Information," for information about FOI requests and appeals.

29. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(e)(1) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(e)(1) (2006).

30. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4)(i) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i) (2006) (amended 2007).

31. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4)(iv) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(iv) (2006).

32. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4)(iii) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(iii) (2006).

33. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(e)(2) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(e)(2) (2006); *see*, *e.g.*, Harris v. Coughlin, 143 A.D.2d 1018, 1018, 533 N.Y.S.2d 604, 605 (2d Dept. 1988) (holding that where administrators deny a prisoner's temporary release application and also his only chance at administrative appeal, the prisoner can then seek judicial review).

34. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(e)(3) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(e)(3) (2006). An example of a rule that could be challenged using the IGP is the rule governing membership of the Temporary Release Committee. *See* Cintron v. Coughlin, 141 A.D.2d 1006, 1007, 531 N.Y.S.2d 46, 47 (3d Dept. 1988) (allowing prisoner to challenge his rejection for release by the Temporary Release Committee by arguing that a parole officer should not be allowed on the committee). Note that this decision is pre-PLRA, but it serves as an example of the grievable rules of the committees listed in DOCS Directive 4040.

35. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4)(i)(d) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i)(d) (2006).

36. The U.S. Citizenship and Immigration Services is a bureau of the Department of Homeland Security and was formerly referred to as Immigration and Naturalization Services.

37. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(f) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(f) (2006).

38. New York City Department of Correction, Directive No. 3375R-A, Inmate Grievance Resolution Program § II(C) (1985) (*as revised* Mar. 13, 2008), *available at* http://home2.nyc.gov/html/doc/html/directives/dept_directives.shtml (select "Inmate Grievance Resolution Program" from the alphabetized list of documents) (last visited June 21, 2010). This city jail grievance directive lists the following issues as non-grievable: matters under investigation by the Inspector General; complaints pertaining to an alleged assault or verbal harassment; complaints pertaining to discrimination based on disability or perceived disability; complaints where the remedy involves the removal of a staff person from an assignment, or the censure, discipline, or termination of a staff person; matters outside the jurisdiction of the Department of Correction; and complaints involving any program or procedure having its own administrative or investigative process.

Finally, if you are filing a claim for loss of or damage to personal property, the New York State Court of Claims requires you to first exhaust the administrative procedures available for compensating prisoners.[39] The IGP cannot be used to do this. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about property claims.

If you are unsure whether an issue is grievable under the IGP, you should file a grievance, and the committee will decide through the grievance process in Section 701.5 of DOCS Directive 4040.[40]

3. How to Write an Effective Grievance

When using the IGP, you should follow several guidelines to increase your chances of obtaining relief (help). First, if you file a formal grievance with a grievance resolution committee, write out your grievance in detail and list exactly what attempts you made to resolve the problem.[41] If you do not try to resolve the problem on your own, your grievance may be dismissed and closed at the grievance committee hearing.[42]

Second, your complaint must show that you are personally affected by the policy or issue that you are filing a grievance against, or that you will be affected unless relief is granted and changes are made.[43]

Third, you should state the problem accurately and precisely. Using inflammatory, disrespectful, offensive, or foul language (such as curse words) in your complaint will reduce your chances of success.

Fourth, the more specific you are about the relief you are seeking, the more likely you are to receive it. You should list in detail every aspect of relief that you seek because the Inmate Grievance Resolution Committee may not consider types of relief that you do not specifically request. For example, explain the conditions or policies you want changed.

Finally, you should keep copies of all papers filed and received. For a more detailed discussion of what information you must include in your grievance, see Part E of this chapter.

D. The Basic Structure of the New York IGP

1. Levels of Authority

The IGP has three levels of authority; higher levels of authority supervise lower levels of authority. The three levels are: the Inmate Grievance Resolution Committee ("IGRC"), the Superintendent, and the Central Office Review Committee ("CORC").[44]

(a) The Inmate Grievance Resolution Committee ("IGRC")

Each correctional institution must have an IGRC.[45] The IGRC must be a five-person group, made up of two voting prisoners, two voting staff members, and a non-voting chairperson.[46] The prisoner IGRC representatives are elected by their peers for a term of six months and ordinarily serve full-time.[47] A prisoner representative may not be removed from his position without a limited due process hearing.[48]

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39. N.Y. Ct. Cl. Act § 10(9) (McKinney 1989 & Supp. 2008) ("[F]ailure to timely comply with statutory filing requirements of the Court of Claims Act … constitutes a fatal jurisdictional defect."). Because of the strict time limits in the Court of Claims, you should exhaust administrative procedures as soon as possible before filing a tort claim in court.

40. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3(e) (2010); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.3(e) (2006).

41. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(a)(2) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(a)(2) (2006).

42. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 701.3(a), 701.5(b)(4)(i)(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program §§ 701.3(a), 701.5(b)(4)(i)(a) (2006).

43. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 701.3(b), 701.5(b)(4)(i)(b) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program §§ 701.3(b), 701.5(b)(4)(i)(b) (2006).

44. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.1(c) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.1(c) (2006).

45. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.1(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.1(a) (2006).

46. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.4(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.4(a) (2006).

47. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.4(b)(2), (4) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.4(b)(2), (4) (2006).

48. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.4(c)(1) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.4(c)(1) (2006).

(b) The Role of the Superintendent and Staff

The superintendent selects staff IGRC representatives from a list of personnel who successfully complete a training course designed for individuals who want to serve as IGRC representatives.[49] The Superintendent must ensure that the IGP staff is trained and available.[50] Chairpersons for IGRC hearings are selected by the IGP Supervisor from a list submitted by the IGRC representatives.[51] The chairperson may be a prisoner, staff member, or a volunteer associated with the facility's program.

(c) The Central Office Review Committee ("CORC")

CORC consists of Deputy Commissioners and staff members.[52] It functions on behalf of and under the authority of the Commissioner of Correctional Services.[53] An Office of Diversity Management representative attends CORC hearings and may offer input on grievances alleging discrimination, but cannot vote.[54]

CORC decisions have the effect of directives. CORC decisions requiring corrective action are implemented by the appropriate facility and/or departmental office.[55] Although the Director of the IGP is not a voting member of the CORC, he is responsible for the administrative function of the IGP and for ensuring that the appropriate facility and/or departmental office carry out CORC decisions.[56]

E. The New York IGP Rules

Understanding how the IGP works will help you use the program effectively. The rules are in two DOCS directives. Directive 4040 contains the rules for the general program, while Directive 4041 contains alternative rules for special facilities. The policies, rules, and procedures contained in Directives 4040 and 4041 are also in Title 7 of the Codes, Rules, and Regulations of the State of New York.[57] Also, Directive 4002 establishes the Inmate Liaison Committee ("ILC"), which is concerned with the general welfare of prisoners.

1. Directive 4040: The Inmate Grievance Program

(a) General Procedures

IGP procedures work along three levels of authority: the IGRC, the Superintendent, and the CORC. As noted earlier, before filing a complaint with the IGRC, you should try to resolve the complaint on your own through existing formal or informal methods.

(b) The IGRC

(i) Filing the Complaint[58]

You must submit your complaint to the Grievance Clerk, using the Inmate Grievance Complaint Form 2131, within 21 calendar days of the incident described in your complaint.[59] In some cases, the IGP supervisor can approve exceptions to this time limit if you attempt to resolve the situation on your own or if

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49. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.4(d) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.4(d) (2006).

50. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.4(d) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.4(d) (2006).

51. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.4(f) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.4(f) (2006).

52. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(2)(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(i) (2006).

53. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(2)(ii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(ii) (2006).

54. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(2)(iii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(i) (2006).

55. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(2)(iii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(ii) (2006).

56. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(2)(iii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(2)(iii) (2006).

57. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 701–02 (2007).

58. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(a) (2006).

59. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(a)(1) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(a)(1) (2006).

your complaint is referred back to the IGP by the courts.[60] If for some reason a Grievance Form is not available, you should submit your complaint to the clerk on a piece of paper. Your Grievance Form must include your name, Department Identification Number, housing unit, program assignment, and other identifying information. In addition, your grievance must include a short, specific description of the problem and the remedy you are requesting. You must also provide details of the actions you have already taken to try to resolve the complaint, including people you have contacted and responses you have received. If you submit your complaint on a plain piece of paper, be sure to include the same information.

(ii) Informal Resolution[61]

IGRC Representatives may try to solve the problem informally instead of conducting a formal hearing. If they do this, it will be within sixteen calendar days of the time the grievance was filed. If the IGRC resolves the matter to your satisfaction, it will enter the resolution, along with your consent, on the Grievance Form.

(iii) IGRC Hearing[62]

If there is no resolution, the full IGRC will consider your complaint. If a hearing is necessary, it must be held within sixteen calendar days after your complaint was filed.[63] The IGRC will conduct the hearing at a set time and place. At the hearing, you, your advisor, anyone the grievance directly affects, or any witnesses can offer evidence. The IGRC will judge the relevance and importance of the evidence offered.[64]

You can miss your IGRC hearing twice before the committee will rule in your absence, as long as you miss your hearing for a legitimate reason, such as a visit, parole hearing, program committee, sick call, keeplock, etc.[65] However, at the third scheduled hearing, it will rule in your absence, even if you have a good excuse. You should make every effort to be at the hearing so you can explain your evidence.

If your confinement status prevents you from appearing within sixteen days and you will be released within thirty calendar days, you can have the hearing postponed until your release or have the hearing held in your absence.[66] But, if you will not be released within thirty days, the hearing will be held without you.[67]

(iv) Committee Decision/Recommendation[68]

After the hearing, the IGRC will discuss the complaint privately. When it has reached a decision, the IGRC may tell you the decision orally. Within two working days of the hearing, the Committee must inform you of its decision and reasons in writing.[69] If the decision requires action by the Superintendent or Central Office, the IGRC will make recommendations for the Superintendent to respond and take action. If a majority of the committee cannot agree, your complaint will be sent to the Superintendent for a response.[70]

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60. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(g) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(g) (2006).

61. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(1) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(1) (2006).

62. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(2) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2) (2006).

63. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(2)(ii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii) (2006).

64. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(2)(iii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(iii) (2006).

65. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(2)(ii)(b) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)(b) (2006).

66. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(2)(ii)(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)(a) (2006).

67. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(2)(ii)(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(2)(ii)(a) (2006).

68. NY. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(3) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5 (b)(3) (2006).

69. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(3)(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(3)(i) (2006).

70. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(3)(ii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(3)(ii) (2006).

(v) Dismissals[71]

As discussed in Part C, the IGRC may dismiss and close your grievance if: (1) you have made no effort to resolve the complaint on your own "through existing channels"; (2) you are not or will not be personally affected by the issue you raise; (3) you seek a remedy that is available through other DOCS programs; (4) your grievance involves issues outside the supervision of DOCS; or (5) the grievance is institutional and relates only to an individual no longer in your facility.[72]

(c) Appealing to the Superintendent

(i) Filing an Appeal[73]

Within seven calendar days of receiving the Committee's written response to your grievance, you may appeal the decision to the Superintendent by filing an appeal with the Grievance Clerk. If you want to appeal the decision, it is important that you file in time. If you do not file within seven calendar days, it will be presumed that you have accepted the IGRC's decision.

(ii) Superintendent's Action[74]

The Superintendent's response to your appeal will depend on whether the issue involved is a departmental or an institutional issue. A Departmental Grievance is one that would affect you during your confinement at any of the many facilities in the Department.[75] An Institutional Grievance is one affecting you only as long as you remain a resident of the facility in which you filed the grievance.[76]

If the matter concerns changing or revising a Departmental policy or directive, then the Superintendent will forward the grievance papers and a recommendation to the CORC for further review—and notify you that he has done so—within seven calendar days of the appeal. But, if the matter does *not* concern changing or revising a Departmental policy directive, then the Superintendent will answer your appeal within twenty calendar days.[77]

In all institutional matters, the Superintendent will make a decision and notify you of it, with reasons stated, within twenty calendar days of the appeal.[78]

(d) Appeal to the CORC

(i) Filing an Appeal[79]

If you are not satisfied with the Superintendent's decision, you may appeal the Superintendent's action to the CORC. To do so, you must file an appeal (Form 2133) with the Grievance Clerk within seven calendar days of receiving the Superintendent's written response to your grievance.[80]

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71. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4) (2007); State of New York, Department of Correctional Services, Directive No. 4040 , Inmate Grievance Program § 701.5(b)(4) (2006).

72. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(b)(4)(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(b)(4)(i) (2006).

73. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(c)(1) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(c)(1) (2006).

74. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(c)(3) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(c)(3) (2006).

75. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(b) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(f) (2006).

76. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(c) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(g) (2006).

77. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(c)(3)(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(c)(3)(i) (2006).

78. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(c)(3)(ii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(c)(3)(ii) (2006).

79. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(1) (2006).

80. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(1)(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(1)(i) (2006).

(ii) CORC Action

The CORC will review the appeal, make a decision, and inform you of its decision and reasons stated within thirty calendar days from the time it receives the appeal.[81] It may take the CORC up to six working days to actually receive your appeal.

(e) Procedural Safeguards for Fair Consideration of Grievances

(i) Advisors[82]

During the grievance process, you may present the grievance yourself without help in preparation, or receive advice or assistance from a staff member who is willing to serve as an advisor, or receive assistance from another prisoner. An advisor is not a direct party to a grievance.[83] A direct party is a person who is so affected by the grievance that he is given the opportunity to provide input before the decision, and he can also appeal the decision afterward.[84]

In addition, if you are a prisoner in the Special Housing Unit, you will have restricted access to other prisoners and may be prohibited from using another prisoner as an advisor (or from serving as an advisor to another prisoner). In this situation, a willing staff member can serve as your advisor.[85]

(ii) Reprisals Prohibited[86]

Reprisal means "any action or threat of action against anyone for the good faith use of ... the grievance procedure."[87] This rule forbids any reprisal, or retaliation, to be taken against you if you use the IGP to file an honest grievance. If such retaliation occurs, you can respond by filing a complaint. You also cannot receive a misbehavior report only for making a supposedly false statement to the IGP.[88]

(iii) Objection to IGRC Representatives[89]

If you object to any of the prisoner representatives on the IGRC, that prisoner representative will not take part in the resolution of your grievance and will be replaced by one of the alternates. If you object to all of the prisoner representatives and the alternates, the committee staff members will make the decision on their own, without any prisoner representatives. In addition, a staff representative who is a party to your grievance cannot vote on the matter. In some especially sensitive circumstances, only staff members will conduct the investigation, even if you do not object to the prisoner representatives.[90] If that happens, the prisoner representatives will still vote.

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81. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(d)(3)(ii) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.5(d)(3)(ii) (2006). **Important:** Note that the code has an error and does not have § 701.5(d)(3) in between § 701.5(d)(2) and § 701.5(d)(4). Instead, it lists § 701.5(d)(2) twice. The *JLM* cites to § 701.5(d)(3) when it refers to the second § 701.5(d)(2) that is listed. However, you should cite to § 701.5(d)(2) if you are using this provision in written documents.

82. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 701.2(h), 701.6(a) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program §§ 701.2(l), 701.6(a) (2006).

83. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(h) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(l) (2006).

84. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(i) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(m) (2006).

85. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(c)(3) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7(c)(3) (2006).

86. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(b) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(b) (2006).

87. 28 C.F.R. § 40.9 (2002).

88. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(b) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(b) (2006).

89. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(c) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(c) (2006).

90. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(e)(2) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(e)(2) (2006).

(iv) Code of Ethics[91]

A Code of Ethics for IGRC staff and prisoner representatives, clerks, and chairpersons has been established to strengthen the credibility and effectiveness of the IGP.[92] For example, the Code of Ethics prohibits IGRC members from preventing a prisoner from filing a grievance[93] or improperly disclosing confidential information.[94] Under the Code of Ethics, a member must have a willing, respectful attitude, a working knowledge of the IGP, and awareness of their own responsibilities under the IGP.[95]

(v) Time Limits[96]

Time limit extensions for review by the IGRC may only be granted if you consent in writing. Otherwise, if the IGRC does not decide a matter within the time limit, you may appeal to the next level.

(vi) File Maintenance/Confidentiality[97]

Grievance files are maintained in a specific area to be used by the IGRC and the Clerk. Unless you consent in writing, no copies of documents may be placed in your central file or facility file. None of the grievance materials will be given to anyone other than you, a direct party, or someone involved in the review process. The Superintendent is responsible for assuring the confidentiality and maintenance of grievance records. Grievance files are kept for at least four years following their conclusion.[98]

(vii) IGRC Reference Materials[99]

The IGRC at each facility is responsible for keeping an up-to-date set of code "AB" Departmental Directives and the IGP Monthly Index of Written Opinions. A copy of the Index must also be kept in the prison law library.

(viii) Emergencies[100]

If your grievance is an emergency, it will be referred directly to the Superintendent or the CORC, depending on who has the authority to ensure a quick and meaningful response. Emergencies include situations in which your health, safety, or welfare is in danger.

(f) Procedures for Prisoners in Special Housing Units[101]

If you are living in a Special Housing Unit ("SHU"), your access to the IGRC may be more restricted than that of general population prisoners. So, facilities must follow many procedures to help you file a grievance.

For example, Inmate Grievance Complaint Forms (Form 2131) must be available to you at all times.[102] You will be given envelopes so you may forward your grievance confidentially to the Inmate

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91. State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(f) (2006). The Code of Ethics can be found in N.Y. Comp. Codes R. & Regs. tit. 7, § 701.11 (2006) and in the State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.11 (2006).

92. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(f)(1) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(f)(1) (2006).

93. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.11(a) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.11(a) (2006).

94. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.11(e) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.11(e) (2006).

95. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.11(b), (h) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.11(a)–(b) (2006).

96. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(g)(2) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(g)(2) (2006).

97. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(k) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(k) (2006).

98. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(k)(3) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(k)(3) (2006).

99. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(l) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(l) (2006).

100. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(m) (2007); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.6(m) (2006).

101. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7 (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7 (2006).

Grievance Office.[103] Your facility may use Inmate Grievance boxes instead of sealed envelopes. These boxes are to be kept locked, and only the IGP supervisor and staff representatives should have keys to them. The grievances will be collected from these boxes at least twice a week.[104] You also have direct access to members of the IGRC, who must make rounds to all special housing units at least once a week to "give inmates who are having communication problems or difficulty writing their complaints an opportunity to request and receive assistance."[105] For security reasons, you may have to use staff, and not another prisoner, as your advisor.[106] The IGP supervisor is responsible for monitoring the grievance procedure in Special Housing Units and for making sure that all of the requirements are met.[107]

If the procedures are not being followed, for example, or if there are never any envelopes or Inmate Grievance boxes, you should tell the IGP supervisor.

(g) Employee Harassment[108]

There are expedited procedures for grievances concerning employee harassment. Employee harassment is defined as "employee misconduct meant to annoy, intimidate or harm an inmate."[109] Under these conditions, you should first report the problem to the harassing employee's immediate supervisor; however, this is not a requirement.[110] You can still file a complaint in the IGP if you choose not to report the employer to his supervisor. In cases of harassment, your grievance and supporting documents will be sent directly to the Superintendent by the end of the day.[111] If the Superintendent concludes that the issue does not relate to harassment, then the grievance will be returned to the IGRC for normal processing.[112] In order to make a stronger case, you should write down and keep a record of every incident of harassment. Your records should include the time, date, nature of the harassment, who was involved, and if there were any other witnesses. You should also keep a record of anything that happened after the harassment, like a conversation you had with someone else about the incident.

If the Superintendent determines that the issue does relate to harassment, he must investigate further, and you will not be allowed to withdraw your complaint.[113] The Superintendent will then make a decision within twenty-five calendar days and inform you of the decision with reasons stated.[114] The time limit can be extended only with your consent. If the Superintendent does not respond within twenty-five days, you may appeal to the CORC by filing a Form 2133 with the Clerk.[115] If you receive a decision from the Superintendent and you want to appeal, you must file your appeal within seven calendar days.[116]

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102. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(a)(1) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7(a)(1) (2006).

103. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(a)(2) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7(a)(2) (2006).

104. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(b) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7(b) (2006).

105. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(c)(1) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7(c)(1) (2006).

106. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(c)(3) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.7(c)(3) (2006).

107. N.Y. Comp Codes R. & Regs. tit. 7, § 701.7 (2006).

108. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8 (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8 (2006).

109. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(e) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(i) (2006).

110. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(a) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8(a) (2006).

111. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(b) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8(b) (2006).

112. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(c) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8(c) (2006).

113. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(d)–(e) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8(e) (2006).

114. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(f) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8(f) (2006).

115. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(g) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.8(g) (2006).

116. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(h) (2006); State of New York, Department of Correctional

(h) Unlawful Discrimination[117]

Unlawful discrimination includes "acts or policies which adversely affect individuals based on race, religion, national origin, sex, sexual orientation, age, disabling condition(s) or political belief, except as provided by law."[118] If you are being unlawfully discriminated against by an employee, program, policy, or procedure, you should report the incident to the immediate supervisor of the offending employee. However, this is not required before filing a complaint in the IGP.[119] This grievance will be forwarded to the Superintendent, and a copy sent to the Office of Diversity Management within twenty-four hours.[120] Either the Superintendent and high-ranking supervisor or the Office of Diversity Management will investigate.[121]

After supervising an investigation, the Superintendent will give a decision within twenty-five calendar days of the grievance and inform you of the decision, with reasons stated.[122] If the Superintendent does not respond within twenty-five days, you may appeal to the CORC.[123] If you receive a decision from the Superintendent and want to appeal, you must file Form 2133 with the Clerk within seven calendar days.[124]

2. Directive 4041: The Inmate Grievance Program Modification Plan

(a) Application of the IGP Modification Plan

It may be difficult for some prisoners to participate in regular IGP procedures. For example, if you are involved in a temporary release program, you may spend many hours each day looking for a job or education, and you may have weekend furloughs (leaves of absences) and daily family visits. In cases like these, the IGP Modification Plan is used to allow you the same opportunity to file a grievance.[125]

(b) Procedures

The procedures for filing a grievance under the Modification Plan are found in N.Y. Comp. Codes R. & Regs. tit. 7, § 702.2 and also in DOCS Directive 4041 § 702.4(a)–(c). First, you must request a grievance form, and one will be provided to you within twenty-four hours of your request. You can ask for help in filling out the form from any prisoner or staff member. A designated staff member will have 16 calendar days to try to resolve your grievance informally. If no resolution occurs, the staff member will request an Inmate Grievance Resolution Committee ("IGRC") hearing within sixteen calendar days of receiving your grievance.[126] IGRC members include two staff representatives and a non-voting chairperson the Superintendent chooses, and two prisoners you choose. After the hearing, the IGRC will make a recommendation about your claim.

Services, Directive No. 4040, Inmate Grievance Program § 701.8(h) (2006); *see*, *e.g.*, Lawrence v. Goord, 304 F.3d 198, 200 (2d Cir. 2002) (finding that behavior of officials fit within the category of "inmate suits about prison life" where prisoner alleged that prison officials fabricated misbehavior reports and related improper action in retaliation for earlier complaints of staff misconduct filed by prisoner).

117. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9 (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9 (2006).

118. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(f) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.2(j) (2006).

119. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9(a) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9(a) (2006).

120. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9(c) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9(c) (2006).

121. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9(d) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9(d) (2006).

122. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9(e) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9(e) (2006).

123. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9(f) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9(f) (2006).

124. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.9(g) (2006); State of New York, Department of Correctional Services, Directive No. 4040, Inmate Grievance Program § 701.9(g) (2006).

125. N.Y. Comp. Codes R. & Regs. tit. 7, § 702.2(a) (1999); State of New York, Department of Correctional Services, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.2(a) (1999).

126. N.Y. Comp. Codes R. & Regs. tit. 7, § 702.4(a)(4) (2007); State of New York, Department of Correctional Services, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.4(a)(4) (2007).

Within seven calendar days after you receive a written recommendation from the IGRC, you can appeal to the Superintendent. The appeal will follow the procedure described in Part E(1)(c) of this chapter. If you do not file an appeal within seven calendar days, you are presumed to have accepted the recommendation.[127]

Within seven calendar days of receiving the Superintendent's response, you can appeal to the CORC.[128] The appeal will follow the procedure described in Part E(1)(d) of this chapter.

3. Directive 4002: The Inmate Liaison Committee

The Superintendent in your facility must establish an ILC.[129] This committee's goal is to provide effective communication between prisoners and the administration, and to promote the accurate distribution and exchange of information. The ILC must discuss the prisoners' general welfare with prison officials. This includes, for example, suggestions from prisoners on facility operations. These discussions may not relate to specific problems of individual prisoners. The Superintendent and Facility Executive Team will meet with the ILC monthly, and informal discussions should occur consistently.

The ILC is made up of a group of prisoners chosen by the general population. Representatives are elected by secret ballot for a term of six months and may serve for two terms in a row. The ILC will elect officers and an executive committee who can serve for one six month term per year. The Superintendent can deny membership to prisoners with recent or ongoing disciplinary problems.[130]

The ILC must have a room with facilities, including a typewriter, desks, supplies, and stationery.[131] The ILC will be governed by a Constitution and By-Laws, which it will prepare with the help of a staff member. A suggested format for the Constitution and By-Laws is attached to Directive 4002.[132]

F. Rules for Inmate Grievance Procedures in Other States

In 1979, Congress set out minimum standards for formal inmate grievance procedures to help reduce the large number of prisoner civil rights cases that were waiting to be heard in courts.[133] States with grievance procedures that meet these standards are certified by the Attorney General.[134] Remember, you must exhaust all available administrative procedures before you can file a claim under 42 U.S.C. § 1983.[135]

In order for an inmate grievance procedure to be certified, the state must meet certain federal minimum standards for the communication of those procedures to all prisoners.[136] One of the requirements set out by Congress is that all IGPs must be published. A certified inmate grievance procedure must also be readily available to all prisoners and employees of the institution. Every prisoner and employee must receive written notification of the procedure when they get to the institution. You must also be given a verbal explanation of the procedure and the opportunity to ask questions about the procedure at that time. The procedure must be written in any language that is spoken by a significant portion of the prison population. Provisions must be made to aid prisoners who speak other languages, as well as for those with disabilities.

In general, you should be able to find guidelines and procedures for filing a grievance in your prison law library. Ask your librarian if you need help finding them. It is important for you to understand these rules before filing your grievance to make the best use of the grievance procedure.

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127. N.Y. Comp. Codes R. & Regs. tit. 7, § 702.4(b)(1) (2007); State of New York, Department of Correctional Services, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.4(b)(1) (2007).

128. N.Y. Comp. Codes R. & Regs. tit. 7, § 702.4(c)(1) (2007); State of New York, Department of Correctional Services, Directive No. 4041, Inmate Grievance Program Modification Plan § 702.4(c)(1) (2007).

129. State of New York, Department of Correctional Services, Directive No. 4002, Inmate Liaison Committee § II(A) (1997) (*as revised* Sept. 21, 2006).

130. State of New York, Department of Correctional Services, Directive No. 4002, Inmate Liaison Committee § II(B)(5) (1997) (*as revised* Sept. 21, 2006).

131. State of New York, Department of Correctional Services, Directive No. 4002, Inmate Liaison Committee § II(E) (1997) (*as revised* Sept. 21, 2006).

132. State of New York, Department of Correctional Services, Directive No. 4002, Inmate Liaison Committee § II(F) (1997) (*as revised* Sept. 21, 2006).

133. S. Rep. No. 96-416, at 34 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 787, 816. The minimum standards for inmate grievance procedures can be found at 28 C.F.R. §§ 40.1–40.10 (2010).

134. 42 U.S.C. § 1997e (2000). The procedures for obtaining certification of a grievance procedure can be found at 28 C.F.R. §§ 40.11–40.22 (2009).

135. 42 U.S.C. § 1997e(a) (2000). See Chapter 16 of the *JLM* for more information on § 1983 claims.

136. 28 C.F.R. § 40.11(b) (2009). For a detailed description of how these procedures must be communicated, see 28 C.F.R. § 40.3 (2009).

G. Conclusion

If you have a grievance, you must go through your state's inmate grievance program before going to court. Once you receive a final decision from the IGP, you may file a complaint in court. If you fail to exhaust your remedies, your case will be dismissed. Even if you feel that the grievance system in your prison is unfair or inefficient, you must exhaust it. Though all of the requirements under the PLRA may seem complicated and intimidating, you should try your best to properly exhaust your grievance. If you make an honest, good-faith effort to comply with the requirements, the courts are more likely to excuse mistakes. For example, if you miss a deadline, you should not give up. Continue to pursue your grievance and request to be excused from the rule you failed to follow, or ask to be able to refile your grievance and start over.

A JAILHOUSE LAWYER'S MANUAL

Chapter 16: Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law

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CHAPTER 16

USING 42 U.S.C. § 1983 AND 28 U.S.C. § 1331 TO OBTAIN RELIEF FROM VIOLATIONS OF FEDERAL LAW*

A. Introduction

1. Overview

The U.S. Constitution and some federal laws protect you against unfair government actions by giving you individual rights. For example, the Eighth Amendment protects your right to be free from cruel and unusual punishment,[1] and the First Amendment protects your right to practice your religion.[2] However, the Constitution does not tell you what to do if someone violates your constitutional or statutory rights.[3] The Civil Rights Act of 1871 ("Section 1983") is the law that allows prisoners to bring lawsuits challenging state or local prison conditions that violate constitutional or federal statutory rights.[4]

Specifically, Section 1983 allows you to sue state and local (but not federal) officials who have violated your rights.[5] You can also use Section 1983 to challenge state prison rules and regulations—for example, restrictions on religious practices or cell assignment policies—that violate constitutional and statutory rights. These rights are explained in other Chapters of the *JLM*. Although you cannot use Section 1983 to sue federal officials, you can use a different law, 28 U.S.C. § 1331, to challenge violations of your constitutional rights.[6] Section 1331 gives federal courts the power to hear claims against the federal government. These lawsuits are called "*Bivens*" actions.[7] Section 1331 and Section 1983 are closely related, and *Bivens* actions often rely on case law interpreting Section 1983.

This Chapter is organized into several Parts. This Part, Part A, is the introduction and includes important warnings and general advice. Part B explains how to use Section 1983 to challenge state prison conditions and other practices that violate your constitutional or federal statutory rights. Part C explains

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1. U.S. Const. amend. VIII.

2. U.S. Const. amend. I. See Figure 1 of this Section for a list of other important rights granted to you by the Constitution.

3. *Constitutional rights* are those rights guaranteed by the U.S. Constitution. § 1983 may allow you to sue someone who violates your constitutional rights if that person is acting "under color of law." § 1983 cases usually involve constitutional rights found in the first 10 amendments to the Constitution (also called the Bill of Rights) or in the 14th Amendment. The Bill of Rights originally limited only the power of the *federal* government. Using the legal theory of "incorporation" and the Due Process Clause of the 14th Amendment, the Supreme Court has ruled that most of its guarantees also protect citizens against *state* governments. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 673 n.42, 97 S. Ct. 1401, 1414 n.42, 51 L. Ed. 2d 711, 731 n.42 (1977) (holding that the 4th Amendment was incorporated against the states by the 14th Amendment). This means that state actors have to respect most of the rights found in the Bill of Rights as well.
Federal statutory rights are those rights created by federal laws enacted by Congress. Many federal statutes include their own "enforcement provisions," which means that the statute gives you a particular right and allows you to sue someone for violating that right. If a federal statute has its own enforcement provision, you must use that statute rather than § 1983 to bring your lawsuit. See Part B(3) of this Chapter for more information about statutory rights and § 1983.

4. 42 U.S.C. § 1983 (2006). See Part B(1) of this Chapter for the full text of the statute.

5. *See* Monroe v. Pape, 365 U.S. 167, 173–74, 81 S. Ct. 473, 477, 5 L. Ed. 2d 492, 498 (1961) (holding that § 1983 gives a federal remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position), *overruled in part* on other grounds, Monell v. N.Y. City Dept. of Social Servs., 436 U.S. 658, 695–701, 98 S. Ct. 2018, 2038–41, 56 L. Ed. 2d 611 (1978). If an official deprives you of constitutional or federal statutory rights, you may also be able to sue that official under state law. However, § 1983 allows you to sue that official under federal law regardless of whether a state remedy is available. Monroe v. Pape, 365 U.S. 167, 173–74, 81 S. Ct. 473, 477, 5 L. Ed. 2d 492, 498 (1961) (detailing several reasons you might prefer to use federal law instead of state law to seek your remedy).

6. 28 U.S.C. § 1331 (2006).

7. *Bivens* actions are named after the case of Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 91 S. Ct. 1991, 29 L. Ed. 2d. 619 (1971) (holding that an implied cause of action may exist where an individual's 4th Amendment right to be free from unreasonable searches and seizures has been violated by *federal* agents).

what you can sue for (the types of relief, like money damages, injunctions, etc.); who to sue; typical defense arguments you will have to defeat; when to sue; where to sue; and how to proceed with your Section 1983 suit. Part D describes other ways to bring lawsuits, including class actions and state court lawsuits. Part E explains *Bivens* actions against federal officials under 28 U.S.C. § 1331. Remember, *Bivens* actions closely rely on case law interpreting Section 1983, so if you want to bring a *Bivens* action you should still read all of this Chapter. Finally, the Appendices to this Chapter have sample forms that you can use as examples when preparing your case.

Figure 1 below explains your rights, the source of each of your rights, and which chapters of the *JLM* you should read.

Types of Prisoner Rights	Source of Constitutional Right[8]	*JLM* Chapter
Mail, visitation, telephone use, and other communications	*First Amendment*	Chapter 19: "Your Right to Communicate with the Outside World"
Religious practices	*First Amendment*	Chapter 27: "Religious Freedom in Prison"
Searches and seizures of pretrial detainees; body searches	*Fourth Amendment*	Chapter 25: "Your Right to Be Free From Illegal Body Searches"
Prison conditions: overcrowding, cleanliness, etc.	*Eighth Amendment*	This Chapter, Chapter 16
Medical care	*Eighth Amendment*	Chapter 23: "Your Right to Adequate Medical Care"
Assault/failure to protect	*Eighth Amendment*	Chapter 24: "Your Right to Be Free From Assault"
Informational privacy	*Fourteenth Amendment*	Chapter 26: "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison," and Chapter 23: "Your Right to Adequate Medical Care"
Due Process in disciplinary hearings	*Due Process Clause of the Fifth & Fourteenth Amendments*	Chapter 18: "Your Rights at Prison Disciplinary Proceedings"
Discrimination on the basis of race, ethnicity, etc.	*Equal Protection Clause of the Fourteenth Amendment*	This Chapter, Chapter 16.
Discrimination on the basis of gender	*Equal Protection Clause of the Fourteenth Amendment*	This Chapter, Chapter 16.
Rights of prisoners with mental illness	*Eighth & Fourteenth Amendments*	Chapter 29, "Special Issues for Prisoners with Mental Illness"

8. This chart is only a simple outline for where in the Constitution courts have traditionally located the rights at issue. Some of these rights may also be protected by federal statutes. Your case will depend on your particular facts, so you should use this chart to begin your research, not end it.

Types of Prisoner Rights	Source of Constitutional Right[8]	*JLM* Chapter
Discrimination on the basis of disability	*Equal Protection Clause of the Fourteenth Amendment*	Chapter 28, "Rights of Prisoners with Disabilities"
Discrimination on the basis of sexual orientation or gender identity	*Equal Protection Clause of the Fourteenth Amendment*	Chapter 30: "Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners"
Access to courts—law libraries or legal assistance	*First, Sixth, & Fourteenth Amendments*	Chapter 3: "Your Right to Learn the Law and Go to Court"

Figure 1: Other *JLM* Chapters that may help you bring a Section 1983 Claim

2. Important Warnings and General Advice

(a) It is VERY important that you read Chapter 13 of the *JLM*, "The Prison Litigation Reform Act," before you begin your Section 1983 claim.

The Prison Litigation Reform Act[9] ("PLRA") is a federal law that significantly affects Section 1983 cases. You must be sure that you meet all of the PLRA requirements before you begin any lawsuit. In particular, be aware of the PLRA's "three strikes" rule, which gives you a "strike" whenever you have a case dismissed as frivolous, malicious, or failing to state a valid legal claim. If you have three cases dismissed as "strikes," you will not be able to use the *in forma pauperis* procedure any longer,[10] or you may lose good time credit.

Another PLRA requirement that you should be especially careful about is the need to exhaust (use up) all your administrative remedies—such as prison grievance procedures and appeals—*before* you go to court. In other words, you need to figure out what procedures exist within your prison to protest your situation and use all of those procedures.[11] Some courts used to require that you describe what you have done already to exhaust your remedies in your complaint; however, in *Jones v. Bock*, the Supreme Court said that such rules are impermissible.[12] The complaint only begins the lawsuit, however. You will still have to describe what you have done to exhaust administrative remedies at some point. Many prisoner Section 1983 complaints are dismissed for failing to exhaust administrative remedies.[13]

(b) Your constitutional rights are not absolute.

In most cases, a prisoner's constitutional rights are balanced against the state or federal government's interests (usually, the government's interest in maintaining a secure prison environment). In many situations, your constitutional rights may be outweighed by the government's interest in prison security. For most constitutional claims,[14] courts use a test established in a case called *Turner v. Safley*[15] to determine whether your constitutional rights have been violated. This test is discussed in detail in Part B(2)(a) of this Chapter.

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9. 42 U.S.C. § 1997(e) (2006).

10. *In forma pauperis* allows you to file a lawsuit as a "poor person." In this way, you can avoid paying many of the normal court fees and costs or pay them on an installment plan.

11. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures."

12. Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 921–22, 166 L. Ed. 2d 798, 813–14 (2007) (holding that an inmate is not required to plead or demonstrate exhaustion in his complaint).

13. *See, e.g.*, Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 958, 967 (2001) (holding that petitioner did not exhaust all available administrative remedies when he failed to appeal an unfavorable administrative decision to the highest level of review).

14. *Turner* applies to substantive constitutional rights. Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Prisoners' rights subject to the *Turner* test include the rights to freedom of speech, freedom of association, free exercise of religion, and the right to marry (subject to restrictions). Note that 8th Amendment "cruel and unusual punishment" violations are not judged under the *Turner* test. See Part B(2)(a) of this Chapter for more information about *Turner*. Remember that you may have a better claim under a federal statute than under § 1983 and *Turner*.

15. Turner v. Safley, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79–80 (1987).

(c) Do NOT use Section 1983 to challenge your original criminal conviction, your sentence, loss of good time, or denial of parole.

You cannot use Section 1983 to challenge violations of your constitutional rights based on the fact of your criminal conviction and sentence except in very limited circumstances.[16] Instead of Section 1983, you can challenge your conviction or sentence by appealing or, if your appeal is denied, by filing for a writ of habeas corpus or other post-conviction relief.[17] You also cannot use Section 1983 to challenge a loss of good time credit, a parole denial, or other official actions that *directly* affect how much time you spend in prison.[18] You should use state procedures to challenge these losses. For example, in New York, prisoners can challenge the loss of good time credit or denial of parole through an Article 78 proceeding.[19] For information about Article 78 proceedings, see Chapter 22 of the *JLM*.

However, you can usually use Section 1983 to challenge administrative decisions that do not *directly* affect the length of your sentence.[20] This Chapter primarily focuses on how you can use a Section 1983 suit if government officials have abused or denied your constitutional or federal statutory rights while you have been in prison. Again, you should not use Section 1983 to challenge the amount of time to be spent in prison.

(d) Make certain that all defendants in your Section 1983 lawsuit had personal involvement[21] in the violation of your rights.

Pro se litigants (people who file a suit without a lawyer) often want to include everybody they can think of as defendants, including supervisory prison officials like wardens or the head of the state department of corrections, and you may want to do this too. But naming everybody is often not a good idea. Courts generally dismiss all claims against supervisory officials unless you provide enough facts in your complaint to show that the particular supervisory officials were involved in the violation of your rights.[22] If you make claims against particular defendants that the court quickly dismisses for lack of personal involvement, the judge may be less likely to trust the rest of your lawsuit. Try as best you can to find out which officials were involved.

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16. *See* Heck v. Humphrey, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383, 394 (1994) (holding that § 1983 suits are not available if the outcome of the suit would imply that a prisoner's conviction or sentence is invalid, unless he proves that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of writ of habeas corpus).

17. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence;" Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence;" Chapter 13, "Federal Habeas Corpus;" and Chapter 21, "State Habeas Corpus: Florida, New York, and Texas," and state-specific habeas Chapters in the upcoming State Supplements for more information on post-conviction relief.

18. *See* Edwards v. Balisok, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589, 137 L. Ed. 2d 906, 915 (1997) (holding that § 1983 claim alleging that the prisoner was deprived of good time credits without procedural due process could not go forward, because if successful it would imply that the deprivation of good time credits was invalid).

19. If your prison is not following its own rules or policies, New York state prisoners can file an Article 78 petition. For more information, see Chapter 22 of the *JLM*, "How To Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

20. *See* Wilkinson v. Dotson, 544 U.S. 74, 82, 125 S. Ct. 1242, 1248, 161 L. Ed. 253, 262–63 (2005) (allowing prisoners to use § 1983 to challenge parole procedures to request new reviews of parole eligibility, where winning the lawsuit would not necessarily result in prisoners' obtaining earlier parole); Muhammad v. Close, 540 U.S. 749, 754–55, 124 S. Ct. 1303, 1306, 158 L. Ed. 2d 32, 38 (2004) (holding that a § 1983 claim may challenge an administrative decision as long as it does not dispute the validity of the underlying conviction); Leamer v. Fauver, 288 F.3d 532, 543 (3d Cir. 2002) (finding to be valid a § 1983 claim that challenged a disciplinary action which could affect the granting of parole, but did not directly affect length of sentence); Jenkins v. Haubert, 179 F.3d 19, 27 (2d Cir. 1999) (holding that § 1983 may be used to challenge a prisoner's term of disciplinary segregation, which did not implicate the length of confinement).

21. Part B(1)(a) of this Chapter explains how you can prove a defendant official was personally involved in violating your rights.

22. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 663 n.7, 98 S. Ct. 2018, 2022 n.7, 56 L. Ed. 2d 611, 619 n.7 (1978) (holding that supervisory officials are not automatically responsible for the actions of their employees). However, sometimes you can name supervisory officials as defendants even if they were not directly involved in violating your rights. See Part C(2)(b) of this Chapter ("Supervisor Liability").

(e) Explain the facts of your case in as much detail as possible.

The most common mistake made by *pro se* litigants is failing to state the facts clearly and adequately. Remember, the court already knows something about the law, but it knows *nothing* about the facts of your claim. Make sure that you tell the court exactly *what* happened to you, *when* and *where* it happened, *who* was involved, and *how* it happened. If you know *why* your rights were violated, you should explain that too. More than anything else, the particular facts of your case will determine the success of your claim. For an example of a written complaint, see Appendix A-2 of this Chapter.

Here's an example to clarify the point. Imagine that you are claiming that your access to the prison law library has been unfairly restricted. The court will want to know the details. When did you want to get into the library? Why did you need access to the library? Are there any set rules in your prison for library access? Exactly how did the denial of access hurt you? Were you unable to meet a filing deadline or respond to a legal argument? Did you have a case pending or a court date? What research were you trying to do? Who stopped you? How many times did this happen, and when? Include as much of this information as possible in your complaint. Of course, the kinds of questions you will want to ask yourself and answer for the court depends on your claim. Give as much relevant[23] detail as possible.

If possible, try to get sworn, written statements—also known as affidavits or declarations[24]—from witnesses who saw your rights being violated. Try to get as much proof as possible that supports the factual claims you are making in your case.

(f) Confirm the information in this or any other Chapter of the *JLM* through library research.

Remember that the cases discussed in this Chapter are only examples to use as starting points in your research. There are many court decisions relating to Section 1983 claims. It is essential that you research and make sure the courts still follow the cases in the footnotes of this Chapter.[25] We have tried to make the *JLM* as up-to-date as possible, but some cases may not be good law anymore if a higher court has made a different decision.[26]

(g) *Bivens* Actions against Federal Officials are Similar to Section 1983 Claims against State or Local Officials.

If you want to sue federal officials, you cannot use Section 1983. Instead, you can bring a type of lawsuit called a *Bivens* action under 28 U.S.C. § 1331. Most federal prisoners therefore bring *Bivens* actions, which are described in Part E of this Chapter. *Bivens* actions are very similar to Section 1983 claims, so you should still read Parts B and C of this Chapter discussing Section 1983 claims.

B. Using 42 U.S.C. § 1983 to Challenge State or Local Government Action

1. Essential Requirements for Obtaining Relief Under Section 1983

Section 1983 states:

> Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

23. *Relevance* is a legal idea. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of [your claim] more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Basically, relevant evidence is anything that helps to prove your story or your legal claim.

24. See Chapter 6 of the *JLM*, "An Introduction to Legal Documents."

25. See Chapter 1 of the *JLM*, "How to Use the *JLM*," and Chapter 2, "Introduction to Legal Research," for more information.

26. It is very important you read the full footnoted cases. Also try to read any cases cited in those cases as well. If possible, look up 42 U.S.C. § 1983 in the United States Code Annotated (U.S.C.A.) or United States Code Service (U.S.C.S.). The U.S.C.A. and U.S.C.S. are commercial publications of the United States Code that include the federal statutes and summaries of related cases interpreting those statutes. You should also look at the Federal Practice Digest and other digests that have case summaries organized by subject matter. The process of making sure a case is up-to-date is called "Shepardizing." See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on how to Shepardize a case.

> the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[27]

The italicized words and phrases state the three essential requirements (also known as elements) that you must fulfill when bringing a lawsuit under Section 1983. In your pleadings, you need to show that *all three* elements of Section 1983 are met.

(a) First Requirement: Person

Section 1983's first requirement is that you must show that your constitutional or federal statutory rights were violated by a "person." The legal definition of "person" for Section 1983 claims includes more than actual people (prison wardens, guards, etc.). A city, county, or municipality can also be a "person" under Section 1983.[28] The definition of "person," however, does not include *state* governments and their agencies.[29] For example, you cannot sue the State of New York or the State Department of Corrections under Section 1983.[30] Thus, while *officials* (actual people) at any level of government (including state government) may be sued under Section 1983, only *non-state governments* and their agencies (such as cities, counties, local agencies, and private corporations) may be sued as a "person" under Section 1983. See Part C(2) of this Chapter, "Whom to Name as Defendants" for a further discussion of whom you can sue using Section 1983.

You should name all "persons" who violated your rights as defendants, whether they are individuals, a local government agency, or both. You may name as many defendants as you choose, as long as *each* of them is *personally involved* in the wrong you are claiming.[31] Courts consider officials and local government agencies to be personally involved if they:

(1) Directly participated in the wrong; or
(2) Knew about the wrong but did not try to stop or fix it; or
(3) Failed to oversee the people who caused the wrong, such as by hiring unqualified people or failing to adequately train the staff; or
(4) Created a policy or custom that allowed the wrong to occur.

The situations listed in (1), (2), and (3) are most common in cases in which you are challenging defendants' specific behavior or failure to act. The fourth situation occurs when you challenge general rules of the prison.

For an example of a type (1) situation, imagine a case in which an injured prisoner asked a guard for medical care. If the guard refused to get the prisoner help, you might say that he directly participated in violating the prisoner's right to medical care. An example of a type (2) situation could be a guard seeing a prisoner being attacked by other prisoners, but not trying to stop the attack. In a type (3) situation, prison officials may be held liable for hiring unqualified people[32] or failing to properly train or supervise their staff.[33]

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27. 42 U.S.C. § 1983 (2000) (emphasis added).

28. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690, 98 S. Ct. 2018, 2035–36, 56 L. Ed. 2d 611, 635 (1978) (holding that municipalities and local governments are considered "persons" under § 1983).

29. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989) (holding that states may not be sued under § 1983).

30. You may, however, be able to sue states and state agencies under other federal laws such as the Americans with Disabilities Act. *See* 42 U.S.C. §§ 12101–213 (2000); United States v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 250 (2006); Pa. Dept. of Corrs. v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998). For information on the rights of prisoners with disabilities, see the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2009) and Chapter 27 of the *JLM*, "Rights of Prisoners with Disabilities."

31. *See* Hafer v. Melo, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (holding that state officials, sued in their individual capacities, were "persons" within the meaning of § 1983 and that the 11th Amendment did not bar such suits. State officers were not absolutely immune from personal liability just because of the "official" nature of their acts).

32. *See* Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) (holding that a municipality may be liable for hiring decisions under a deliberate indifference standard if adequate screening of the employee alleged to have violated the plaintiff's rights would have made it clear to a reasonable policymaker that hiring the employee was highly likely to result in the type of constitutional violation alleged by the plaintiff).

33. *See* City of Canton v. Harris, 489 U.S. 378, 388–89, 109 S. Ct. 1197, 1204–05, 103 L. Ed. 2d 412, 426–27 (1989) (finding the city could be liable under § 1983 for failure to train employees, if the failure amounts to deliberate

Finally, in a type (4) situation, prison officials can be liable for creating rules, policies, or customs that result in a violation of your rights. These can include written rules or policies[34] or unwritten policies.[35] You should always be specific about what kind of rule or practice you are challenging and who was responsible for creating the rule or practice (if you know). If you are arguing that an unwritten policy or custom violated your rights, you need to gather as much evidence as possible to show that it is widely followed in your jail or prison, so that it will be considered an actual policy or custom.[36] An example of a type (4) situation could be a guard who makes sure that any prisoner who violates a prison rule does not receive medical care for a month, even if the prisoner is ill or injured.

Sometimes, several people or agencies will be involved in violating your rights, and they will all be involved in different ways. For example, if a prison guard assaults you, you can sue that guard because he participated in violating your rights. If another guard sees the assault but does not try to stop it, you can sue that guard as well, because he did not try to stop or fix the wrong. If you complain to the warden that this guard has assaulted you several times, and the warden does nothing, you might also be able to sue the warden. If you then find out that there is a prison policy of allowing guards to assault prisoners, or that this guard had a history of assaulting prisoners at his previous job, then you might be able to sue the local department of corrections for creating an unconstitutional policy or hiring an unqualified guard. In this situation, it would probably be obvious to you that the guard who assaulted you and the guard who watched the assault were personally involved in violating your rights. However, figuring out whether the warden and/or the local department of corrections were personally involved is much more complicated. For more about showing personal involvement, see Part C(2)(b) of this Chapter, "Supervisor Liability," and Part C(2)(c) of this Chapter, "Municipal or Local Government Liability."

(b) Second Requirement: Under Color of State Law

The second requirement for suing under Section 1983 is that the person who violated your rights must have been acting "under color of state law." This means that the person you sue must be someone who was acting under the state's authority. States have authority over their own agencies and employees; over cities, counties, and municipalities, and over city, county, and municipal employees. In prison, persons acting under color of state law include:

(1) Employees of state or local prisons or jails, like a prison doctor or guard; and
(2) Private parties who make contracts with the state to perform services.[37]

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indifference to the constitutional rights of persons coming into contact with those employees).

34. *See, e.g.*, Shain v. Ellison, 273 F.3d 56, 66 (2d Cir. 2001), *cert. denied*, Nassau County v. Shain, 537 U.S. 1083, 123 S. Ct. 672, 154 L. Ed. 2d 582, (2002) (holding that a prison's written policy of unreasonably strip searching all arrestees was unconstitutional); Barrett v. Coplan, 292 F. Supp. 2d 281 (D.N.H. 2003) (allowing prisoner to go forward with a claim that the prison's blanket policy of refusing to consider surgical or hormone treatment for prisoners with gender identity disorder violated prisoner's 8th Amendment right to adequate medical care).

35. *See, e.g.*, Fairley v. Luman, 281 F.3d 913, 918 (9th Cir. 2002), *cert. denied*, 537 U.S. 1044, 123 S. Ct.659, 154 L. Ed. 2d 515 (holding that city's failure to have procedures in place to verify warrants was an unwritten policy that deprived plaintiff of his right to due process when he was mistakenly held on outstanding warrants for the arrest of his twin brother); Garrett v. Unified Gov. of Athens-Clark County, 246 F. Supp. 2d 1262, 1279–80 (M.D. Ga. 2003) (noting that even when there is no formal written policy, supervisors can be held liable where there is an unconstitutional custom, but not where there is a custom that is used unconstitutionally only on particular occasions), *rev'd on other grounds sub nom.*, Garrett v. Athens-Clark County, 378 F.3d 1274 (11th Cir. 2004) (per curiam); Gonzalez v. City of Schenectady, 141 F. Supp. 2d 304, 307 (N.D.N.Y. 2001) (holding that an unwritten city policy of strip searching all detainees prior to court action was unconstitutional).

36. *See, e.g.*, Henry v. Farmer City State Bank, 808 F.2d 1228, 1237 (7th Cir. 1986) (holding that if there is no formal written policy, "the plaintiff must allege a specific pattern or series of incidents that support the general allegation of a custom or policy; alleging one specific incident in which the plaintiff suffered a deprivation will not suffice."); Gailor v. Armstrong, 187 F. Supp. 2d 729, 734 (W.D. Ky. 2001) (holding that one incident of failure to follow a jail's excessive force policy plus 30 to 40 other instances of excessive force over a 10-year period for which officers were punished was not enough to show a custom of failing to follow the excessive force policy).

37. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 n.5, 122 S. Ct. 515, 522 n.5, 151 L. Ed. 2d 456, 467 n.5 (2001) (noting, but not holding, that state prisoners may sue private prison corporations under § 1983); West v. Atkins, 487 U.S. 42, 54–57, 108 S. Ct. 2250, 2258–60, 101 L. Ed. 2d 40, 53–55 (1988) (holding that a private doctor under contract with a state to provide medical services to prisoners at a state prison hospital on a part-time basis acts "under color of state law" within the meaning of § 1983); Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (holding that "private prison-management corporations and their employees may be sued" under § 1983); Conner

Be aware that a person may act "under color of state law" even though the person does something that state law specifically prohibits. In other words, for something to be done "under color of" state law it does not have to be legal to do it.[38] For example, state law forbids a prison guard from assaulting you. But, if a prison guard assaults you, he is acting "under color of state law" because the guard carries a "badge of authority" from the state.[39] Thus, "under color of state law" can be loosely interpreted to mean "as a representative of the state."

(c) Third Requirement: Deprivation of Federal Right

The third and final requirement is that the person you sue must have deprived you of a right, privilege, or immunity you have under the Constitution or federal laws. In simpler terms, they must have violated one of your constitutional or federal statutory rights. Part B(2) explains the general rules that courts have developed for determining whether the constitutional rights of prisoners have been violated and gives examples of violations of rights claimed by other prisoners. Part B(3) discusses Section 1983 claims for violations of rights that have been created by federal statutes.

2. Constitutional Bases for Section 1983 Claims

Not every violation of state law or prison regulations amounts to a constitutional violation that you can challenge using Section 1983. For example, a prison may have a regulation stating that all general population prisoners are allowed five phone calls a week. This "right to five phone calls" is not a constitutionally guaranteed right, and if the prison suddenly allows prisoners to make only one call a week, you won't be able to sue using Section 1983.[40] Instead, you may want to challenge that change in privileges through your prison's grievance system or in a state court. Similarly, if a prison guard harms you or your property by acting negligently (carelessly), this will not be enough to allow you to sue under Section 1983. Instead, you may, in some cases, be able to sue using state tort law.[41]

The next part of this Section begins with a general discussion of prisoners' constitutional rights and the "reasonably related" test (*Turner* test). Subsections (b) through (g) outline different constitutional protections that prisoners have under specific constitutional amendments. Make sure to read the other chapters of the *JLM* that also talk about these particular rights. Also, remember that your claim might involve violations of more than one constitutional right. Think about your situation from as many different angles as possible.

(a) General Framework for Prisoners' Constitutional Rights

As discussed earlier, keep in mind that your constitutional rights are not absolute. *The government is allowed to take away some of your rights in order to run the prison more safely or smoothly.* When you sue

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v. Donnelly, 42 F.3d 220, 223 (4th Cir. 1994) (holding that "a physician who treats a prisoner acts under color of state law even though there was no contractual relationship between the prison and the physician"); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (holding that private corporation under contract with the state to operate its prisons may be sued under § 1983); Ancata v. Prison Health Servs., 769 F.2d 700, 703 (11th Cir. 1985) (noting that defendant Prison Health Services workers, while not public employees, were clearly state actors); Christy v. Robinson, 216 F. Supp. 2d 398, 412 (D.N.J. 2002) (noting that doctors employed by a private medical association that contracts with the state to provide medical services to prisoners acts "under color of state law"); Mauldin v. Burnette, 89 F. Supp. 2d 1371, 1376–77 (M.D. Ga. 2000) (holding that private individual who was responsible for signing a prisoner in and out of prison and supervising him on work release acted "under color of state law"). *But cf.* Styles v. McGinnis, No. 00-1415, 28 F. App'x 362, 364 (6th Cir. 2001) (*unpublished*) (holding that doctor who was an independent contractor who provided emergency services at a hospital where he treated plaintiff prisoner was not acting under color of state law); Nunez v. Horn, 72 F. Supp. 2d 24, 27 (N.D.N.Y. 1999) (holding that doctor who treated prisoner was not acting under color of state law because the treatment was provided at a non-prison hospital and the doctor was not under contract with the state or Bureau of Prisons to treat prisoners).

38. Berg v. County of Allegheny, 219 F.3d 261, 268 (3d Cir. 2000) (holding that "[t]o make out a prima facie case under § 1983, the plaintiff must demonstrate that a person, acting under color of law, deprived him of a federal right.")

39. Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492, 497 (1961) (holding that officials who violate constitutional rights by acting illegally or abusing their authority are acting under "color of state law" for the purposes of § 1983), *overruled in part on other grounds*, Monell v. N.Y. City Dept. of Social Servs., 436 U.S. 658, 695–701, 98 S. Ct. 2018, 2038–41, 56 L. Ed. 2d 611 (1978).

40. If a New York state prison is not following its own rules or policies, prisoners can file an Article 78 petition. See Chapter 22 of the *JLM* for information on filing Article 78 petitions.

41. See Chapter 17 of the *JLM* for information on bringing a tort claim.

government officials or agencies for violating your rights, the officials or agencies must explain to the court why they acted that way. The reasons they give must have some rational relationship to the violation of your rights. The court then balances your constitutional rights against the reasons given by the defendants for taking away some of those rights. Most of the time, courts accept the prison official's explanation for the violation and rule against the prisoner.

In your claim, you should emphasize why your right is important and reasonable and why the prison officials' actions were unnecessary or unreasonable. Just saying that your rights were violated is usually not enough. You must try to expect arguments that the prison will make about the need for security or order and respond to them in the claim.

One of the leading Supreme Court cases regarding prisoners' constitutional rights is *Turner v. Safley.*[42] In *Turner*, the Supreme Court held that when a prison regulation has an impact on a prisoner's constitutional rights, the regulation is still valid if it is "reasonably related to legitimate penological interests."[43] Penological means "related to prison management." A penological interest is legitimate if it is a valid and justifiable concern for the prison and/or the officials operating the prison. Legitimate penological interests may include concerns for safety, discipline, effective punishment, and other management issues. Under the *Turner* test (also called the "reasonably related" test), a court will weigh the importance of the state's valid penological interests against the impact of the state's actions on your constitutional rights.

The *Turner* test has been used in cases challenging formal and informal prison policies and practices, as well as individual actions.[44] The test applies both to prison regulations and to actions taken by prison officials, individually or together. Note that *Turner* does not apply to claims of racial discrimination,[45] Eighth Amendment violations,[46] restrictions on private religious exercise,[47] and at least some procedural due process claims.[48]

To use the *Turner* test, courts evaluate if a regulation (or action) is "reasonably related" by looking at four factors:

(1) Whether there is a valid connection between the regulation and the government's justification for it;[49]

(2) Whether you still have other ways of exercising your constitutional right despite the regulation;[50]

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42. Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

43. Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

44. *See, e.g.*, Allah v. Al-Hafeez, 208 F. Supp. 2d 520, 529–31 (E.D. Pa. 2002) (applying *Turner* test to chaplain's decision to exclude prisoner from services after the prisoner disrupted the service); Youngbear v. Thalacker, 174 F. Supp. 2d 902, 914 (N.D. Iowa 2001) (applying *Turner* test to administrative decision resulting in year-long delay in building a sweat lodge).

45. Johnson v. California, 543 U.S. 499, 510–11, 125 S. Ct. 1141, 1149, 160 L. Ed. 2d 949, 961–62 (2005) (holding that the *Turner* test could not be applied to evaluate prison policy of assigning new prisoners cellmates of the same race). For more information on equal protection rights in prison, see Part B(2)(f) of this Chapter.

46. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993) (refusing to apply *Turner* test to prisoner's 8th Amendment claim); Austin v. Hopper, 15 F. Supp. 2d 1210, 1255 (M.D. Ala. 1998) (refusing to apply to *Turner* test to prisoner's 8th Amendment claim and noting that the Supreme Court has never used *Turner* for an 8th Amendment claim). For information on 8th Amendment claims for "cruel and unusual punishment," see Part B(2)(d) of this Chapter.

47. The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5 (2006), replaced *Turner's* "legitimate penological interest" standard with a stricter "compelling governmental interest" and "least restrictive means" test when evaluating government restrictions on private religious exercise in prisons and other institutions. *See* Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir. 2005).

48. *See* Washington v. Harper, 494 U.S. 210, 225, 228–29, 110 S. Ct. 1028, 1038, 1040–41, 108 L. Ed. 2d 178, 200, 202–03 (1990) (using the *Turner* test to analyze prisoner's substantive due process claim but not applying it to prisoner's procedural due process claim). For further discussion of your procedural due process rights, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings."

49. Turner v. Safley, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) ("[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it.").

50. Turner v. Safley, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) ("Where 'other avenues' remain available for the exercise of the asserted right … courts should be particularly conscious" of giving weight to prison officials' decisions). For example, in McRoy v. Cook County Dept. of Corr., 366 F. Supp. 2d 662 (N.D. Ill. 2005), a court upheld a prison's cancellation of Muslim services on certain occasions, in part because the court found that the prison had provided other opportunities for a prisoner to observe his religion, such as allowing him to keep religious materials and allowing prisoners to pray together in community rooms.

(3) Whether there will be a "ripple effect"[51] on the rights of others if you are allowed to exercise the right;[52] and
(4) Whether there is an easy way to meet the regulation's goal without limiting your constitutional right.[53]

In most cases, a prison regulation survives the *Turner* test because it only requires that the government's explanation for the regulation be rational (that it makes sense). This is not a very high standard for the government to meet. The government does not need to demonstrate that the regulation you are challenging is better than another less restrictive regulation, but the government does need to show that there is a connection between the regulation and the purpose it is supposed to accomplish.[54] This means that even if there are other potential regulations that would help the government achieve its goals without impacting prisoners' rights, the government can still pass the *Turner* test if there is connection between the current regulation and its purpose.

In *Turner*, the Court applied this test to a prison regulation banning prisoners from writing to or receiving letters from prisoners at other prisons (not including family members). The prison argued that letters between prisoners could be used to plan escapes or assaults. The Court first found that preventing escapes and assaults was a valid government interest, and that banning letters between prisoners was a rational way to help prevent escapes and assaults. As for factor (2), the Court noted that prisoners still had other ways to exercise their First Amendment rights to express themselves, since prisoners could write to and receive letters from anyone besides other prisoners. The Court found that allowing prisoners to correspond with other prisoners would have a significant "ripple effect" on others (factor (3)), since it might threaten the safety of other prisoners and prison guards. Finally, the Court found that there was no simple alternative way of ensuring that escapes and assaults were not planned through prisoner-to-prisoner letters. After going through the four factors, the Court held that the regulation was "reasonably related" to legitimate interests in security despite its interference with prisoners' First Amendment rights to free expression and communication.[55]

However, *Turner* also decided that a regulation preventing prisoners from marrying unless the superintendent found "compelling circumstances" was not "reasonably related" to legitimate security concerns.[56] The prison claimed that the regulation was primarily justified because "love triangles" among

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51. A "ripple effect" means an indirect effect on others.

52. Turner v. Safley, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987) ("A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.").

53. Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262–63, 96 L. Ed. 2d 64, 79–80 (1987) ("[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. … By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."). A prison may be able to meet the same goal by using one of several different rules. The prison does not have to choose the rule that has the least impact on your rights. However, the existence of alternative rules that accomplish the same goals may be considered evidence that the rule you are challenging is unreasonable, especially if the alternative rules do not have additional drawbacks. Turner v. Safley, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987).

54. *See* Hunafa v. Murphy, 907 F.2d 46, 48 (7th Cir. 1990) (finding the factual record provided by the prison was too "skimpy" to determine whether the prison's refusal to provide a pork-free meal to a prisoner was reasonably related to a legitimate penological interest); Walker v. Sumner, 917 F.2d 382, 386–87 (9th Cir. 1990) (holding that prison officials must provide support for the justifications of their regulations: assertions made without explanation or factual support are not enough). *But see* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (noting that a plaintiff's case should not be dismissed unless the prison has provided evidence supporting a rational relationship between a policy and the policy's justification, or there is a "common-sense connection" between the policy and the prison's penological interests); Austin v. Hopper, 15 F. Supp. 2d 1210, 1235 (M.D. Ala. 1998) (refusing to require "evidence of a valid, rational connection" between the claimed goals of a policy and the policy itself and instead using a "common sense" approach to whether a policy is reasonably related to legitimate correctional interests).

55. Turner v. Safley, 482 U.S. 78, 93, 107 S. Ct. 2254, 2263–64, 96 L. Ed. 2d 64, 81–82 (1987) ("The prohibition on correspondence is reasonably related to valid corrections goals. The rule is content neutral, it logically advances the goals of institutional security and safety … and it is not an exaggerated response to those objectives."). *But see* Allen v. Coughlin, 64 F.3d 77, 81 (2d Cir. 1995) (holding that a prison had not established a valid reason for a regulation banning newspaper clippings sent through the mail).

56. Turner v. Safley, 482 U.S. 78, 97–98, 107 S. Ct. 2254, 2266, 96 L. Ed. 2d 64, 84–85 (1987) ("The Missouri regulation … [restricting prisoner marriage] represents an exaggerated response to … security objectives. There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a … [minimal]

prisoners might lead to violence. The Court stated that there was no reasonable relationship between preventing marriage and preventing violence, since "love triangles" were just as likely when prisoners were unmarried. The Court also mentioned that a prisoner's marriage was generally a private decision that would not have a "ripple effect" on others. The Court emphasized that less restrictive regulations on prisoner marriages, such as those used at many other prisons, would be sufficient to meet the concerns of prison officials.

As you can see from these examples, you need to carefully consider how to argue your claim in terms of the four factors. You have a better chance of success if a regulation *completely* deprives you of the ability to exercise your right, since such a regulation fails factor (2) above. In such cases, you should suggest other rules that could accomplish the same prison goal without completely violating your rights. Comparing the bad practices of your prison with the better practices of other prisons may also be helpful.

The next Subsections address specific constitutional rights and give examples of claims brought under Section 1983 by prisoners. Many of these rights are addressed elsewhere in the *JLM* in much more detail, so make sure you read any other relevant *JLM* chapters.

(b) First Amendment Claims

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[57]

In other words, the First Amendment protects your rights to express yourself, practice your religion, and communicate with others. Your rights under the First Amendment can take many forms and several chapters of the *JLM* address these rights in detail. For a summary of your right to freedom of expression and a discussion of your right to communicate, see Chapter 19 of the *JLM*, "Your Right to Communicate with the Outside World." If your religious rights are being violated, you may want to sue under the Religious Freedom Restoration Act ("RFRA")[58] or the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[59] instead of Section 1983. It is more difficult for the prison to defend a regulation against a RLUIPA or RFRA lawsuit than a Section 1983 lawsuit.[60] See Chapter 26 of the *JLM*, "Religious Freedom in Prison," for more information.

(c) Fourth Amendment Claims

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[61] It prohibits unreasonable searches and seizures of pretrial detainees and other individuals confined by the state who have not been convicted of a crime.[62] The Fourth Amendment also protects convicted prisoners from unreasonably intrusive body searches (but not cell searches[63]), as discussed in Chapter 25 of the *JLM*, "Your Right to be Free From Illegal Body Searches."

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burden on the … security objectives."). Although the right to marry comes from the substantive due process part of the 14th Amendment, not the 1st Amendment, the analysis on how to balance the rights is the same. For information on prison marriage and divorce, go to http://www.hrlr.org/ jlm/toc.

57. U.S. Const. amend. I.

58. 42 U.S.C. § 2000bb-1 (2006). You may not bring a lawsuit under RFRA against state governments or officials. *See* City of Boerne v. Flores, 521 U.S. 507, 535, 117 S. Ct. 2157, 2172, 138 L. Ed. 2d 624, 649 (1997) (holding RFRA's application to State governments and State officials unconstitutional); *see also* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (finding that RFRA could constitutionally be applied to federal officers and agencies).

59. 42 U.S.C. § 2000cc-1 (2000). Note that you cannot use RLUIPA if the agency that operates your prison does not receive federal funding. Most state and local corrections departments do receive federal funding.

60. *See* Warsoldier v. Woodford, 418 F.3d 989, 998 (9th Cir. 2005) (noting that RLUIPA was designed to enhance protection of prisoners' religious freedom by replacing the *Turner* "legitimate public interest" test with a "compelling interest" test).

61. U.S. Const. amend. IV.

62. *See* Shain v. Ellison, 273 F.3d 56, 63–66 (2d Cir. 2001) (allowing a pretrial detainee to challenge a prison's strip-search policy).

63. *See* Block v. Rutherford, 468 U.S. 576, 591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438, 450 (1984) (holding

(d) Eighth Amendment Claims

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[64] Most cases prisoners bring under the Eighth Amendment relate to "cruel and unusual punishment." There are several types of claims courts will consider under the cruel and unusual punishment part of the Eighth Amendment. These claims include alleged harm resulting from prison conditions, inadequate medical care, and assault. The cases below provide some specific examples of Eighth Amendment claims which courts have recognized.

Read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act" ("PLRA"), if you plan to file a claim for cruel and unusual punishment under the Eighth Amendment. The PLRA prohibits federal lawsuits by prisoners for compensatory damages[65] for mental or emotional injury without accompanying physical injury.[66]

A claim that prison conditions or practices constitute cruel and unusual punishment must satisfy two tests. These tests are referred to as an "objective" and a "subjective" test:

(1) The objective test requires that prison conditions be objectively bad enough to be considered cruel and unusual. Conditions must amount to: "unquestioned and serious deprivations of basic human needs" or deprivation of the "minimal civilized measure of life's necessities," or they must include the "wanton and unnecessary infliction of pain."[67] Recent Supreme Court cases have emphasized serious threats to prisoners' health and safety.[68] However, under some circumstances, conditions need not inflict or threaten serious injury to meet the objective test of the Eighth Amendment. For example, cell searches amounting to "calculated harassment unrelated to prison needs" may constitute cruel and unusual punishment.[69] Similarly, excessive force may violate the Eighth Amendment if it is "repugnant to the conscience of mankind"[70] (even if it inflicts little physical injury). It is possible that other conditions that do not actually inflict physical injury (like sexually intrusive searches,[71] credible threats of immediate harm that are not acted upon,[72] or acts that amount to psychological torture[73]) may also be considered cruel and unusual punishment.

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searches of pretrial detainees' cells in their absence to be constitutional because government interest in conducting searches and maintaining security in this manner exceeded contrary interests of detainees); Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–03 (1984) (holding that the 4th Amendment prohibition against unreasonable searches does not apply to prison cells because "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions"); Willis v. Artuz, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that prisoners are not protected from cell searches by prosecutors or police even though such searches are not related to prison security). Note that the 4th Amendment does apply to searches of *jail* cells in some cases.

64. U.S. Const. amend. VIII (emphasis added).

65. Compensatory damages repay you for damages you have already sustained, like the cost of medical bills. Compensatory damages do not include punitive damages, which are meant to punish the wrongdoer rather than to compensate you for your injuries. See Part C(1)(a) of this Chapter for a more complete explanation of compensatory damages.

66. 42 U.S.C. § 1997e(e) (2006). The statute states that "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Courts have held that the statute only prohibits compensatory damages for mental or emotional injury, so prisoners can still claim injunctive relief or other forms of damages for emotional injuries.

67. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981) (finding that a practice of placing two prisoners in a single cell did not violate the 8th Amendment).

68. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (finding that excessive risk of attack—whether for reasons unique to one prisoner or to all in his situation—could qualify as a violation of the 8th Amendment).

69. Hudson v. Palmer, 468 U.S. 517, 530, 104 S. Ct. 3194, 3202, 82 L. Ed. 2d 393, 405 (1984). Note that the Court found no calculated harassment had occurred in this case.

70. Hudson v. McMillian, 503 U.S. 1, 10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 168 (1992) (allowing claim to go forward even where there was no significant injury or need for medical attention).

71. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1522, 1530 (9th Cir. 1993) (*en banc*) (holding that policy of "random, non-emergency, suspicionless clothed body searches on female prisoners" by male guards violated the 8th Amendment).

72. *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (holding that, if true, allegation that corrections officer brandished a gun and threatened to kill prisoner could make out an 8th Amendment violation); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) (holding that a prisoner has a right to be free from "the terror of

(2) The subjective test requires that prison officials have a certain state of mind in order to be found to have violated the Eighth Amendment. In most prison conditions cases, the standard is "deliberate indifference," which means that the officials must have had actual knowledge that they were subjecting you to an excessive risk of harm or other objectively unconstitutional conditions.[74] In use of force cases, however, you must show that the official who used force against you acted "maliciously and sadistically" for the purpose of causing harm.[75]

Under the objective test, as mentioned above, if your complaint is about the conditions of your imprisonment, you have to show that, "alone or in combination," the conditions deprived you of "the minimal civilized measure of life's necessities."[76] Life's necessities (or basic human needs) identified by the courts include "food, clothing, shelter, medical care and reasonable safety," [77] warmth,[78] exercise,[79] and the "basic elements of hygiene."[80] If you are trying to show that several conditions combined to deprive you of a life necessity, keep in mind that the conditions must have a "mutually enforcing [combined] effect that [deprives you] of a single, identifiable human need such as food, warmth, or exercise."[81] For example, you may suffer cruel and unusual punishment if the inadequate heat in your cell-block, combined with the prison's failure to issue blankets, deprives you of warmth.[82]

Under the subjective test, as mentioned above, you must show that the prison officials who injured you or failed to provide for your basic human needs did so with a certain state of mind. The exact state of mind needed for a violation to exist will depend on whether your claim is for inadequate prison conditions, inadequate medical care, assault, or issues surrounding work or exercise. These issues are described in the next few sections.

The amount of harm that the court will require you to show also varies depending on the type of Eighth Amendment claim that you bring. For example, if you are complaining about prison guard brutality, you may not have to show that your injury was "serious," only that it was more than minor and the other circumstances of the assault were unjustifiable.[83] On the other hand, if your claim is that you were deprived

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instant and unexpected death at the whim of his allegedly bigoted custodian").

73. *See, e.g.*, Hicks v. Frey, 992 F.2d 1450, 1457 (6th Cir. 1993) (noting that confining paraplegic prisoner to a cell where he was essentially restricted to his bunk without access to the showers could constitute a violation of the 8th Amendment); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (finding that prisoner who was threatened with a knife, denied requests for medical attention and continuously aggressively taunted by guard could claim a violation of the 8th Amendment).

74. Farmer v. Brennan, 511 U.S. 825, 839–43, 114 S. Ct. 1970, 1980–82, 128 L. Ed. 2d 811, 826–29 (1994).

75. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992).

76. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

77. Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 2480, 125 L. Ed. 2d 22, 31 (1993) (citing DeShaney v. Winnebago County Dept. of Social Serv., 489 U.S. 189, 199–200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)).

78. Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991); Palmer v. Johnson, 193 F.3d 346, 352–53 (5th Cir. 1999) (holding overnight exposure to winds and cold could violate the 8th Amendment).

79. Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991); Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 810 (10th Cir. 1999) (holding allegation of prolonged denial of outdoor exercise could violate the 8th Amendment).

80. Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (quoting Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971)) (holding that deprivation of toilet facilities for prisoners in a small area would violate the 8th Amendment); *see* Harper v. Showers, 174 F.3d 716, 717, 720 (5th Cir. 1999) (noting that allegation of placement into filthy, sometimes feces-smeared cells formerly housing psychiatric patients states an 8th Amendment claim); Bradley v. Puckett, 157 F.3d 1022, 1025–26 (5th Cir. 1998) (holding that defendant who alleged an inability to bathe for two months resulting in a fungal infection requiring medical attention stated an 8th Amendment claim). *But see* Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998) (holding that confinement in cell with blood on floor and excrement on wall was not unconstitutional because it was only for three days and cleaning supplies were available).

81. Wilson v. Seiter, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d. 271, 283 (1991) ("Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.").

82. *See, e.g.*, Wilson v. Schomig, No. 93-C-3854, 1998 U.S. Dist. LEXIS 6849, at *9–10 (N.D. Ill. May 7, 1998) (holding that lack of heat in prison cells may violate 8th Amendment principles).

83. *See* Hudson v. McMillian, 503 U.S. 1, 10, 112 S. Ct. 995, 1000–01, 117 L. Ed. 2d 156, 168 (1992) (holding that an assault on a prisoner by prison guards resulting in a cracked dental plate and minor bruises and swelling was enough harm to constitute a valid 8th Amendment claim).

of medical care, you will have to show that your medical needs were "sufficiently serious" and that prison officials were "deliberately indifferent" to these needs.[84]

(i) Prison Conditions

Poor prison conditions may constitute a violation of the Eighth Amendment. Such conditions can include a lack of basic necessities[85] or the presence of safety hazards, such as substandard fire prevention.[86] Excessively long confinement to a small cell and denial of outdoor exercise can also violate the Eighth Amendment.[87] Other conditions that may establish cruel and unusual punishment forbidden by the Eighth Amendment include unsanitary facilities, overcrowding, and inadequate heating and ventilation.[88] Some courts have held that the failure to protect prisoners from secondhand smoke may constitute a violation of the Eighth Amendment.[89] However, such cases generally require prisoners to show that the secondhand smoke poses an unreasonable risk of future harm to their health.[90] For more information about addressing secondhand smoke exposure, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

Courts have found that overcrowding violates prisoners' Eighth Amendment rights, especially where overcrowding leads to harmful consequences.[91] For example, in *Lareau v. Manson,*[92] prisoners successfully sued because a prison's failure to check newcomers for contagious diseases, combined with overcrowding, increased the risk of infection.

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84. *See* Wilson v. Seiter, 501 U.S. 294, 299, 111 S. Ct. 2321, 2324–25, 115 L. Ed. 2d 271, 279–80 (1991) (holding that a claim of an 8th Amendment violation must show deliberate indifference on part of prison officials). To bring a claim for inadequate medical care, see Chapter 22 of the *JLM*, "Your Right to Adequate Medical Care."

85. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (holding that a state must provide "prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety so as to avoid the imposition of cruel and unusual punishment"); Nicholson v. Choctaw County, Ala., 498 F. Supp. 295, 308–11 (S.D. Ala. 1980) (finding that 8th Amendment rights had been violated through, among other things, the unsanitary conditions in the jail, the lack of adequate medical care, unsafe conditions, and the lack of religious services or instruction).

86. *See, e.g.*, Hoptowit v. Spellman, 753 F.2d 779, 783–84 (9th Cir. 1985) (holding that hazardous work environment; inadequate lighting, plumbing, fire safety, and ventilation; and vermin infestation could constitute inhumane conditions); Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (holding that a state must provide "prisoners with reasonably adequate … personal safety so as to avoid the imposition of cruel and unusual punishment"). *But see* Osolinski v. Kane, 92 F.3d 934, 938–39 (9th Cir. 1996) (requiring more than a single defective piece of equipment to create inhumane conditions).

87. *See* Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 810 (10th Cir. 1999) (holding allegation of prolonged denial of outdoor exercise could violate the 8th Amendment); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (stating that with the exception of "inclement weather, unusual circumstances, or disciplinary needs that [make it] impossible," outdoor exercise is required when prisoners are otherwise confined to small cells 24 hours per day).

88. *See, e.g.*, Palmer v. Johnson, 193 F.3d 346, 352–53 (5th Cir. 1999) (finding that the combined circumstances of overnight outdoor confinement without shelter, blanket, heating, or access to bathroom facilities were a denial of necessities in violation of the 8th Amendment); DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988) (finding that prisoner stated sufficient 8th Amendment claim in § 1983 complaint alleging unsanitary and dangerous conditions); French v. Owens, 777 F.2d 1250, 1252–53 (7th Cir. 1985) (holding that overcrowding, medical neglect, and failure to protect prisoners from threats to safety violated 8th Amendment); Morales Feliciano v. Hernandez Colon, 697 F. Supp. 37, 40–45 (D.P.R. 1988) (ruling that overcrowding, vermin-infestation, and otherwise unsanitary conditions violated the 8th Amendment); Toussaint v. McCarthy, 597 F. Supp. 1388, 1409–11 (N.D. Cal. 1984) (finding constitutional violation due to certain conditions, including double-celling; insufficient ventilation and heating; and inadequate and unsanitary clothing and bedding supplies), *aff'd in part and rev'd in part*, 801 F.2d 1080 (9th Cir. 1986).

89. *See* Gill v. Smith, 283 F. Supp. 2d 763, 769 (N.D.N.Y. 2003) (allowing prisoner with asthma to go forward with 8th Amendment claim that exposure to secondhand smoke posed an unreasonable risk of future harm to his health); Atkinson v. Del. Dept. of Corr., No. 99-562-JJF, 2001 U.S. Dist LEXIS 25586, at *13 (D. Del. June 27, 2001) (same).

90. *See* Helling v. McKinney, 509 U.S. 25, 36, 113 S. Ct. 2475, 2482, 125 L. Ed. 2d 22, 33 (1993) (holding that exposure to extreme levels of tobacco smoke that pose an unreasonable risk to future health may be an 8th Amendment violation, and that the plaintiff did not need to wait until he was actually harmed to ask a court to correct unsafe conditions); Gill v. Smith, 283 F. Supp. 2d 763, 769 (N.D.N.Y. 2003) (same); Atkinson v. Del. Dept. of Corr., No. 99-562-JJF, 2001 U.S. Dist LEXIS 25586, at *13 (D. Del. June 27, 2001) (same).

91. *See, e.g.*, Tillery v. Owens, 907 F.2d 418, 427–28 (3d Cir. 1990) (holding that double-celling due to overcrowding, in combination with other factors, such as the physical condition of the cell, violated 8th Amendment); Mitchell v. Cuomo, 748 F.2d 804, 807–08 (2d Cir. 1984) (granting prisoners an injunction against the closing of a facility that would result in overcrowding in other prisons); Fisher v. Koehler, 692 F. Supp. 1519, 1564 (S.D.N.Y. 1988) (holding that the level of both prisoner-prisoner violence and staff-prisoner violence resulting, in part, from overcrowding, violated 8th Amendment), *aff'd*, 902 F.2d 2 (2d Cir. 1990).

92. Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981).

Some Section 1983 claims challenge the prison housing arrangements. Courts have generally held that double-celling (placing two prisoners in each cell) is constitutional as long as both prisoners are provided with their basic needs, such as enough space to sleep and a clean interior. Double-celling is not by itself considered a constitutional violation because prisoners still enjoy their rights within that two-person set-up and because prison officials have strong administrative concerns in providing housing for all prisoners.[93] Similarly, administrative segregation is also acceptable and does not violate a prisoner's rights.[94] However, administrative segregation imposed upon you by prison officials in order to get back at you for a complaint or claim you filed is not constitutional.[95] Note that cases complaining about administrative segregation are brought as substantive due process claims, not Eighth Amendment claims. For a discussion of substantive due process, see Part B(2)(e)(i) below. Because cases for inadequate cell assignments often overlap with Eighth Amendment claims for assault, you should be sure to review the cases cited in this Subsection and Chapter 24 of the *JLM*, "Your Right to be Free From Assault by Prison Guards and Other Prisoners."

(ii) Inadequate Medical Care and Other Health Risks

Inadequate medical care has also been found to be a violation of the Eighth Amendment. Unreasonable risks to your health may violate the Eighth Amendment even if you have not been harmed yet.[96] For information on your right to medical care, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

(iii) Assault

Many Section 1983 cases have claimed Eighth Amendment violations due to prison officials' failure to protect prisoners from assaults by other prisoners. For more detailed information, see Chapter 23 of the *JLM*, "Your Right to be Free from Assault."

(iv) Exercise, Work, and Education

Eighth Amendment claims challenging deprivations of exercise and recreation have had mixed results. A prisoner's right to exercise is judged in terms of basic needs. Thus, because prison officials are constitutionally required to provide for the health of the prisoners under their supervision, prisoners must generally be allowed certain minimum levels of exercise.[97] This right is violated only if movement is denied, muscles are allowed to waste, or the health of the individual is threatened.[98] Most courts will not find a deprivation of recreation time to be a violation of constitutional rights, since general recreation, unlike exercise, does not necessarily affect prisoners' health.

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93. *See* Rhodes v. Chapman, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 70 (1981) (holding that double-celling did not violate the 8th Amendment since it did not lead to deprivations of basic needs, and did not increase violence among prisoners or create other conditions intolerable for prison confinement).

94. *See, e.g.*, Sealey v. Giltner, 197 F.3d 578, 589–90 (2d. Cir. 1999) (finding that administrative confinement after a required factual determination that plaintiff posed a threat to prison safety, was not an "atypical and significant hardship" when compared to the ordinary conditions of prison life). *Sealey* is not an 8th Amendment case, but was brought under the Due Process Clause of the 14th Amendment.

95. *See* Allah v. Seiverling, 229 F.3d 220, 223–24 (3d Cir. 2000) (allowing prisoner to go forward with due process claim that he was kept in administrative segregation in retaliation for filing civil rights suits).

96. *See* Helling v. McKinney, 509 U.S. 25, 36, 113 S. Ct. 2475, 2482, 125 L. Ed. 2d 22, 33 (1993) (holding that exposure to extreme levels of environmental tobacco smoke that pose an unreasonable risk to future health may be an 8th Amendment violation, and that the plaintiff did not need to wait until he was actually harmed to ask a court to correct unsafe conditions). *But see* Glick v. Henderson, 855 F.2d 536, 540 (8th Cir. 1988) (denying prisoner's 8th Amendment claim based on exposure to HIV in prison, because it was based on an "unsubstantiated fear").

97. *See* Davenport v. DeRobertis, 844 F.2d 1310, 1315–1316 (7th Cir. 1988) (finding an 8th Amendment violation where prisoners in a segregation unit were allowed only one hour a week of exercise outside of their cells); French v. Owens, 777 F.2d 1250, 1255–56 (7th Cir. 1985) (noting that lack of physical exercise may be a constitutional violation); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) ("[T]he denial of fresh air and regular outdoor exercise and recreation constitutes cruel and unusual punishment."). *But see* Anderson v. Coughlin, 757 F.2d 33, 36 (2d Cir. 1985) ("[N]either an occasional day without exercise when weather conditions preclude outdoor activity nor reliance on running, calisthenics, and isometric and aerobic exercises in lieu of games is cruel and unusual punishment.").

98. French v. Owens, 777 F.2d 1250, 1255–56 (7th Cir. 1985) (when "movement is denied and muscles allowed to atrophy, the health of the individual is threatened and the state's constitutional obligation" is affected). *See also* Mitchell v. Rice, 954 F.2d 187, 192–93 (4th Cir. 1992) (stating that prisons may restrict exercise only in exceptional circumstances, such as when an adult prisoner is in disciplinary segregation).

Eighth Amendment claims challenging deprivations of meaningful work or educational programs have not been very successful. The Supreme Court has said that because limited work hours or delays in accessing education do not inflict pain and are not punishments, work and education generally are not basic needs protected by the Eighth Amendment.[99]

(e) Fourteenth Amendment Claims: Due Process Clause

The Due Process Clause of the Fourteenth Amendment forbids the state from "depriv[ing] any person of life, liberty, or property, without due process of law."[100] The Clause has been interpreted as containing two separate types of protections: "substantive due process" and "procedural due process."

(i) Substantive Due Process

The substantive aspect of the Due Process Clause prevents the government from interfering with your fundamental individual rights in a way that is not "reasonably related to legitimate penological interests."[101] The idea of liberty in the Constitution includes some rights that you retain as a prisoner. In general, substantive due process claims arise when state officials deprive you of this liberty. For example, you have a right to bodily privacy, a right to informational privacy and confidentiality, a right to get married, and a right to refuse medical or psychiatric treatment. All of these rights are protected under substantive due process, but this protection has limits. The government only violates your substantive due process rights when it acts in a way that is not reasonably related to a legitimate goal. "Reasonable relation to a legitimate goal" is determined using the *Turner* test, described above in Part B(2)(a).

As mentioned earlier, the right to bodily privacy is one of the liberty rights you maintain while in prison. The right to bodily privacy includes a limited right to not be viewed unclothed or strip-searched by members of the opposite sex.[102] This right is often outweighed by prison security interests, but not always. Bodily privacy also includes the right to an abortion, which some courts have upheld for prisoners.[103]

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99. *See* Rhodes v. Chapman, 452 U.S. 337, 348, 101 S. Ct. 2392, 2400, 69 L. Ed. 2d 59, 70 (1981) ("[L]imited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments."); Granillo v. Corr. Corp. of Am., No. 99-5720, 2000 U.S. App. LEXIS 28037, at *2–3 (6th Cir. Nov. 6, 2000) (*unpublished*) (dismissing as frivolous complaint where prisoner claimed administrative detention denied him of goods, recreation, work opportunities, money, schooling, television, telephone, contact visitation, and a microwave to heat his cold meals); Women Prisoners v. District of Columbia, 93 F.3d 910, 927 (D.C. Cir. 1996) (noting that a prisoner has no constitutional right to work and educational opportunities); Higgason v. Farley, 83 F.3d 807, 810 (7th Cir. 1995) (determining that reduction in privileges, including educational programs, "did not infringe on a protected liberty interest").

100. U.S. Const. amend. XIV, §1. The 14th Amendment applies to state government action. The 5th Amendment contains an identical prohibition: "No person shall be … deprived of life, liberty, or property, without due process of law" and applies to the federal government. U.S. Const. amend. V. Federal prisoners therefore usually use the 5th Amendment instead of the 14th Amendment to challenge due process violations.

101. Turner v. Safley, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77–78 (1987) (finding that prison regulations that affect constitutional rights can only be upheld if they have a rational connection to a legitimate government interest); *see also* Washington v. Harper, 494 U.S. 210, 224, 110 S. Ct. 1028, 1038–39, 108 L. Ed. 2d 178, 200 (1990) (reasoning that the right to be free of psychotropic medication had to be balanced against the state's duty to treat mentally ill prisoners and run a safe prison).

102. *See, e.g.*, Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (finding that right to bodily privacy may have been violated where male prisoners were subject to unclothed observation by female guards); Sepulveda v. Ramirez, 967 F.2d 1413, 1415 (9th Cir. 1992) (upholding parolees' privacy rights not to be under surveillance by guards of the opposite sex while giving urine samples). *But see* Oliver v. Scott, 276 F.3d 736, 739 (5th Cir. 2002) (holding that prison's use of female prison guards to strip search male prisoner was justified by security concerns); Forts v. Ward, 621 F.2d 1210, 1217 (2d Cir. 1980) (finding that issuing suitable sleepwear and covering cell windows during changing times adequately protects female prisoners' privacy interest in not being viewed by male guards). See Chapter 24 of the *JLM*, "Your Right to be Free From Illegal Body Searches" for more information.

103. In cases involving prisons' blanket prohibitions or court-order requirements, courts have routinely applied the *Turner* reasonableness test to assess whether the challenged policy violates an inmate's right to abortion under the 14th Amendment. *See* Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 337–38 (3d Cir. 1987) (holding that the county's administrative and economic reasons for limiting access to elective abortions for prisoners did not meet the *Turner* reasonableness standard); Roe v. Crawford, 514 F.3d 789, 793 (8th Cir. 2008) (holding that the Missouri Department of Corrections' policy of prohibiting transportation of pregnant inmates off-site for elective, non-therapeutic abortions violated inmates' Fourteenth Amendment due process rights); Doe v. Arpaio 150 P.3d 1258, 1259 (Ariz. Ct. App. 2007) (holding that a prison's policy requiring an inmate to obtain a court order to receive an elective, non-therapeutic abortion off-site served no "legitimate penological interest"). *But see* Gibson v. Matthews, 926 F.2d 532, 536–

The right to informational privacy and confidentiality is another substantive due process right. Some courts have interpreted the Fourteenth Amendment to find that HIV-positive prisoners have protections against disclosure of their HIV status, at least to non-medical personnel.[104] Segregation of HIV-positive prisoners is another way in which the substantive due process right to informational privacy may be violated.[105] However, not all courts agree that disclosure of prisoners' HIV status impacts a constitutionally protected right.[106]

Other rights the Supreme Court has held to be fundamental and protected by substantive due process include the right to marriage[107] and the right to marital privacy.[108]

There are two important points that you should know if you are thinking of bringing a Section 1983 lawsuit based on a substantive due process violation. First, if the particular "liberty" that you feel was violated is specifically protected by another constitutional amendment, you should make sure to claim a violation of that amendment rather than using the general substantive due process protection.[109] For instance, if you are not given proper access to medical care, you should not argue that you are suffering a substantive due process violation of life or liberty, since inadequate medical care is specifically covered by the Eighth Amendment's prohibition of cruel and unusual punishment.

Second, in order to bring a lawsuit for a substantive due process violation, you must be able to show that the officials who violated your liberty rights acted with "deliberate indifference" to your rights. The definition of deliberate indifference varies from circuit to circuit, so be sure to look at cases raising similar claims in your circuit to see how your circuit defines deliberate indifference.[110]

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37 (6th Cir. 1991) (holding that prison officials' negligent failure to provide a prisoner with a requested abortion was not unconstitutional); Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004) (holding that a prison's policy of requiring inmates to obtain a court order before receiving elective medical procedures, including abortions, was reasonable under the *Turner* framework); Bryant v. Maffucci, 729 F. Supp. 319, 327 (S.D.N.Y. 1990). For more information on women prisoners' access to abortion, see Part D(2) of Chapter 22 of the *JLM*, "Your Right to Adequate Medical Care."

104. *See* Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001) (holding that the 14th Amendment protects a prisoner's right to medical privacy, subject to legitimate penological interests); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988) *aff'd* 899 F.2d 17 (7th Cir. 1990) (finding prisoners' substantive due process rights violated when prison officials allowed non-medical employees and other prisoners to learn their HIV status); Nolley v. County of Erie, 776 F. Supp. 715 (W.D.N.Y. 1991) (holding that prison inmates are protected by a constitutional right to privacy from the unwarranted disclosure of their HIV status); Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988) (holding that prisoners must be afforded some protection against nonconsensual disclosure of their HIV status).

105. For information and cases on segregation of prisoners with HIV, see Chapter 25 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison."

106. Reed v. Allen, 379 Fed. App'x 879, 880 (11th Cir. 2010) (holding that an inmate challenging a policy of requiring HIV-positive inmates to wear white wristbands had not "clearly established" a violation of a constitutional right); Harris v. Thigpen, 941 F.2d 1495, 1514 (11th Cir. 1991) (holding that a prison's policy of segregating HIV-positive inmates from the rest of the general population, and thereby disclosing their HIV-status to other prisoners, served a legitimate penological goal).

107. Turner v. Safley, 482 U.S. 78, 95–96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987) (holding the right to marry is subject to substantial restrictions due to incarceration, but that it is still a constitutionally protected right in the prison context). For information on prison marriage and divorce, go to http://www.hrlr.org/jlm/toc.

108. *See* Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772, 787 (1997) (discussing liberty interests protected by substantive due process).

109. *See* Jackson v. Hamm, 78 F.Supp.2d 1233, 1242 (M.D. Ala. 1999) ("[T]he Supreme Court has made clear that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process.").

110. For claims concerning medical care, prisoners must show that they were denied medical care for a "serious medical need" and that the denial was a result of officials' deliberate indifference. *See* Estelle v. Gamble, 429 U.S. 96, 104–05, 97 S. Ct. 285, 291–92, 50 L. Ed. 2d 251 (1976). *See also* Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994); Marshall v. Crandall, 20 Fed. Appx. 633 (9th Cir. 2001) (holding that a prisoner failed to show deliberate indifference where prison nurses responded to his fractured rib with non-prescription painkillers); Lloyd v. Lee, 570 F. Supp. 2d 556, 560 (S.D.N.Y. 2008) (holding that prison officials' failure to give an inmate an MRI nearly one year after he suffered a torn rotator cuff and ripped tendon in his shoulder asserted a plausible claim of deliberate indifference); Sanchez v. Vild 891, F.2d 240, 242 (9th Cir. 1989) (holding that a difference of medical opinion does not rise to the level of deliberate indifference). For claims concerning personal liberty and security, prisoners need only show that officials' conduct amounted to deliberate indifference of their personal security. *See* Redman v. County of San Diego, 942 F.2d 1435, 1445 (9th Cir. 1991) (holding that a jury could find prison officials' decision to place a heterosexual male in a cell with an "aggressive homosexual," resulting in his rape, to be deliberate indifference to the prisoner's personal security); Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) (holding that prison officials' failure to act to prevent a

The second kind of substantive due process violation occurs when a state official acts in a way that "shocks the conscience." Courts have never supplied a clear definition of what the phrase means. In *Rochin v. California*, the Supreme Court found that forcibly pumping a person's stomach to obtain evidence was shocking to the conscience.[111] However, the Court has held that forcibly drawing blood to obtain evidence is not shocking to the conscience. In high-speed police car chases, the Court has stated that a police officer's behavior only shocks the conscience if the officer acts "maliciously and sadistically for the very purpose of causing harm."[112] In general, you will probably only be able to bring this type of claim if a state official has harmed you by intentionally acting in a way that is truly outrageous.

(ii) Procedural Due Process

Your right to procedural due process under the Fifth and Fourteenth Amendments means that the government cannot deprive you of life, liberty, or property without going through certain procedures, or due process. In order to successfully argue that your procedural due process rights were violated, you must be able to show that you were deprived of liberty or property, *and* that the deprivation occurred without enough procedural protection.[113]

Showing that you were deprived of liberty or property means showing that either your property or your liberty was taken from you *in a way that is not typical of prison life*.[114] You must also show that the prison officials' action was not accidental or simply careless.[115]

Prisoners often file procedural due process claims after a prison administrative procedure or hearing happens in some manner that is unfair to them, like if they were not told about the hearing in advance or were not allowed to defend themselves in some other way.[116] For an extensive discussion of due process claims resulting from disciplinary and administrative segregation and loss of good time credits, work release programs, and parole, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings." Chapter 18 also explains the Supreme Court's important decision in *Sandin v. Conner*,[117] which governs the procedural due process requirements in the prison setting.

The amount of procedural protection that is sufficient to protect your rights and the exact procedures that prisons must use depend on the situation. For example, if prison officials know in advance that they are going to take away a liberty or property interest, then they have to provide some type of procedural due process (such as a hearing) *before* the deprivation occurs. If they do not, you may be able to pursue a claim

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violent overthrow, when they had heard rumors of plans involving plaintiffs' safety, rose to the level of deliberate indifference).

111. Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 209–10, 96 L. Ed. 183, 190 (1952).

112. County of Sacramento v. Lewis, 523 U.S. 833, 853–54, 118 S. Ct. 1708, 1720, 140 L. Ed. 2d 1043, 1061–62 (1998) (holding that in the context of a high-speed chase, official conduct can be in violation of substantive due process only if the officer intended to violate the victim's constitutional rights).

113. Procedural protection refers to the requirement that deprivations of due process are at least subject to certain procedural safeguards, such as the right to a hearing, the right to counsel, or an opportunity to speak in one's own defense, which serve to protect the prisoner or the accused. *See, e.g.*, Sandin v. Connor, 515 U.S. 472, 487, 115 S. Ct. 2293, 2302 (1995) (holding that a parole hearing to explain the circumstances behind a prisoner's misconduct record sufficed to afford "procedural protection" for a parole board's decision not to grant parole); Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976 (1974) (holding that the determination of prisoners' guilt of "serious misconduct," for which they could lose "good-time credits," requires some sort of hearing to safeguard the minimum requirements of procedural due process).

114. *See* Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life).

115. *See* Daniels v. Williams, 474 U.S. 327, 331–32, 106 S. Ct. 662, 664–65, 88 L. Ed. 2d 662, 668 (1986) (holding that negligence is not enough to constitute a violation under the Due Process Clause).

116. *See, e.g.*, Jones v. Ray, 279 F.3d 944, 946 (11th Cir. 2001) (noting that a parole board's reliance on false information in a parole file can violate procedural due process); Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (finding 305 days in segregation to be an adequate departure from normal prison life so as to require procedural due process protections); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (finding that a 90-day confinement in segregation may require due process protections).

117. Sandin v. Conner, 515 U.S. 472, 478, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life).

under Section 1983.[118] However, if the deprivation is necessary because of an emergency situation or occurs accidentally—then due process (such as a hearing) is not required until *after* the deprivation occurs.[119] Some courts say that the availability of a remedy (such as compensation for lost property) under state tort law is enough to meet the requirement of due process—even if you can't actually win the state claim because of governmental immunity.[120] If there is a remedy for the deprivation of liberty or property under state law, you may not be allowed to bring a suit under Section 1983.[121]

(f) Fourteenth Amendment Claims: The Equal Protection Clause

Under the Equal Protection Clause of the Fourteenth Amendment, all persons in the United States, including prisoners, are guaranteed "the equal protection of the laws."[122] This means that the state may not treat you differently or discriminate against you because you belong to a particular group or "class" of people. In general, for a prisoner to make a claim under the Equal Protection Clause, the claim has to meet two requirements:[123] (1) it must state that you were treated differently from other prisoners who were in a similar situation or similar circumstances,[124] and (2) it must state that the unequal treatment resulted from intentional or purposeful discrimination.[125] You are most likely to be able to make an equal protection claim if you have been discriminated against because of your race,[126] gender,[127] ethnicity,[128] or disability.[129]

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118. *See* Zinermon v. Burch, 494 U.S. 113, 139, 110 S. Ct. 975, 990, 108 L. Ed. 2d 100, 122 (1990) (holding that plaintiff had made a sufficient due process claim when it was shown that a deprivation of his rights was foreseeable such that pre-deprivation safeguards could have prevented the harm suffered).

119. *See* Parratt v. Taylor, 451 U.S. 527, 540–41, 101 S. Ct. 1908, 1915–16, 68 L. Ed. 2d 420, 432 (1981) (holding that post-deprivation remedy is sufficient to meet the requirements of due process where a pre-deprivation hearing would be "impracticable" or "impossible"), *overruled on other grounds by* Daniel v. Williams, 474 U.S. 327, 330–31, 106 S. Ct. 662, 664, 88 L. Ed. 2d 662 (1986).

120. *See, e.g.*, Hamlin v. Vaudenberg, 95 F.3d 580, 585 n.3 (7th Cir. 1996) (noting that adequate state law remedies are not made inadequate by defendants' ability to raise immunity defenses); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1245 (M.D. Ala. 1999) (holding that a state tort claim for false imprisonment was an adequate remedy even if the defendants were immune from being sued); Irshad v. Spann, 543 F. Supp. 922, 929 (E.D. Va. 1982) (finding a state remedy could be adequate even if defendants were immune from suit). *But see* Larramendy v. Newton, 994 F. Supp. 1211, 1216 (E.D. Cal. 1998) (holding that state tort law is not sufficient to satisfy due process where a state defendant would be absolutely immune from being sued under state law, thereby making recovery impossible); Soto v. Lord, 693 F. Supp. 8, 15–16 (S.D.N.Y. 1988) (same); Madden v. City of Meriden, 602 F. Supp. 1160, 1169 (D. Conn. 1985) (noting that state remedy is inadequate for procedural due process purposes if defendant cannot be sued); Harper v. Scott, 577 F. Supp. 15, 17 (E.D. Mich. 1984) (holding that state law remedies are inadequate where defendants are immune from suit).

121. *See* City of W. Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999) (holding that police seizure of private property during a criminal investigation did not violate due process where the police gave plaintiffs a list of the property seized, and where state law provided the means for plaintiffs to eventually retrieve their property, even though the police did not actually notify plaintiffs that they could retrieve their property). For more information, see Chapter 16 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

122. U.S. Const. amend XIV.

123. *See* Veney v. Wyche, 293 F.3d 726, 730–31 (4th Cir. 2002) (naming the two requirements that must be met for a prisoner who wants to make an equal protection claim); Wilson v. Taylor, 515 F. Supp. 2d 469, 472 (D. Del. 2007) (same); Williams v. Manternach, 192 F. Supp. 2d 980, 990 (N.D. Iowa 2002) (same).

124. Klinger v. Dept. of Corr., 31 F.3d 727, 731 (8th Cir. 1994) (noting that the Equal Protection Clause requires the state to treat people alike when they are in similar situations).

125. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987) (noting that a successful equal protection claim must prove that there was purposeful discrimination). This means that it is not enough to argue that you received different treatment, but that you must also argue that you were *intentionally* treated differently (treated differently on purpose).

126. *See* Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 963 (2005) (finding that a prisoner's 14th Amendment rights to equal protection are violated if the prison discriminates on the basis of race, unless the prison can demonstrate that such discrimination is *necessary* in order to achieve a *compelling* government interest); Sockwell v. Phelps, 20 F.3d 187, 191 (5th Cir. 1994) (finding equal protection violation where prisoners were segregated by race in their cells, because a general fear of racial violence could not justify segregation); Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) (finding that plaintiffs had proven the existence of equal protection violations based on a pattern of racism affecting job placement, housing assignments, and discipline). *But see* Wilson v. Taylor, 515 F. Supp. 2d 469, 473 (D. Del. 2007) (dismissing equal protection claim based on race discrimination in prison discipline because prisoner did not provide evidence that the discipline was racially motivated or that white prisoners who were similarly situated were treated differently); Hill v. Thalacker, 399 F. Supp. 2d 925, 929 (W.D. Wis. 2005) (dismissing prisoner's claim of race discrimination in promotion because he did not provide any evidence that the white

You may also have an equal protection claim if you are discriminated against because of your custodial status (the type of custody you are in, such as protective custody, general population, etc.).[130] However, in practice, equal protection claims for discrimination based on custodial status are difficult to win, since treating different types of prisoners in different ways is allowed as long as the prison has *some* reasonable explanation.[131]

The Supreme Court has also recognized that it may be possible to make an equal protection claim if you are singled out as an individual for "arbitrary and irrational treatment," even if you are not being discriminated against as a member of a certain group.[132] Like other constitutional rights, the right to equal protection is balanced against the state's legitimate interests, such as keeping prisons safe and orderly.

(g) First, Sixth, and Fourteenth Amendment Claims: Access to Courts

A prisoner's right to court access comes from several constitutional provisions, including the First Amendment's right to freedom of speech, the Sixth Amendment's right to counsel, and the Fourteenth Amendment's right to due process. For a discussion of your right to access the courts, see Chapter 3 of the *JLM*, "Your Right to Learn the Law and Go to Court."

3. Federal Statutory Bases for Section 1983 Claims

Sometimes you can also bring a Section 1983 claim if a right created by certain federal statutes has been violated by a state actor.[133] However, only a few federal laws can be enforced using Section 1983. These laws include 38 U.S.C. § 5301(a), which deals with payment of veteran's benefits.[134] You may also be able to bring a Section 1983 claim if your rights under certain international treaties have been violated. For example, a

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prisoners who were promoted before he was were similarly situated); Bass v. Becher, 2004 U.S. Dist. LEXIS 2372, at *12 (W.D. Wis. Feb. 17, 2004) (*unpublished*) (dismissing claim of equal protection violation based on race because the plaintiff did not provide facts to show how his treatment would be different from a white prisoner in the same position); Brown v. Byrd, No. 00-3118, 2000 U.S. Dist. LEXIS 17354, at *15–19 (E.D. Pa. Dec. 1, 2000) (*unpublished*) (finding that defendants' policy of assigning cells based on whether they thought prisoners would get along, even if shown to have a racial impact, if not a discriminatory purpose, withstood *Turner* scrutiny and did not violate the Equal Protection Clause because, even if prisoners were treated differently, it was reasonably related to the prison's legitimate interests in safety and security); Giles v. Henry, 841 F. Supp. 270, 275 (S.D. Iowa 1993) (finding African-American plaintiff's argument that defendants treated similarly situated white prisoners more favorably than him to be unpersuasive, because there was no clear pattern of discrimination in the evidence).

127. For information on and cases regarding equal protection violations based on gender, see "Special Issues of Women Prisoners," available online at http://www.hrlr.org/jlm/toc, or write to the *JLM* to request a copy.

128. *See* Jean v. Nelson, 711 F.2d 1455, 1486 (11th Cir. 1983) (noting that "[a] claim of discrimination based on nationality does not differ from that based on race"); Parisie v. Morris, 873 F. Supp. 1560, 1562–63 (N.D. Ga. 1995) (finding plaintiff's claim that the parole board had impermissibly considered his ethnicity in denying him parole was a valid claim).

129. *See, e.g.*, Green v. McKaskle, 788 F.2d 1116, 1125 (5th Cir. 1986) (noting restrictions on movement and access based on disability may violate equal protection if no possible justification is shown). See Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities," for more information on disability discrimination.

130. Williams v. Manternach, 192 F. Supp. 2d 980, 990–92 (N.D. Iowa 2002) (finding that plaintiff made a valid equal protection claim by stating that he was treated differently as a "lifer" with regard to jobs and classification). *But see* Gerber v. Hickman, 291 F.3d 617, 623–624 (9th Cir. 2002) (*en banc*) (finding no equal protection violation for a life prisoner barred from providing his wife with a sperm sample for the purposes of artificial insemination, because keeping up with contacts outside of prison is not as important for prisoners who will never be released from prison).

131. *See, e.g.*, Little v. Terhune, 200 F. Supp. 2d 445, 452 (D.N.J. 2002) (rejecting plaintiff's equal protection claim because the lack of programming available to prisoners in administrative segregation compared with those in the general population was rationally related to the prison's security concerns and budgetary constraints).

132. Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074–75, 145 L. Ed. 2d 1060, 1063 (2000) (finding that equal protection claims can be made by a "class of one" if the plaintiff has been arbitrarily and irrationally singled out and treated differently from others in similar situations and there is no rational basis for the difference in treatment).

133. Maine v. Thiboutot, 448 U.S. 1, 4, 100 S. Ct. 2502, 2504, 65 L. Ed. 2d 555, 559 (1980) (holding that § 1983 may be used for violations of a right under a federal statute).

134. Higgins v. Beyer, 293 F.3d 683, 689–690 (3d Cir. 2002) (holding that 38 U.S.C. § 5301(a) (2000), which prohibits veterans benefits from being seized or attached, creates a right that can be enforced under § 1983). In *Higgins*, a prisoner brought a § 1983 claim against the New Jersey Department of Corrections and other defendants for taking a portion of the money from his veteran's disability check to pay a fine the prisoner owed to the Victims of Crime Compensation Board. Higgins v. Beyer, 293 F.3d 683, 685–86 (3d Cir. 2002).

few courts have decided that Article 36 of the Vienna Convention on Consular Relations ("VCCR"),[135] which describes foreign nationals' right to consular access, can be used as the basis for a Section 1983 claim.[136] You Also, some federal statutes that cannot be enforced through Section 1983 have their own enforcement provisions.[137]

It can be easier to show that your rights under a statute have been violated than it is to show a constitutional violation, so if courts have already found that a particular statute can be used as the basis for a Section 1983 claim, you should examine the cases interpreting the statute to determine if your case is similar to them. Pay special attention to which cases rely on Section 1983 and which do not.[138]

C. Your Lawsuit

1. Types of Relief a Court May Grant

Whether your Section 1983 claim is based on a violation of constitutional or federal statutory rights, you may generally ask a federal district court for several types of relief in a Section 1983 action. Types of relief include damages (money payment), injunctive relief (an order from the court to the person you sued to do something or to stop doing something), and declaratory relief (a court statement of what your rights are). You may ask for more than one type of relief in your suit. However, the type of relief you can ask for may be different depending on whom you sue or name as defendants.[139]

(a) Money Damages

The court may require the individual defendants (such as a warden, guard, or employee) to pay you money damages. You generally cannot get a judgment for money damages against states or state agencies, such as a state prison.[140] Monetary damages are available, with some limitations, against municipalities and private corporations. If you are suing for damages, either you (the plaintiff) or the defendant can demand a trial by jury.

There are three general categories of money damages: compensatory, punitive, and nominal damages. *Compensatory damages*, also known as actual damages, are awarded to make you "whole"—that is, to put you back in the same position as before you suffered the wrong. For example, if an item of your property has

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135. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100, 596 U.N.T.S. 261, 292.

136. Note that the federal courts are not in agreement as to whether Article 36 of the Vienna Convention creates a right enforceable by an individual who has been arrested. *Compare* Jogi v. Voges, 480 F.3d 822, 834 (7th Cir. 2007) (holding that Article 36 of the Vienna Convention confers individual rights on detained nationals), *with* Gandara v. Bennett, 528 F.3d 823, 827–28 (11th Cir. 2008) (holding that Article 36 of the Vienna Convention on Consular Relations does not create individual rights); De Los Santos Mora v. New York, 524 F.3d 183, 209 (2d Cir. 2007) (same); Cornejo v. County of San Diego, 504 F.3d 853, 855 (9th Cir. 2007) (same). The majority of federal courts that have addressed the issue have concluded that the Vienna Convention does not create enforceable individual rights, and the Supreme Court has not yet addressed the issue of whether Article 36 can provide the basis for a §1983 claim. United States v. Perez-Sanchez, No. CR02-4065-MWB, slip op., 2006 WL 2949503, at *8 (N.D. Iowa Oct. 16, 2006) (*unpublished*). For more information on consular access, see the Immigration and Consular Access Supplement to the *JLM*.

137. *See, e.g.*, The Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101–12213 (2006); Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5 (2006). For more about your rights under the ADA, see Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities." For more about your rights under RLUIPA, see Chapter 27 of the *JLM*, "Religious Freedom in Prison."

138. Courts generally decide on a case-by-case basis which statutes can be used as the basis for a § 1983 lawsuit, depending on how the court thinks that Congress intended the statute to work. *See* Blessing v. Freestone, 520 U.S. 329, 340, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569, 581–82 (1997) (discussing how courts have traditionally determined whether federal statutes create rights that are enforceable using § 1983). For example, courts have held that juvenile offenders who are illegally housed with adult offenders in adult prisons can use § 1983 to enforce their right to be housed separately. *See* 42 U.S.C. § 5633(a)(12)(A) (2006); Hendrickson v. Griggs, 672 F. Supp. 1126, 1136 (N.D. Iowa 1987). However, if you are an adult whose criminal history is wrongfully disclosed, you cannot sue under § 1983. *See* 42 U.S.C. § 3789g (2006); Polchowski v. Gorris, 714 F.2d 749, 751 (7th Cir. 1983). Sometimes, different courts do not agree on whether a particular statute can be used as the basis for a § 1983 claim. You should research your jurisdiction's case law about bringing § 1983 claims based on federal statutory rights.

139. For a list of the types of relief available from different defendants, see Figure 2 in Part C(3)(c) of this Chapter.

140. As a practical matter, it is often the case that if you sue state employees in their individual capacity (as opposed to the actual state or state agency), the state will voluntarily pay the damages for the employees. This is called "indemnification."

been unlawfully damaged by a prison official and the property was worth seventy dollars, then you could receive seventy dollars in damages, unless you could repair or restore the property to its original condition for less than seventy dollars. Or, if you sustained physical injuries as a result of the defendant's conduct, a court or jury might award you sufficient money to cover your medical expenses or to compensate you for a resulting disability. In addition, compensatory damages may include pain and suffering damages, which try to compensate you financially for the physical pain and suffering that you endured as a result of the wrongful conduct. When you seek compensatory damages, you must state and prove the nature, extent, and cause of your injuries in detail.

A second type of money damages is *punitive damages*. These are not awarded very often. The purpose of punitive damages is to punish the defendant for what she did, rather than just to compensate you for what happened. Punitive damages are available when the defendant acted with "evil motive or intent" or when his conduct involved "reckless or callous indifference" to your federal rights.[141] A court cannot award punitive damages against governmental agencies,[142] like the prison or jail, but it can award them against individual officials or employees.

The third type of money damages are *nominal damages.* Nominal damages are a form of symbolic relief that is usually no more than one dollar.[143] A plaintiff prisoner who proves that his rights were violated, but does not prove that any harm resulted from that violation, may be entitled to nominal damages but not compensatory damages.[144] If you receive nominal damages, you *may* be able to recover punitive damages as well.[145]

No matter which type of damages you ask for, you should read Chapter 13 of the *JLM*, "The Prison Litigation Reform Act," since the PLRA limits the types of damages you can recover in given situations.[146]

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141. Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 651 (1983) (holding that a prisoner may be awarded punitive damages for recklessness or serious indifference to his rights, as well as for "evil intent"); *see also* Reilly v. Grayson, 310 F.3d 519, 521 (6th Cir. 2002) (upholding punitive damages award against prison officials whose refusal to house asthmatic prisoner in smoke-free environment was found to be a reckless disregard for his rights); Blissett v. Coughlin, 66 F.3d 531, 535–36 (2d Cir. 1995) (upholding jury award of punitive damages against prison guards for assault and unlawful confinement of prisoner).

142. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 635 (1981) (holding that punitive damages are not available against a municipality in a § 1983 suit); Ciraolo v. City of N.Y., 216 F.3d 236, 242 (2d Cir. 2000) (reversing an award of punitive damages against New York City in a § 1983 action based on *City of Newport* and holding that municipal immunity from punitive damages is absolute, with no "outrageous conduct" exception).

143. Courts may award more than one dollar. *See, e.g.*, Hatch v. Yamauchi, 809 F. Supp. 59, 61 (E.D. Ark. 1992) (awarding nominal damages in the amount of ten dollars for violation of prisoners' right to access the courts (including access to the law library and trained legal assistance)).

144. *See* Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) (holding that under the PLRA claims for constitutional violations absent physical injury need not be dismissed outright, but recovery is limited to nominal and punitive damages (as well as injunctive and declaratory relief) because allowing compensatory damages without physical injuries would amount to recovery for mental or emotional injury, which the PLRA prohibits); *see also* Royal v. Kautzky, 375 F.3d 720, 722–23 (8th Cir. 2004) (holding that the compensatory damages limitation of the PLRA applies to all federal prisoner lawsuits, including those for 1st Amendment violations); Searles v. Van Bebber, 251 F.3d 869, 875–76 (10th Cir. 2001) (holding that the prisoner could not recover compensatory damages for the violation of his constitutional rights without first showing a physical injury). However, some courts do not require any showing of physical injury where the deprivation involves the 1st Amendment. *See* Oliver v. Scott, 276 F.3d 736, 747 n.20 (5th Cir. 2002) (applying the physical injury requirement to claims of cruel and unusual punishment under the 8th Amendment, but declining to reach the issue in a 1st Amendment case); Williams v. Ollis, 230 F.3d 1361, 2000 U.S. App. LEXIS 30373 (6th Cir. 2000) (*unpublished*) (stating that the plaintiff's 1st Amendment claim was not precluded by § 1997e(e)); Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) (holding that a "deprivation of First Amendment rights standing alone is a cognizable injury," therefore "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that "the deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show.").

145. *See* Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) (noting that in appropriate cases, both nominal and punitive damages may be awarded for a violation of constitutional rights without an accompanying injury).

146. *See* Harris v. Garner, 216 F.3d 970, 984 (11th Cir. 2000) (en banc) (holding that the language "no action shall be brought" operates as a bar to a prisoner's entire suit absent physical injury). *Compare* Davis v. District of Columbia, 158 F.3d 1342, 1348–49 (D.C. Cir. 1998) ("§ 1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of the legal wrong."), *with* Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) ("§ 1997e(e) applies only to claims for mental or emotional injury. Claims for other types of injury do not

(b) Injunctive Relief

Another type of relief the court can award in a Section 1983 action is an *injunction*. An injunction is an order to prison officials either *to take* certain actions—for example, to improve the conditions of your confinement—or *to not take* certain kinds of actions against you in the future—for example, to stop censoring your mail.[147] An injunction is often referred to as "equitable relief."

In order to obtain an injunction, you must be able to show that (1) there is a likelihood of substantial, immediate, irreparable injury without an injunction; *and* (2) the remedies at law, such as money damages, are inadequate.[148] To meet the immediate injury requirement, you must be able to prove that your injury is likely to happen to you again in the foreseeable future and was not a single, isolated incident.[149] One of the most effective ways of showing that you are likely to suffer future harm is to show that the harm is ongoing either due to a written policy or a pattern or custom of officially sanctioned behavior (behavior approved by officials).[150] You also have to prove that your injury is a substantial and irreparable one. You can show that your injury is substantial (serious) by pointing out the specific ways you are being harmed. Showing that your injury is irreparable means showing that you are being harmed in a way that cannot be fixed in the future. Many courts consider the ongoing violation of a constitutional right to be substantial and irreparable harm.[151] Lastly, you have to show that no other available legal remedy will address your injury. In other words, you must demonstrate that an injunction is the only way to prevent and correct the source of your injury.[152]

If you can show that an injunction is necessary to protect your rights until your trial is over, you may be able to get a temporary injunction before the trial is completed or even before it starts.[153] This type of relief

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implicate the statute.") (citations omitted), and Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) ("[T]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, Section 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought.").

147. *See, e.g.*, Koch v. Lewis, 216 F. Supp. 2d 994, 1007 (D. Ariz. 2001) (ordering prison to release prisoner from segregation into the general population after finding that indefinite segregation based solely on gang membership was unconstitutional), *vacated on other grounds*; Northern v. Nelson, 315 F. Supp. 687, 688 (N.D. Cal. 1970) (ordering prison to allow prisoner to practice his Muslim religion); The Luparar v. Stoneman, 382 F. Supp. 495, 502 (D. Vt. 1974) (ordering prison to allow circulation of current issue of prison newspaper).

148. *See* O'Shea v. Littleton, 414 U.S. 488, 502, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 687 (1974) (noting that to obtain equitable relief, plaintiff must prove "likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law"); Younger v. Harris, 401 U.S. 37, 46, 91 S. Ct. 746, 751, 27 L. Ed. 2d 669, 676 (1971) (stating that proof of an irreparable injury is required for any injunction). These requirements are often referred to as the requirements for "standing" (the right to make a legal claim before the court) to seek injunctive relief.

149. *See* Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S. Ct. 1660, 1670, 75 L. Ed. 2d 675, 690 (1983) (holding that injunctive relief is unavailable when there is no "real or immediate threat that the plaintiff will be wronged again"); Hague v. CIO, 307 U.S. 496, 518, 59 S. Ct. 954, 965, 83 L. Ed. 1423, 1438 (1939) (granting injunctive relief because the threat of continued police misconduct made the threat of constitutional deprivations ongoing); Kritenbrink v. Crawford, 313 F. Supp. 2d 1043, 1053 (D. Nev. 2004) ("The mere fact that a plaintiff has suffered an injury in the past is not sufficient to allege standing for injunctive relief.").

150. *See* Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001) (stating that a realistic threat of a repeating injury may arise from a written policy or a pattern of officially sanctioned behavior).

151. *See, e.g.*, Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (stating that there is a "presumption of irreparable injury that flows from a violation of constitutional rights"); Nat'l People's Action v. Wilmette, 914 F.2d 1008, 1013 (7th Cir. 1990) ("Even a temporary deprivation of First Amendment freedom of expression rights is generally sufficient to prove irreparable harm."); Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987) (noting that deprivation of a constitutional right amounts to irreparable harm); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (holding that an alleged violation of a constitutional right is enough to show irreparable harm). *But see* Wis. Cent. Ltd. v. Public Serv. Comm'n of Wis., 95 F.3d 1359, 1372 (7th Cir. 1996) (holding that where the only constitutional right at issue related to the procedures for receiving compensation for a governmental taking of property, irreparable harm was not shown); Pinckney v. Bd. of Educ., 920 F. Supp. 393, 400–01 (E.D.N.Y. 1996) (holding that irreparable harm was not shown by alleged procedural due process violation where plaintiff could be compensated with money damages).

152. *See* O'Shea v. Littleton, 414 U.S. 488, 501–02, 94 S. Ct. 669, 679, 38 L. Ed. 2d 674, 686–87 (1974) (holding that plaintiffs did not meet the required elements for injunctive relief because there were state and federal remedies that could provide them with adequate relief for their alleged wrongs); Pinckney v. Bd. of Educ., 920 F. Supp. 393, 400–01 (E.D.N.Y. 1996) (holding that irreparable harm was not shown by alleged procedural due process violation where plaintiff could be compensated with money damages).

153. *See, e.g.*, Mitchell v. Cuomo, 748 F.2d 804, 808 (2d Cir. 1984) (upholding preliminary injunction that prohibited closing a prison where prisoners proved that such a closing would force them to be moved to prisons that

is called a *preliminary injunction*. In order to get one you must follow the procedures described in Rule 65(a) of the Federal Rules of Civil Procedure. Most courts also require you to show that:

(1) You are likely to succeed on the merits of your claim;
(2) You are likely to suffer irreparable harm if the preliminary injunction is denied;
(3) You will suffer more if the injunction is denied than the defendant will suffer if it is granted; and
(4) Granting the preliminary injunction is consistent with the public interest.[154]

Generally you can only receive a preliminary injunction after a hearing in which your opponent has the opportunity to argue against the injunction. However, there is one type of injunction that can be granted in advance of a hearing. This type of injunction is a temporary restraining order ("TRO"). Courts will only grant a TRO in exceptional and urgent situations. To get a TRO, you must show that you will suffer "immediate and irreparable injury, loss, or damage" if you have to wait for a hearing.[155] If you are granted a TRO, the court will set a date for a hearing as soon as possible. At this hearing you must ask that the TRO be converted to a preliminary injunction.[156]

If the court grants a TRO, it may require you to provide money for assurance purposes. You can, however, ask the court to waive this requirement. To take advantage of this waiver, you should file your TRO request *in forma pauperis*.[157] See Appendix A-5 of this Chapter for sample *in forma pauperis* documents.

If you believe you are eligible for a TRO, you must file an "Order to Show Cause and Temporary Restraining Order" with the court. See Appendix A-4 of this Chapter for an example. If possible, you must also notify the prison officials that you are requesting a TRO and send them copies of your request. You must also submit to the court an affidavit that describes your efforts to contact the prison officials, and a short memorandum stating the reasons why the court should grant your request for a TRO.[158]

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already were too crowded); Inmates of Attica Corr. Facility v. Rockefeller, 453 F.2d 12, 23–24 (2d Cir. 1971) (granting preliminary injunctive relief to prisoners after extended mistreatment by prison guards, where prison officials had not taken sufficient steps to ensure that such mistreatment would not continue during trial), *overruled on other grounds*; Campos v. Coughlin, 854 F. Supp. 194, 214 (S.D.N.Y. 1994) (allowing prisoners to wear religious beads); Dean v. Coughlin, 623 F. Supp. 392, 405 (S.D.N.Y. 1985) (ordering prison officials to provide "adequate dental care to inmates with serious dental needs"), *vacated on other grounds,* 804 F.2d 207 (2d Cir. 1986). *But see* Parker v. State Bd. of Pardons and Paroles, 275 F.3d 1032, 1037 (11th Cir. 2001) (finding plaintiff was not entitled to a preliminary injunction since he was unable to show that there was a substantial likelihood of success on the merits of his claims); Espinal v. Goord, 180 F. Supp. 2d 532, 541 (S.D.N.Y. 2002) (denying plaintiff's motion for a temporary restraining order or preliminary injunction because plaintiff had not made a "substantial showing of likelihood of success on the merits of his due process claims").

154. Consistency with the public interest is the standard for a preliminary injunction in most federal courts. *See* Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 578 (6th Cir. 2006); Joelner v. Vill. of Wash. Park, Ill., 378 F.3d 613, 619 (7th Cir. 2004); Rodde v. Bonta, 357 F.3d 988, 994 (9th Cir. 2004); Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 120 (1st Cir. 2003); Shire U.S., Inc. v. Barr Labs., Inc., 329 F.3d 348, 352 (3d Cir. 2003); Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 254 (4th Cir. 2003); *In re* Sac & Fox Tribe of the Miss. in Iowa, 340 F.3d 749, 758 (8th Cir. 2003); Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001); Parker v. State Bd. of Pardons & Paroles, 275 F.3d 1032, 1035 (11th Cir. 2001); Wenner v. Tex. Lottery Comm'n, 123 F.3d 321, 325 (5th Cir. 1997). However, some courts modify the test slightly. To receive a preliminary injunction from a court in the Second Circuit, you must show: (1) you are likely to suffer irreparable harm if the preliminary injunction is denied, and (2) either (a) you are likely to succeed on the merits of your claim, or (b) your claim raises sufficiently serious questions to justify litigation and you will suffer more if the injunction is denied than the defendant will suffer if it is granted. *See* Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (upholding preliminary injunction that prohibited the closing of a prison where prisoners proved that such a closing would force them to be moved to prisons that were already too crowded).

155. Fed. R. Civ. P. 65(b).

156. Fed. R. Civ. P. 65(b).

157. "*In forma pauperis*" is Latin for "in the manner of a poor person." It means that you cannot afford the fee or costs and are asking the court to waive them. *See Black's Law Dictionary* 794–95 (8th ed. 2004). Some states use the English "Poor Person Status" instead of the Latin term.

158. There are no technical rules that you must follow in composing your supporting memorandum. Simply state your arguments as clearly as possible and stress the consequences that will result if the court does not grant your request. Be sure to tell the court why you need action immediately and why you cannot wait for a hearing. Chapter 2 of the *JLM*, "Introduction to Legal Research," explains how to conduct research for a memorandum of law. Chapter 6 of the *JLM*, "An Introduction to Legal Documents," will also help you in writing your memorandum.

Under 18 U.S.C. § 3626(a)(2) of the PLRA, any preliminary injunction that is granted will automatically expire after ninety days, unless the court makes certain findings required for granting an injunction[159] and issues a final order for an injunction before the expiration of the ninety-day period.[160] It is often difficult or impossible for the parties to complete discovery and for the court to complete a trial and issue a decision within ninety days. However, the court can issue a new preliminary injunction if it finds that you are still faced with irreparable harm.[161]

(c) Declaratory Relief

Finally, the court may issue a *declaratory judgment*. A declaratory judgment is a statement about the nature and limits of your rights, which the court can issue *before* your rights have been violated.[162] A declaratory judgment can be useful if prison officials threaten to take some action that you believe would violate your rights. In such circumstances, you may use Section 1983 to request that the court issue a declaratory judgment saying that it would be illegal for the prison to take the action in question. You may seek a declaratory judgment even if you are not seeking any other type of relief.[163] Later on, you can still seek an injunction if you find that the declaratory judgment is not enough to protect you.

2. Whom to Name as Defendants

Figuring out exactly who to name as a defendant in your Section 1983 lawsuit can be confusing. As noted in Part B(1)(a) above, you can only sue a "person" who violated your rights while acting "under color" of state law. For the purposes of Section 1983, the definition of a "person" includes individual people (like prison wardens, guards, and other employees), as well as a city, county, or municipality that adopts policies, rules, or regulations that violate your rights.[164] However, state governments and their agencies (including your state's department of corrections) are not considered "persons" under Section 1983.[165]

(a) Individual Defendants

If any of your defendants are individuals, you must decide in what "capacity" you will sue them—"individual capacity," "official capacity," or both. When you sue someone in his individual capacity, you are suing him personally. When you sue someone in his official capacity, you are suing his office (for example, suing the county prison warden's office rather than suing the individual who happens to be the county prison warden). Whether you sue a particular individual in his individual capacity, his official capacity, or both, will affect the type of damages you can receive and the defenses that the individual can raise.[166]

In general, if you want to obtain an injunction (described in Part C(1)(b) of this Chapter), you should sue defendants in their official capacities. If you are seeking monetary damages, you should usually sue defendants in their individual capacities. If you are seeking monetary damages against a high-ranking local official, like a sheriff or a warden, then you should probably sue him in both his official and individual capacities. If you are confused about which capacity to use for a particular defendant, you always have the option of suing that defendant in both his individual and official capacities. However, you should know that suing defendants in both capacities may lead the defendants to file motions asking that part of your lawsuit be dismissed. Such motions can further delay your lawsuit.

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159. 18 U.S.C. §§ 3626(a)(1)–(2) (2006).

160. 18 U.S.C. § 3626(a)(2) (2006).

161. *See, e.g.*, Mayweathers v. Newland, 258 F.3d 930, 936 (9th Cir. 2001) (upholding a district court's second preliminary injunction allowing prisoners to attend religious services without being punished).

162. Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2006).

163. Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2006). *See, e.g.*, Clarkson v. Coughlin, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995) (granting declaratory judgment for plaintiffs that corrections department's creation of a special unit for deaf prisons that was unavailable to females deprived them of equal protection of the law).

164. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690–91, 98 S. Ct. 2018, 2035–36, 56 L. Ed. 2d 611, 635 (1978) (holding that municipalities and local governments are considered "persons" under § 1983).

165. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 68–71, 109 S. Ct. 2304, 2311–12, 105 L. Ed. 2d 45, 56–58 (1989) (holding that states and state defendants sued in their official capacities are not "persons" under § 1983 and therefore may not be sued for money damages).

166. See Part C(3) of this Chapter for an explanation of how individual and official capacities affect potential defenses and the types of damages you can receive.

Sometimes you may not know the name of the person who violated your rights. In such a case, you must refer to the defendant as "John (or Jane) Doe."[167] This tells the court that you do not know the name of the person about whom you are complaining. You must, however, locate and identify all John and Jane Does at some point or the claims against them will be dismissed.[168] Once the lawsuit is started, you should be able to learn the defendants' identities through discovery. For more information on discovery, see Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery."

(b) Supervisor Liability

A supervisory official who causes or participates in a violation of your rights may be liable under some circumstances. Supervisor liability under Section 1983 should not be confused with "*respondeat superior*," which is the idea that supervisors are legally responsible for their subordinates' (lower-ranked staff members') actions, whether or not the supervisor had actual knowledge of the actions.[169] The concept of *respondeat superior* does not apply to Section 1983 lawsuits.[170] Thus, in Section 1983 claims, supervisory officials cannot be charged with responsibility for lower officials' acts unless they were "personally involved" in them. As with any other individual, a supervisor may be liable if he directly participated in the violation of your rights. For example, a supervisor who participated in an assault on you might be liable because of his own role. In addition, a supervisor is considered to be "personally involved" in a constitutional violation if:

(1) The supervisor, "after learning of [a] violation [of your rights] ... failed to remedy the wrong"; or
(2) The supervisor "created a policy or custom under which" your constitutional rights were violated, "or allowed such a policy or custom to continue"; or
(3) The supervisor was "grossly negligent" in that he did not adequately supervise the subordinates who violated your rights.[171]

To hold a supervisor liable in any of the above situations, you must show that the supervisor acted with "deliberate indifference."[172] The definition of deliberate indifference can vary from circuit to circuit and may depend on the type of supervisor liability you are claiming.[173] Be sure to look at cases in your circuit to see how your circuit defines deliberate indifference for the purposes of supervisor liability. Most courts say that a supervisor acts with deliberate indifference when he knows or should know that there is a substantial risk of harms that violate your constitutional rights and he fails to prevent or remedy that harm.[174]

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167. *See* Roper v. Grayson, 81 F.3d 124, 126 (10th Cir. 1996) (holding that it is permissible to name John or Jane Doe as defendants "so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process can eventually be served"); Dean v. Barber, 951 F.2d 1210, 1215–16 (11th Cir. 1992) (finding plaintiff adequately identified unnamed defendant such that he could be added later when his identity was determined).

168. *See, e.g.*, Figueroa v. Rivera, 147 F.3d 77, 82–83 (1st Cir. 1998) (upholding dismissal without prejudice of a claim where plaintiffs had made no attempt to identify or to serve John Doe defendants 17 months after filing the lawsuit).

169. *Respondeat superior* is Latin for "let the superior [master] make answer." *See Black's Law Dictionary* 1338 (8th ed. 2004).

170. *See, e.g.*, Worrell v. Henry, 219 F.3d 1197, 1214 (10th Cir. 2000) ("Under § 1983, a defendant may not be held liable under a theory of respondeat superior."); Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998) ("Supervisory liability under § 1983 'cannot be predicated on a respondeat theory, but only on the basis of the supervisor's own acts or omissions.'") (citation omitted).

171. *See* Williams v. Smith, 781 F.2d 319, 323–24 (2d Cir. 1986) (discussing the ways in which supervisors may be found liable under § 1983).

172. *See* Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997) ("Liability of a supervisor under § 1983 must be predicated on the supervisor's deliberate indifference, rather than mere negligence.").

173. *See, e.g.*, Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997) (defining supervisor "deliberate indifference" in an 8th Amendment context as occurring where the supervisor *knows* "he is 'creating a substantial risk of bodily harm'") (emphasis added); Poe v. Leonard, 282 F.3d 123, 140 (2d Cir. 2002) (defining supervisor "deliberate indifference" with respect to his subordinates' actions as occurring when a supervisor "fail[s] to act on information indicating unconstitutional acts were occurring or for his gross negligence in failing to supervise his subordinates who commit such wrongful acts, provided that the plaintiff can show an affirmative causal link between the supervisor's inaction and her injury") (internal citations omitted); Jeffers v. Gomez, 267 F.3d 895, 912 (9th Cir. 2001) (defining supervisor "deliberate indifference" as occurring when an official is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference") (internal citations omitted).

174. *See* Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998) ("To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure

To prevail in a supervisor liability claim, you must be able to show that your constitutional rights were actually violated, and that there was a clear connection between the violation of your rights and the supervisor's actions or failure to act.[175] What follows is a discussion of the three types of situations where you may be able to hold a supervisor liable.

(i) Failure to Act to Remedy a Wrong

If a supervisor becomes aware of a violation of your rights, but fails to take steps to remedy the violation, he may be liable under Section 1983.[176] Information about a violation of rights may come to a supervisor's attention in a variety of ways. The supervisor may learn of the violation through an appeal you make through the prison grievance system,[177] or the appeal of a disciplinary decision.[178] He may learn of the violation through a report or through the filing of a lawsuit.[179] He may also learn of a violation through informal sources of information,[180] such as letters from prisoners[181] or by directly witnessing the violation.[182]

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to take easily available measures to address the risk."). The Second Circuit has applied a standard of gross negligence in cases involving a supervisor's deficient management of staff or failure to respond to constitutional violations, holding that the supervisor need only have been "grossly negligent." *See, e.g.*, Williams v. Smith, 781 F.2d 319, 323–24 (2d Cir. 1986) ("[A] supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event"); Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) ("Supervisory liability may be imposed where an official demonstrates 'gross negligence' or 'deliberate indifference' to the constitutional rights of inmates by failing to act on information indicating that unconstitutional practices are taking place."). But, if you are filing your complaint within the Second Circuit, you should plead "deliberate indifference" in your complaint.

175. *See* Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998) ("There is supervisory liability only if (1) there is subordinate liability, and (2) the supervisor's action or inaction was 'affirmatively linked' to the constitutional violation caused by the subordinate."); Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997) ("To establish a supervisor's liability under § 1983 [plaintiff] must show that an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.") (citations and internal quotations omitted).

176. *See* Williams v. Smith, 781 F.2d 319, 324 (2d Cir. 1986) (holding that supervisor who affirmed prisoner's disciplinary conviction when prisoner was not permitted to call witnesses may be liable for violation of prisoner's due process rights); Boone v. Elrod, 706 F. Supp. 636, 638 (N.D. Ill. 1989) (finding valid §1983 claim where plaintiff claims that defendants ignored complaints of prior attacks by other prisoners).

177. *See* Amaker v. Hakes, 919 F. Supp. 127, 131–32 (W.D.N.Y. 1996) (stating that information received by superintendent of correctional facility through prisoner grievance procedures may support supervisor liability in that it demonstrates personal involvement on part of supervisor).

178. *See* Gabai v. Jacoby, 800 F. Supp. 1149, 1156 (S.D.N.Y. 1992) (finding that supervisor who learned that prisoner's rights were violated during a disciplinary procedure may be liable for failing to overturn the disciplinary decision on appeal).

179. *See* Morris v. Eversley, 205 F. Supp. 2d 234, 241–42 (S.D.N.Y. 2002) (noting that supervisor who received prisoner's report of sexual misconduct by guard may be found liable); Langley v. Coughlin, 709 F. Supp. 482, 486 (S.D.N.Y. 1989) (holding that commissioner of Department of Corrections may be personally liable for violation of mentally ill prisoners' rights where he received information of such violations through complaints filed in lawsuits as well as through a report written by the Correctional Association of New York in conjunction with the Department of Corrections describing "deficiency in the treatment of chronically mentally ill inmates").

180. *See, e.g.*, Green v. Branson, 108 F.3d 1296, 1302–03 (10th Cir. 1997) (holding that warden who was informed by prisoners of attack on a prisoner and who failed to take any steps to ensure that the prisoner receive adequate medical care may be liable); Walker v. Godinez, 912 F. Supp. 307, 312–13 (N.D. Ill. 1995) (stating that prisoners' report of corrections officers' misconduct to supervisory officials may be sufficient for supervisory liability).

181. *See* Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) (stating that the Commissioner may be liable, depending on contents of letter from prisoner complaining about violation of his rights); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (noting that letters from prisoner to supervisory official regarding violation of rights may be sufficient for "personal involvement" of supervisor where supervisor failed to remedy the violation); Pacheco v. Comisse, 897 F. Supp. 671, 678 (N.D.N.Y. 1995) (same); Barry v. Ratelle, 985 F. Supp. 1235, 1239 (S.D. Cal. 1997) (same); Mandala v. Coughlin, 920 F. Supp. 342, 351 (E.D.N.Y. 1996) (same); Strachan v. Ashe, 548 F. Supp. 1193, 1204 (D. Mass. 1982) (stating that, among other things, a letter from prisoner's attorney informing supervisory officials of violation of prisoner's rights may support finding of personal involvement for supervisor liability). *But see* Watson v. McGinnis, 964 F. Supp. 127, 130 (S.D.N.Y. 1997) ("[A]llegations that an official ignored a prisoner's letter are insufficient to establish liability" under § 1983); Pritchett v. Artuz, No. 99 Civ. 3957, 2000 WL 4157, *6, 1999 U.S. Dist. LEXIS 20041, *16 (S.D.N.Y. Jan. 3, 2000) ("Generally, the allegation that a supervisory official ignored a prisoner's letter protesting unconstitutional conduct is not itself sufficient to allege the personal involvement of the official so as to create liability under § 1983.") (quoting Gayle v. Lucas, No. 97 Civ. 883, 1998 WL 148416, *4, 1998 U.S. Dist. LEXIS 3919, *11 (S.D.N.Y. Mar. 30, 1998)).

182. *See* Gailor v. Armstrong, 187 F. Supp. 2d 729, 736–37 (W.D. Ky. 2001) (finding that supervisor who failed to

Regardless of how a supervisor learns of a violation of your rights, the information he receives must be sufficient to put him on *notice* of the nature of the violation. This means that the supervisor must have enough information that he knows or should know that the violation is occurring.[183] Note that some courts have held that prisoners' letters are not sufficient to put prison officials on notice of a violation.[184] Moreover, the nature of the violation must be one that the particular supervisor has authority to correct or has responsibility over.[185] Finally, the supervisor must have actually failed to remedy the violation.

(ii) Creating or Allowing an Unconstitutional Policy or Custom

A supervisor may be found to be personally involved in a violation of your rights if he develops an unconstitutional policy or if he allows an unconstitutional policy to continue.[186] The policy does not need to be written. Supervisors can be held liable for creating or allowing an unconstitutional informal policy or custom.[187] However, if a supervisor creates a constitutional policy and his subordinates violate your rights by failing to follow that policy, the supervisor cannot be held liable.[188] Similarly, if policies are in place to protect your constitutional rights, and subordinates violate your rights by ignoring those policies, the supervisor cannot be held liable.[189] There is one exception to these two rules. If staff members ignore or fail to follow a policy because the supervisor did not do a good enough job of hiring or training those staff members, then the supervisor *can* be held liable. This exception is discussed in Part C(2)(b)(iii), below.

(iii) Deficient Management of Subordinates

A supervisor may be liable if a staff member violates your constitutional rights as a result of that supervisor's mismanagement of subordinates. A subordinate is an individual who works under the command of the supervisor. This type of liability can arise when the supervisor (1) knew of a subordinate's past

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intervene during use of excessive force that resulted in death of prisoner may be liable under § 1983). Keep in mind that all prison officials, not only supervisors, may be liable for failing to intervene to stop a violation of your rights. *See* Skrtich v. Thornton, 280 F.3d 1295, 1302 (11th Cir. 2002) ("It is not necessary that a police officer actually participate in the use of excessive force in order to be held liable under Section 1983. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his failure to act"); Davis v. Hill, 173 F. Supp. 2d 1136, 1143 (D. Kan. 2001) ("Although only two defendants were directly responsible for the attack [on the prisoner], the remaining five may still be liable if they were in a position to prevent the attack but failed to do so.").

183. *See* Vance v. Peters, 97 F.3d 987, 993 (7th Cir. 1996) ("The plaintiff still has the burden of demonstrating that the communication, in its content and manner of transmission, gave the prison official sufficient notice to alert him or her to" a constitutional violation); Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (finding that supervisor could not be held personally involved in violation of prisoner's rights based on a letter, the contents of which were unknown, because the court could not determine "whether the letter was one that reasonably should have prompted [the supervisor] to investigate"); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 81–82 (6th Cir. 1995) (finding that the warden could be found to have known of the possibility that prisoner would be raped because warden knew that there were problems in the classification procedures and that young prisoners were more vulnerable to sexual assaults).

184. *See* Watson v. McGinnis, 964 F. Supp. 127, 130 (S.D.N.Y. 1997) ("[A]llegations that an official ignored a prisoner's letter are insufficient to establish liability" under § 1983).

185. Hill v. Marshall, 962 F.2d 1209, 1213–14 (6th Cir. 1992) (stating that corrections official whose job was "to review and respond to inmates' medical needs" could be liable for failing to do his job when he was on notice of prisoner's medical needs); Pinto v. Nettleship, 737 F.2d 130, 133 (1st Cir. 1984) (holding that supervisor cannot be personally liable "based on prison conditions beyond" his control); Williams v. Bennett, 689 F.2d 1370, 1388–89 (11th Cir. 1982) (holding that a supervisor "who was without the authority or means to provide the necessary security" could avoid supervisor liability).

186. *See* Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 84 (6th Cir. 1995) (finding that warden could be liable for failure to adopt reasonable policies to insure that transferees were not placed in grave danger of rape); Redman v. County of San Diego, 942 F.2d 1435, 1446–49 (9th Cir. 1991) (*en banc*) (noting that sheriff could be liable for prisoner's rape where sheriff approved a faulty classification policy); Williams v. Coughlin, 875 F. Supp. 1004, 1014 (W.D.N.Y. 1995) (finding that superintendent of prison could be liable for policy of withholding food from prisoners who committed disciplinary infractions).

187. *See* Leach v. Shelby County Sheriff, 891 F.2d 1241, 1247–48 (6th Cir. 1989) (stating that sheriff may be liable for unwritten policy of deliberate indifference to detainees' serious medical needs).

188. *See* Buffington v. Baltimore County, 913 F.2d 113, 122–23 (4th Cir. 1990) (holding that police chief was not liable for subordinates' violation of suicide prevention policy).

189. *See* Vasquez v. Coughlin, 726 F. Supp. 466, 473–74 (S.D.N.Y. 1989) (noting that supervisor was not liable for subordinate's violation of prisoner's rights where a policy existed that was designed to prevent such violations).

misconduct and failed to take action to remedy it,[190] (2) failed to set up policies that help guide subordinates' conduct so that violations of constitutional rights do not occur,[191] (3) failed to inform and train staff on policies designed to avoid deprivations of constitutional rights,[192] or (4) failed to properly supervise staff to ensure that they follow policies.[193]

If your complaint alleges that the violation of your rights was the result of a failure to train staff (the third basis for liability under a deficient management theory), you must show "a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable."[194]

(c) Municipal or Local Government Liability

A municipality or local government—such as a county, city, or town—can be held liable under Section 1983 if you can show that the violation of your constitutional rights was either (1) caused by a policy or custom of the municipality *or* (2) caused by a municipal policymaker's failure to take certain actions, such as properly training employees. In the first situation, the municipality has "direct liability" for violating your rights. In the second situation, the municipality has "indirect liability" for violating your rights. The requirements for each type of liability are discussed in detail in Parts C(2)(c)(i) and (ii) of this Chapter below.

There are several benefits to naming a municipality as a defendant. First, while you cannot recover punitive damages from a municipality,[195] you can still sue it for both compensatory damages and injunctive relief.[196] Second, municipalities, unlike individuals, cannot claim qualified immunity.[197] A third benefit is that if you are successful in your suit against a municipality, there is a better chance that the municipality will make broad changes in handling situations similar to yours in the future.

(i) "Direct" Municipal Liability

In order to hold a municipality directly liable for a violation of your rights you must meet the regular requirements for a Section 1983 claim and also show the following:

(1) A policy or custom of the municipality caused your rights to be violated;[198] *and*

(2) The policy was created by someone who is a final policymaker for the municipality.[199]

For a policy or custom to be considered the direct cause of a violation of your rights, it must be unconstitutional on its face. A policy or custom is "unconstitutional on its face" if the policy or custom itself causes your rights to be violated.[200] For example, if a particular prison guard refuses to get medical help for

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190. *See* Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1396 (8th Cir. 1997) (affirming finding that superintendent of prison was liable for guard's use of excessive force where superintendent knew of guard's propensity for excessive force and failed to take steps to investigate and correct the problem).

191. *See* Bryant v. McGinnis, 463 F. Supp. 373, 387 (W.D.N.Y. 1978) (holding that commissioner could be liable for failing to issue rules for protecting Muslim religious practices).

192. *See* Gilbert v. Selsky, 867 F. Supp. 159, 166 (S.D.N.Y. 1994) (finding that a Director of Inmate Discipline may be liable for failing to train disciplinary hearing officers who violated prisoner's rights at disciplinary hearing).

193. *See* Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 80–81 (6th Cir. 1995) (noting warden's failure to ensure that staff properly carried out transfer policy may create supervisor liability); Allman v. Coughlin, 577 F. Supp. 1440, 1448 (S.D.N.Y. 1984) (stating Commissioner could be liable for failing to supervise emergency response team).

194. McDaniels v. McKinna, No. 03-1231, 96 F. App'x 575, 579, 2004 U.S. App. LEXIS 8262, *8 (10th Cir. Apr. 27, 2004) (*unpublished*) (quoting Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988)); Smith v. Hill, 510 F. Supp. 767 (D. Utah 1981).

195. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 635 (1981) (holding that punitive damages are not available against municipalities in § 1983 actions).

196. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690, 98 S. Ct. 2018, 2035, 56 L. Ed. 2d 611, 635 (1978) (concluding that local government entities may be sued under § 1983 for compensatory damages, and injunctive and declaratory relief).

197. *See* Owen v. City of Independence, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed. 2d 673, 685–86 (1980) (holding that qualified immunity is not available to a municipality). Qualified immunity is discussed in Part C(3)(c) of this Chapter.

198. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 804 (1985) (finding that municipal liability required a showing of an actual connection between the policy or custom and the violation).

199. Pembaur v. Cincinnati, 475 U.S. 469, 481–83, 106 S. Ct. 1292, 1299–1300, 89 L. Ed. 2d 452, 464–65 (1986) (noting that municipalities can only be held liable under § 1983 for policies made by officials who had final authority to make the challenged policy).

200. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978) (holding that a municipality can be held liable when an unconstitutional official policy is the "moving force" behind a

you when you are injured, the municipality will not be liable for failing to provide medical care. However, if the prison has a known policy of delaying medical help to some or all prisoners, the municipality can be held liable for your denial of medical care.[201] Policies do not necessarily have to be written and policymakers' acts may also be considered municipal "policies."[202] For instance, if a policymaker fires an employee for an unconstitutional reason, the firing may be considered a "policy."[203] Moreover, a municipality can also be held responsible for a custom or settled practice of the municipality that is unconstitutional.[204] In all of these situations, you must be able to show a clear link between the existence of the policy or custom and the constitutional violation.[205]

Under the second requirement for "direct" municipal liability, the person who created the policy must be someone who has final authority to make that particular policy for the municipality.[206] A court will look to state law to determine if the law in your state has designated the individual in question with the authority to make policy.[207]

If you are claiming that a municipal custom, rather than an official policy, resulted in a violation of your rights, you generally must show that the custom was so widespread that policymakers knew of or should have known of the custom.[208] In essence, you will be arguing that, because the custom was so widespread, policymakers implicitly approved of it.[209]

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violation); Gibson v. County of Washoe, 290 F.3d 1175, 1189 (9th Cir. 2002) (finding municipal policy of delaying medical care to prisoners who are "combative, uncooperative or unable to effectively answer questions due to intoxication" may create municipal liability for deliberate indifference to serious medical needs of prisoners).

201. *See* Gibson v. County of Washoe, 290 F.3d 1175, 1189 (9th Cir. 2002) (finding municipal policy of delaying medical care to prisoners who are "combative, uncooperative or unable to effectively answer questions due to intoxication" may create municipal liability for deliberate indifference to serious medical needs of prisoners).

202. *See* Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626, 639 (1997) (observing that a policy or custom need not be formal or written so long as a plaintiff can demonstrate that the alleged unwritten policy or customer is "so widespread as to have the force of law."); Paige v. Coyner, 2010 U.S. App. LEXIS 15239, 27 (6th Cir. 2010) ("[A] policy or custom does not have to be written law; it can be created 'by those whose edicts or acts may fairly be said to represent official policy.'") (quoting Monell v. Dept. of Social Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978)).

203. *See* Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994) (holding school board that had final authority to make firing decisions could be liable for unconstitutional firing of teacher); Bowles v. City of Camden, 993 F. Supp. 255, 268–69 (D.N.J. 1998) (allowing plaintiff to go forward with claim against city and mayor for unconstitutional firing). Note, however, that the municipality, in some way, must have *deliberately* caused the injury. *See* Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626, 639 (1997) ("[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.") This is a high standard to meet: you may have to prove that the municipality's legislative body or authorized decisionmaker intentionally deprived you of a federally protected right or that the action itself violated federal law.

204. *See* Monell v. Dept. of Social Servs., 436 U.S. 658, 690–91, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978) (finding a municipality may be liable for a custom that causes violation of rights where a plaintiff can demonstrate that the custom is so "persistent and widespread" that it constitutes a "permanent and well settled city policy"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68, 90 S. Ct. 1598, 1613–14, 26 L. Ed. 2d 142, 159–60 (1970) (holding that official practices can be so settled and permanent that they amount to customs that can give rise to § 1983 liability).

205. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791, 804 (1985) (finding that municipal liability requires a showing of an actual connection between the policy or custom and the constitutional violation).

206. *See* St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107, 118 (1988) ("[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability.") (citing Pembaur v. Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465 (1986)).

207. *See* McMillian v. Monroe County, 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1, 8 (1997) (finding that state law determines whether an individual is an authorized policymaker for a municipality).

208. Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) ("Absent a formal governmental policy, [the plaintiff] must show a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity.'") (quoting Gillette v. Delmore, 979 F.2d 1342, 1346–47 (9th Cir. 1992)).

209. *See, e.g.*, Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002) (holding that in order for a municipality to be liable for a widespread custom, the municipality or a municipal policymaker must have "actual or constructive knowledge" of the custom); Sorlucco v. N.Y. City Police Dept., 971 F.2d 864, 871 (2d Cir. 1992) (concluding a plaintiff may establish a municipality's liability by showing that the actions of subordinate officers are sufficiently widespread to amount to "constructive acquiescence" (implied approval) by senior policymakers).

(ii) "Indirect" Municipal Liability

There are two "indirect" ways that a municipality can be held responsible when its employees violate your rights. First, a municipality may be liable when its failure to adequately train, supervise, or discipline its employees results in an employee violating your rights.[210] Second, a municipality may be liable for failing to adequately screen (look at the background of) an employee during hiring if that employee later violates your rights. For both failure to train, supervise, or discipline, and inadequate screening claims you will need to show that an employee of the municipality violated your constitutional rights and that the municipality demonstrated "deliberate indifference" to your constitutional rights. To prove "deliberate indifference" in this context, you must show that the municipal policy-makers knew that their actions were likely to cause someone's rights to be violated in a particular way.[211]

(d) Failure to Train, Supervise, or Discipline

There are some types of training that are so obviously necessary to avoid having employees violate your rights that a municipality can be held liable for failing to provide such training. For example, failing to train armed prison guards on when they may use deadly force creates an obvious risk that someone's rights will be violated and can amount to deliberate indifference.[212]

In other situations, if there is a pattern of repeated unconstitutional behavior by municipal employees, at some point this pattern makes it obvious that more or better training, supervision, or discipline is needed to prevent such behavior.[213] In such situations, the municipality may be held liable for failing to address these obvious needs.[214] In all cases, you must be able to demonstrate that the inadequate training polices in question were the direct cause of, or "moving force" behind your injuries.[215] However, it is important to note

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210. *See* City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426 (1989) (noting that a city could be liable under § 1983 for failure to train its employees, if the failure amounted to deliberate indifference to the rights of people who come into contact with the city employees).

211. *See* Gibson v. County of Washoe, 290 F.3d 1175, 1186 (9th Cir. 2002) ("[P]laintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation.") (citing Farmer v. Brennan, 511 U.S. 825, 841, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994)); Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001) ("To survive summary judgment on a failure to train theory, the [plaintiffs] must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference.").

212. *See* City of Canton v. Harris, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427–28 (1989) ("[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.").

213. Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626, 641 (1997) (noting that policymakers' awareness of a pattern of unconstitutional conduct by employees, along with a failure to address the problem, may demonstrate conscious disregard for a need to train, which would give rise to municipal liability); City of Canton v. Harris, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427–28 (1989) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.") (O'Connor, J., concurring in part and dissenting in part)).

214. *See, e.g.*, Olsen v. Layton Hills Mall, 312 F.3d 1304, 1320 (10th Cir. 2002) (leaving it up to jury to decide whether county's failure to train its officers to recognize detainees' symptoms of Obsessive Compulsive Disorder, which the court noted is a fairly common disease, amounts to deliberate indifference); Davis v. Lynbrook Police Dept., 224 F. Supp. 2d 463, 479 (E.D.N.Y. 2002) (finding that six reports and complaints alleging potential unconstitutional conduct of a police officer could "demonstrate an obvious need for more or better supervision to protect against constitutional violations") (quoting Vann v. City of N.Y., 72 F.3d 1040, 1049 (2d Cir. 1995)); Perin v. Gentner, 177 F. Supp. 2d 1115, 1125 (D. Nev. 2001) (finding evidence that municipality failed to adequately train police officers and discipline them for use of excessive force could support an inadequate training and supervision claim); Young v. City of Providence, 404 F.3d 4, 27–28 (1st Cir. 2005) (concluding that municipal liability might be established where a city failed to train police officers in avoiding misidentifications of off-duty police officers because problems with misidentifications had occurred in the past and a failure to train officers in the area posed "obvious risk.").

215. *See* City of Canton v. Harris, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427–28 (1989) ("[f]ailure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it *actually causes injury*.") (emphasis added).

that the fact that training is imperfect or not in the precise form you would prefer is insufficient to establish municipal liability.[216]

(e) Inadequate Screening

The gist of an inadequate screening claim is that the municipality knew or should have known that it was *highly likely* that the individual it hired would violate your rights.[217] For example, if a city jail hired a guard that had been dismissed from a previous job for assaulting prisoners, and then the guard assaulted you, you could claim that the municipality is responsible because any reasonable person should have known that there was a high risk that this guard would engage in the specific act of assaulting prisoners.[218]

In order to make a successful inadequate screening claim, you must show that the decision to hire the individual who violated your rights demonstrates a "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the [hiring] decision."[219] It is not enough to show that the city or town hired someone who committed bad acts in the past.[220] Instead, you must show that an adequate look at the job applicant's background would cause an "objectively reasonable policymaker" to conclude that the "plainly obvious" result of hiring that individual would be a violation of someone's federal rights.[221] You must also show that it was highly likely—not simply possible or probable—that the *particular* harm you suffered would be the result of hiring the individual.[222] In other words, the violation of your rights must have a strong link to the bad acts that the supervisor knew or should have known that the employee committed in the past, and it must have been highly likely that those bad acts would be repeated.[223]

Making a successful claim regarding inadequate screening during hiring is very difficult. A court will demand a very close connection between the information available to the person making the hiring decision and the violation that took place. Such claims are not likely to succeed unless the individual who violated your rights engaged in similar behavior before he was hired, and the supervisor knew or should have known about it.

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216. *See* City of Canton v. Harris, 489 U.S. 378, 391, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412, 428 (1989) (observing that imperfect training cannot itself be the basis for § 1983 liability); Grazier v. City of Philadelphia, 328 F.3d 120, 125 (3d Cir. 2003) (holding that the scope of failure to train liability is narrow where plaintiffs "merely allege that a different program than the one in place would have been more effective."); Palmquist v. Selvik, 111 F.3d 1332, 1345 (7th Cir. 1997) (finding that where a town gave police officers some training on handling suspects exhibiting abnormal behavior, the argument that even more training should have been given was unpersuasive).

217. *See* Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that [the particular] officer was highly likely to inflict the *particular* injury suffered by the plaintiff.") (emphasis in original).

218. Romero v. City of Clanton, 220 F. Supp. 2d 1313, 1318 (M.D. Ala. 2002) (allowing plaintiff to go forward with an inadequate screening claim against a city that hired a police officer who allegedly had a prior history of sexual misconduct and who later attempted to sodomize plaintiff).

219. Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (holding that a plaintiff must show that the decision to hire reflects deliberate indifference to the risk that the particular violation that occurred would follow the decision).

220. *See* Snyder v. Trepagnier, 142 F.3d 791, 796 (5th Cir. 1998) (holding that evidence that an officer had committed nonviolent offenses in the past is not enough to show that the municipality knew or should have known that the officer would engage in violent acts in the future); Waterman v. City of New York, 1998 U.S. Dist. LEXIS 17087, 9 (S.D.N.Y 1998) (concluding that plaintiff could not prevail on an inadequate screening claim where the only evidence offered to support the claim was that the police officer in question had been arrested once for assault prior to being hired).

221. Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 411, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (holding that in order to hold a municipality liable for a hiring decision, the risk that the violation of rights would occur must be plainly obvious to an objectively reasonable policymaker).

222. Bd. of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (1997) ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the *particular* injury suffered by the plaintiff.") (emphasis in original).

223. *See* Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 412, 117 S. Ct. 1382, 1392, 137 L. Ed. 2d 626, 644 (holding that municipal liability for inadequate screening requires a strong connection between the job applicant's background and the specific harm he inflicted).

3. Defenses That May Be Raised Against Your Claim

There are several ways that the persons who you are suing might be able to defend themselves against your Section 1983 lawsuit. For example, the defendants might claim that the facts in your complaint are false or that your legal arguments are incorrect. You will not know how the defendants have chosen to defend themselves until after you file your complaint. You do not need to respond to their defenses until after you receive either an answer or a motion to dismiss from the defendants.[224] However, your lawsuit is more likely to succeed if you can organize your complaint to avoid some of the defenses that you think might be raised.

The rest of this Part will explain some of the defenses that are most likely to come up in a Section 1983 lawsuit. Most of the following sections focus on different kinds of immunities. Immunities are rules that protect certain individuals or agencies from liability even when they may have done something wrong. Immunities are almost always an issue in Section 1983 suits.

(a) Eleventh Amendment Immunity

As a general matter, the Eleventh Amendment to the U.S. Constitution protects states and their agencies from being sued in federal court.[225] This means that you cannot name the state itself as a defendant in your Section 1983 suit.[226] Nor can you name the state department of corrections or any other state government agency as a defendant.[227] Eleventh Amendment immunity is also known as "sovereign immunity."

This same Eleventh Amendment immunity rule prevents you from suing a state official in his or her "official capacity" *for money damages* in federal court.[228] This is considered the same thing as suing the state.[229] However, this prohibition does not apply to suits for *injunctive* or *declaratory* relief against state officials sued in their official capacity. In other words, although you cannot sue the state itself for an injunction, you can sue a state official in his official capacity for an injunction.[230] Luckily, the effect of suing

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224. See Part C(8) of this Chapter, "What to Expect After Your Legal Papers Have Been Filed in Court," for an explanation of an "answer" and a motion to dismiss.

225. Note these rules do not apply to claims brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006), which prohibits disability discrimination. These rules also do not apply to some claims brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–213 (2000). *See* United States v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006) (holding that individuals may sue states under the ADA where the conduct alleged to violate the ADA also violates the Constitution). For more information on the rights of prisoners with disabilities, see Chapter 27 of the *JLM,* "Rights of Prisoners with Disabilities." In addition, some states may allow you to sue the state or its agencies under certain state laws.

226. Alabama v. Pugh, 438 U.S. 781, 782 98 S. Ct. 3057, 3057, 57 L. Ed. 2d 1114, 1116 (1978) ("[S]uit against the State ... is barred by the Eleventh Amendment."). The state must affirmatively raise an 11th Amendment immunity defense. Wis. Dept. of Corr. v. Schacht, 524 U.S. 381, 389, 118 S. Ct. 2047, 2052, 141 L. Ed. 2d 364, 372 (1998) ("The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.") (internal citations omitted).

227. Alabama v. Pugh, 438 U.S. 781, 782 98 S. Ct. 3057, 3057, 57 L. Ed. 2d 1114, 1116 (1978) ("[S]uit against the State and its Board of Corrections is barred by the Eleventh Amendment"); *see also* Hale v. Arizona, 993 F.2d 1387, 1399 (9th Cir. 1993) (finding governmental agency in charge of prison industry is "an arm of the state" and therefore protected by 11th Amendment immunity); Griess v. Colorado, 841 F.2d 1042, 1044–45 (10th Cir. 1988) (stating that even if a state allows itself to be sued in its own courts, the 11th Amendment bars a § 1983 action in federal court against that state unless the state also waives its immunity in federal court).

228. Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24, 117 S. Ct. 1055, 1070 n.24, 137 L. Ed. 2d 170, 194 n.24 (1997) ("State officers in their official capacities**,** like States themselves, are not amenable to suit for damages under § 1983.") (citing Will v. Michigan, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 2312 n.10, 105 L. Ed. 2d 45, 58 n.10 (1989)).

229. Kentucky v. Graham, 473 U.S. 159, 169, 105 S. Ct. 3099, 3107, 87 L. Ed. 2d 114, 123–24 (1985) (noting that official capacity suits for money damages have the same effect as suing the state for money damages and therefore both types of suits are barred).

230. Verizon Md., Inc., v. Public Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S. Ct. 1753, 1760, 152 L. Ed. 2d 871, 882 (2002) (allowing plaintiff to seek injunctive relief against state commissioners sued in their official capacities); Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed. 2d 114, 122 n.14 (1985) ("[O]fficial-capacity actions for prospective [injunctive] relief are not treated as actions against the State").

a state official for an injunction is the same as if you were suing the state or a state agency. When you sue state officials for injunctive relief, remember to sue them in their official capacity.[231]

Eleventh Amendment immunity does not apply to suits for money damages against state officials sued in their *individual* capacities.[232] If you are seeking money damages and are suing state officials, you must sue these individuals in their individual capacities.

Also, county and city officials do not receive Eleventh Amendment immunity at all.[233] It should be noted, however, that state and county officials may claim one of the personal immunities discussed below. Immunity defenses are often used by defendants in prison litigation suits. You should read the following parts carefully so that you will be able to argue why the defendant(s) in your suit are not immune.

(b) Absolute Immunity of Individuals

Certain types of individuals are absolutely (completely) immune from suit for all actions taken within the scope of their official duties. If an official is absolutely immune it means that he cannot be sued for money damages and sometimes cannot be sued for injunctive relief either. Legislators,[234] prosecutors,[235] witnesses,[236] and judges (including administrative judges)[237] are usually completely immune from liability for damages under Section 1983 as long as they were acting within the scope of their official duties. You should be aware of these immunities when deciding whom to name as defendants in your lawsuit.

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231. Suits for injunctive relief against state officials in their official capacities are said to fall within the "*Ex parte Young* doctrine." *Ex parte Young* is the case where the Supreme Court said that state officials can be sued for an injunction in federal court, even though the state itself cannot be sued. *Ex parte* Young, 209 U.S. 123, 155–56, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

232. *See* Hafer v. Melo, 502 U.S. 21, 31, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301, 313 (1991) (holding that state officials, when sued in their individual capacities, are "persons" within the meaning of § 1983 and therefore are not immune under the 11th Amendment). Some states will actually pay any damages awarded against state officials sued in their individual capacities because of state "indemnification" laws. Even though the state will be paying damages, an indemnification law does not turn your lawsuit into a suit against the state that would be barred by the 11th Amendment. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 317 n.10, 110 S. Ct. 1868, 1879 n.10, 109 L. Ed. 2d 264, 279 n.10 (1990) (noting that "[l]ower courts have uniformly held that States may not cloak their officers with a personal Eleventh Amendment defense by promising, by statute, to indemnify them for damage awards imposed on them for actions taken in the course of their employment").

233. Monell v. Dept. of Social Servs., 436 U.S. 658, 691 n.54, 98 S. Ct. 2018, 2036 n.54, 56 L. Ed. 2d 611, 636 n.54 (1978) (noting that the 11th Amendment does not prevent suits against local governments that are not considered to be part of the state).

234. *See* Bogan v. Scott-Harris, 523 U.S. 44, 49, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79, 85 (1998) ("[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities … Congress did not intend the general language of § 1983 to impinge [on this immunity]") (internal citations omitted); Tenney v. Brandhove, 341 U.S. 367, 372, 71 S. Ct. 783, 786, 95 L. Ed. 1019, 1025 (1951) (extending absolute legislative immunity to protect state legislators); Kilbourn v. Thompson, 103 U.S. 168, 202–04, 26 L. Ed 377, 391–92 (1881) (interpreting the federal Speech and Debate Clause, U.S. Const., art. I, § 6, to provide absolute immunity to federal legislators).

235. *See* Burns v. Reed, 500 U.S. 478, 492, 111 S. Ct. 1934, 1942, 114 L. Ed. 2d 547, 562 (1991) (holding that prosecutor's appearance in court in support of application for search warrant and presentation of evidence at hearing were protected by absolute immunity in civil rights action brought by arrestee); Imbler v. Pachtman, 424 U.S. 409, 430–31, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 143–44 (1976) (holding that prosecutor was absolutely immune from suit even though he knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony). Prosecutorial immunity is limited to immunity from being sued for money damages. Prosecutors do not have immunity from being sued for injunctive relief. If a prosecutor violates your rights while acting within the scope of his official duties, you can sue him for injunctive relief. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 736, 100 S. Ct. 1967, 1977, 64 L. Ed. 2d 641, 656 (1980) (noting that prosecutors, though shielded by absolute immunity for damages liability, may be subject to § 1983 suits for injunctive relief).

236. *See* Briscoe v. LaHue, 460 U.S. 325, 326, 103 S. Ct. 1108, 1110–11, 75 L. Ed. 2d 96, 102 (1983) (holding that a police officer, when testifying in court, is acting as a witness and is therefore entitled to absolute immunity).

237. *See* Stump v. Sparkman, 435 U.S. 349, 355–56, 98 S. Ct. 1099, 1104–05, 55 L. Ed. 2d 331, 338 (1978) (holding that a judge will not be deprived of immunity because action he took was in error, was done maliciously, or was in excess of his authority); Pierson v. Ray, 386 U.S. 547, 553–54, 87 S. Ct. 1213, 1217–18, 18 L. Ed. 2d 288, 294 (1967) (holding local judge immune from liability for civil rights damages that occurred on account of judge convicting individual under a statute later found to be unconstitutional), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

You usually will not be able to sue any of these individuals for violating your constitutional rights if their actions were within the scope of their official responsibilities. In figuring out whether an action falls within the scope of an official's duties, the courts generally look to the nature of the individual's responsibilities, as opposed to just the individual's title. For example, many officials with state or federal legislative responsibilities will be completely immune from suit even if they are not named legislators.[238] Similarly, officials who perform judicial functions within administrative agencies may be entitled to absolute judicial immunity even though they are not technically judges.[239] However, the Supreme Court has held that prison officials on a prison disciplinary committee are not performing judicial functions, and are therefore not completely immune from liability for violating your rights.[240]

Keep in mind that none of these officials is absolutely immune from being sued for money damages for performing an action outside the scope of his official duties. As described above, you must look to the nature of the official's actions, and not simply his title, to determine whether the official's actions are entitled to absolute immunity. For example, in keeping with the rule, a prosecutor is only absolutely immune from suit for those actions taken within "the scope of his prosecutorial duties."[241] Therefore, he has absolute immunity for actions related to initiating and presenting the government's case against you, but not for investigative actions performed prior to this or for actions that did not relate to his role as prosecutor.[242] In *Buckley v. Fitzsimmons*, the Supreme Court found that a prosecutor was not entitled to absolute immunity for allegedly making false statements to the media regarding the defendant because giving statements to the press is outside the prosecutor's role in prosecuting the defendant.[243] Similarly, investigative actions performed by a prosecutor to establish probable cause to arrest a defendant are also outside his role and not entitled to absolute immunity because such actions do not relate to preparing for trial.[244] On the other hand, interviewing witnesses and evaluating evidence in preparation for trial are within the prosecutor's role and always entitled to absolute immunity.[245]

With respect to judges (including administrative judges[246]), the only instances in which they do not have complete immunity from damages are when they do acts that are not judicial in nature[247] and when they act

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238. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 734, 100 S. Ct. 1967, 1976, 64 L. Ed. 2d 641, 655 (1980) (holding defendant judges absolutely immune from suit because they were performing legislative functions when they created the disciplinary rules at issue); *see also* Lake Country Estates v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405, 99 S. Ct. 1171, 1179, 59 L. Ed. 2d 401, 412–13 (1979) (holding regional officials entitled to absolute immunity where they were officially acting in a capacity comparable to that of state legislators).

239. *See* Butz v. Economou, 438 U.S. 478, 512–13, 98 S. Ct. 2894, 2914, 57 L. Ed. 2d 895, 920 (1978) (granting absolute individual immunity to administrative judges of the Department of Agriculture for damages from wrongful initiation of administrative proceedings).

240. *See* Cleavinger v. Saxner, 474 U.S. 193, 206, 106 S. Ct. 496, 503, 88 L. Ed. 2d 507, 517–18 (1985) (declaring that prison officials on prison disciplinary committee do not have absolute immunity).

242. *See* Imbler v. Pachtman, 424 U.S. 409, 420, 96 S. Ct. 984, 990, 47 L. Ed. 2d 128, 137–38 (1976) ("[A] prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.").

242. Zahrey v. Coffey, 221 F.3d 342, 346 (2d Cir. 2000) ("The nature of a prosecutor's immunity depends on the capacity in which the prosecutor acts at the time of the alleged misconduct. Actions taken as an advocate enjoy absolute immunity, while actions taken as an investigator enjoy only qualified immunity. This immunity law applies to *Bivens* actions as well as actions under [S]ection 1983.") (internal citations omitted).

243. Buckley v. Fitzsimmons, 509 U.S. 259, 277–78, 113 S. Ct. 2606, 2617–18, 125 L. Ed. 2d 209, 228 (1993) (holding prosecutor's prejudicial out-of-court statements to the press were not within the scope of his duties and not entitled to absolute immunity); Burns v. Reed, 500 U.S. 478, 495–96, 111 S. Ct. 1934, 1944–45, 114 L. Ed. 2d 547, 566 (1991) (holding that absolute immunity from liability for damages under § 1983 did not apply to state prosecutor giving legal advice to police).

244. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 273–74, 113 S. Ct. 2606, 2616, 125 L. Ed. 2d 209, 226 (1993) (holding that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," he is not entitled to absolute immunity); Zahrey v. Coffey, 221 F.3d 342, 346 (2d Cir. 2000) (prosecutor accused of fabricating false evidence against a defendant was only entitled to a qualified immunity defense because the alleged misconduct occurred while prosecutor was acting in an investigative capacity).

245. *See* Imbler v. Pachtman, 424 U.S. 409, 431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 144 (1976) (holding prosecutors absolutely immune for all actions performed "in initiating a prosecution and in presenting the State's case").

246. Butz v. Economou, 438 U.S. 478, 512–13, 98 S. Ct. 2894, 2914, 57 L. Ed. 2d 895, 920 (1978) (according judicial immunity to federal administrative agency officers performing adjudicatory functions during the course of a hearing).

247. *See* Forrester v. White, 484 U.S. 219, 228–29, 108 S. Ct. 538, 545, 98 L. Ed. 2d. 555, 566 (1988) (holding that judge who fired an employee because of her sex was not absolutely immune from suit, because hiring and firing are

with a clear and complete absence of jurisdiction.[248] A judge acts in the complete absence of jurisdiction when he makes a ruling in a case that he had no authority to hear in the first place. For example, a family court judge does not have authority to try felony cases and therefore would be acting without jurisdiction if he did hear such a case.[249] If you think that a judge had the power to hear your case, but made a mistake that harmed you, you cannot sue the judge for money damages. Instead, you should try to appeal the judge's ruling.

(c) Qualified Immunity of Individuals

Officials who are sued in their individual capacity and who are not completely immune from suit may still enjoy a limited immunity, known as "qualified immunity." State, city, and county officials at all levels may claim some degree of qualified immunity.[250] However, qualified immunity does not protect private parties who are acting under color of state law.[251]

Qualified immunity means that officials will only have to pay money damages if "their conduct ... violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[252] Therefore, to be protected by qualified immunity, the official whom you sue has to show either that it was objectively reasonable to believe his or her actions did not violate the law, or that the law was not clearly established at the time of the violation.[253] In other words, prison officials sued in their individual capacity can be granted qualified immunity even if their conduct is found to be illegal—but only if the court

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administrative, not judicial functions, and judges may be liable for damages for administrative, legislative, or executive functions: "[I]t [is] the nature of function performed, not the identity of the actor who performed it, that informs[s] our immunity analysis.").

248. *See* Mireles v. Waco, 502 U.S. 9, 11–12, 112 S. Ct. 286, 288, 116 L. Ed. 2d 9, 9 (1991) (*per curiam*) (explaining that judicial immunity is overcome in only two sets of circumstances: a judge is not immune from liability for nonjudicial actions (actions not taken in judge's judicial capacity) and a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction); Bradley v. Fisher, 80 U.S. 335, 352, 10 L. Ed. 646, 651 (1872) (noting that a judge does not have complete immunity when he acts in a situation where he knows that he has absolutely no jurisdiction over the subject matter of the lawsuit).

249. Stump v. Sparkman, 435 U.S. 349, 357 n.7, 98 S. Ct. 1099, 1104 n.7, 55 L. Ed. 2d 331, 339 n.7 (1978) (noting the difference between an act in excess of jurisdiction and one in the absence of jurisdiction: "[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.").

250. *See* Procunier v. Navarette, 434 U.S. 555, 561–62, 98 S. Ct. 855, 859–60, 55 L. Ed. 2d 24, 30–31 (1978) (noting that the scope of qualified immunity varies depending on the level of discretion and responsibilities of the official and how the circumstances appeared at the time), *overruled on other grounds* by Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

251. *See* Wyatt v. Cole, 504 U.S. 158, 159, 112 S. Ct. 1827, 1829, 118 L. Ed. 2d 504, 509 (1992) (concluding that the rationales mandating qualified immunity for public officials are not applicable to private parties); Richardson v. McKnight, 521 U.S. 399, 401, 117 S. Ct. 2100, 2102, 138 L. Ed. 2d 540, 545 (1997) (holding that prison guards at a privatized prison are not entitled to qualified immunity, unlike prison guards who are employed by the government). *But see* Eagon *ex rel.* Eagon v. City of Elk City, Okl., 72 F.3d 1480, 1489–90 (10th Cir. 1996) (holding that defendant, a private individual acting under the authority of the City but not a city official, was entitled to qualified immunity because she "was not invoking state law in pursuit of private ends" but was "performing a government function pursuant to a government request." "[A] private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself.") (internal citation omitted).

252. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). For examples of cases dealing with the issue of qualified immunity, see Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523, 531–32 (1987) (holding that since defendant could reasonably have believed that the search at issue was lawful, he should have been allowed to claim a defense of qualified immunity), and Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994) (holding that defendants should have been given the opportunity to attempt to prove that they reasonably believed they were not violating settled law and were therefore entitled to a qualified immunity defense).

253. *See* Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994) (remanding, based on factual dispute related to whether a reasonable officer could believe that his conduct was lawful); Powell v. Ward, 643 F.2d 924, 934 n.13 (2d Cir. 1981) (stating that a defendant who "knew or should have known that her conduct violated a constitutional norm" was not entitled to immunity); Fiscus v. City of Roswell, 832 F. Supp. 1558, 1564 (N.D. Ga. 1993) (holding that Supreme Court decision within same month did not constitute clearly established law); Kaminsky v. Rosenblum, 737 F. Supp. 1309, 1318 (S.D.N.Y. 1990) (holding that qualified immunity did not apply because the prison doctors were aware that alleged conduct implicated the prisoner's rights).

finds that it was *objectively reasonable* for the official to believe his conduct was legal[254] or that the *law was unclear* when the violation occurred.[255]

You do not have to allege in your complaint that the law that was violated was clearly established. The defendant is responsible for raising the qualified immunity defense.[256] If the defendant fails to claim qualified immunity at the trial court level, he may lose the right to raise that defense in later proceedings (such as appeals).[257]

Note that qualified immunity does not give officials a defense to a claim for injunctive relief.[258] This means that an individual may have qualified immunity, but the court can still tell that individual to stop doing something that violates your rights. Qualified immunity is also not available as a defense for municipalities[259] or privately employed prison guards.[260] Qualified immunity is usually (but not always) decided by the judge during summary judgment proceedings.[261] Summary judgment is described in Part C(8).

Figure 2 below should help you understand which defendants are completely or partially immune from suit in federal court, and what kind of relief you can request. Note that state courts have different immunity rules. If you want to bring your lawsuit in state court (discussed below in Part D(2)), you should research your state's immunity rules.

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254. "Objectively reasonable" means that it doesn't matter whether the officer actually believed that his conduct was legal. Instead, the officer has to prove that a reasonable officer could have believed that the conduct was legal.

255. Courts will look at the clarity of the law in the factual context of your case. For example, if you claim that an officer violated your substantive due process right to privacy by strip-searching you, you cannot defeat a qualified immunity defense solely by showing that the right to bodily privacy is clearly established. You would also have to show that at the time you were strip-searched, clearly established law (from the Supreme Court or a court in your circuit or district) dictated that strip-searching violated your right to bodily privacy. *See* Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 282 (2001) (stating that the question of whether a law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition").

256. *See* Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 1924, 64 L. Ed. 2d 572, 578 (1980). Note that Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411, 427 (1985), allows defendants to immediately appeal a court's decision to deny them qualified immunity, provided that the denial turns on an issue of law. These immediate appeals are called "interlocutory appeals." You may attempt to oppose a defendant's immediate appeal of a ruling on qualified immunity by arguing to the appellate court that the issue turns on "disputed questions of fact" rather than questions of pure law. *See* Tierney v. Davidson, 133 F.3d 189, 194 (2d Cir. 1998) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." (citation omitted)); Kulwicki v. Dawson, 969 F.2d 1454, 1461 (3d Cir. 1992) (holding that an order denying qualified immunity is subject to interlocutory appeal). *But see* Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989) (finding a denial of motion for summary judgment on issue of qualified immunity not immediately appealable).

257. *See* Walsh v. Mellas, 837 F.2d 789, 800 n.5 (7th Cir. 1988) (holding that the qualified immunity defense was waived because it was not raised prior to the second appeal).

258. *See* Project Release v. Prevost, 463 F. Supp. 1033, 1036 (E.D.N.Y. 1978) (finding that the Court could issue a declaratory judgment against officials despite officials' qualified immunity).

259. *See* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under [Section] 1983. In short, a municipality can be sued under [Section] 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury [because there is no *respondeat superior* municipal liability under § 1983]."); Owen v. City of Independence, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed. 2d 673, 685–86 (1980) (holding that a municipality cannot use the defense of qualified immunity in a § 1983 action by simply arguing its employees acted in good faith). *But see* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 635 (1981) (holding that punitive damages are not available against a municipality in a § 1983 suit).

260. *See* Richardson v. McKnight, 521 U.S. 399, 412–13, 117 S. Ct. 2100, 2107–08, 138 L. Ed. 2d 540, 552–53 (1997).

261. *See* Snyder v. Trepagnier, 142 F.3d 791, 799–800 (5th Cir. 1998) (noting that qualified immunity is ordinarily determined by the judge, but finding that there was no error in allowing the jury to decide the issue when there were facts in dispute relating to qualified immunity); Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990) ("The better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for summary judgment when possible."); *see also* Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589, 595 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Type of Defendant	Type of Immunity	Relief You Can Obtain
State or state agency	Eleventh Amendment (sovereign) immunity	None, unless state law authorizes such lawsuits
Any officials sued in their *individual* capacity	Qualified immunity	Declaratory judgment or Injunctive relief; Money damages, but only if a) the official does not raise the qualified immunity defense or b) he does raise the defense, but you can demonstrate that a reasonable person would have known that his actions violated a clearly established right
State officials in their official capacity	Eleventh Amendment (sovereign) immunity from suit for money damages only	Declaratory judgment; Injunctive relief
Non-state (local or municipal) officials in their official capacity	None	Declaratory judgment; Injunctive relief; Money damages
Witnesses	Absolute immunity	None, unless you are alleging that the individual violated your rights at a time that he was not acting as a witness
Legislators and individuals authorized to perform legislative functions	Absolute immunity from any suit for actions performed within the scope of official legislative duties	None, unless you are alleging that the individual violated your rights while acting outside the scope of his official duties
Prosecutors	Absolute immunity from suit for money damages only, for actions performed within the scope of official prosecutorial duties	Declaratory judgment; Injunctive relief
Judges (including administrative judges)	Absolute immunity from suit for money damages, for actions performed within the scope of official judicial duties, unless acting with a complete absence of jurisdiction	Declaratory judgment; Injunctive relief, but only if a declaratory judgment has been violated or is not available
Municipalities	Immunity from punitive damages	Declaratory judgment; Injunctive relief; Attorney's fees
Private parties acting under color of state law (such as prison guards at a privately-run prison)	Qualified immunity in some circumstances	Declaratory judgment; Injunctive relief; Money damages

Figure 2: Types of Immunity Available to and Types of Damages Available from Different Defendants

(d) Defenses Based on Required Procedure

The defendants may try to persuade the court to dismiss your lawsuit by arguing that you have failed to meet important procedural requirements. For example, the court can dismiss your case if you fail to meet the filing deadline imposed by your state's statute of limitations. See Part C(5) of this Chapter for an explanation of statutes of limitations. Of course, you can avoid the possibility of this defense by filing your lawsuit on time.

In addition, the defendants may argue that your claim has already been resolved by an earlier court case or a prior administrative proceeding of a judicial nature. If this argument applies to you, the court may refuse to hear your current lawsuit according to the doctrines of "*res judicata*," "collateral estoppel," or

"preclusion."[262] These doctrines effectively prohibit the re-litigation of specific claims or issues that have already been litigated in previous cases between the same parties.[263] To avoid these defenses, before asserting the claims in your current case you should carefully analyze and understand any claims you have previously filed, and any determinations a court may have made with regard to those claims. In general, a claim will be barred because it was previously raised, if:

(1) There was a final judgment *on the merits* of the claim in the previous case; [264]
(2) The ruling court in the previous case was a court of competent jurisdiction; [265]
(3) The prior action involved the same parties as the present case; and
(4) The prior case involved the same type of claim (cause of action).[266]

Finally, defendants may argue that your complaint should be dismissed if you did not exhaust (use) all administrative procedures available to you before bringing your complaint. This is because, under the Prison Litigation Reform Act, you *must* exhaust all administrative remedies (such as prisoner grievance procedures) that are available to you before bringing a suit. See Chapter 13 of the *JLM*, "The Prison Litigation Reform Act" for more information on the exhaustion requirement and Chapter 14 of the *JLM*, "Inmate Grievance Procedures," for information on prisoner grievances. Remember to keep copies of everything that you or prison officials write in this process, so that if a defendant claims that you did not use all required administrative procedures, you will be able to prove that you did.[267] Note, however, that neither Section 1983 nor the PLRA requires you to exhaust your possible state court remedies before suing in federal court.[268]

4. Where to File

Once you have decided to bring your Section 1983 action in federal district court, you have to figure out *which* federal district court is the correct court.[269] For example, New York is divided into four federal judicial districts. Your Section 1983 suit must be filed in the same district where the harm occurred *or* in the district where any defendant lives if all the defendants live in the same state.[270] If not all of your defendants live in the same state, and there is a reason that you cannot file in the district where the harm occurred, then you can file in a judicial district where any defendant can be found.[271] *In most cases, this means you have to file in the district where your prison is located.* If you have been moved to another prison or have been released since the time you suffered the wrong, you must still file in the district where the harm occurred. Appendix I

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262. Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) (holding that collateral estoppel applied to § 1983 actions and included both civil and criminal state-court decisions); *see* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552, 359 n.5 (1979) ("Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.").

263. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552, 559 (1979) (explaining that collateral estoppel and *res judicata* have the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party … and of promoting judicial economy by preventing needless litigation.").

264. "On the merits" generally means that the previous lawsuit was decided on a motion for summary judgment or after a trial, or was dismissed with prejudice.

265. Jurisdiction is a word for a court's power to hear and decide a case. If the court that heard your original case was not a court with power to hear that case, you can file the same case in another court.

266. *See In re* Teltronics Servs., Inc., 762 F.2d 185, 190 (2d Cir. 1985) (describing the factors that prevent re-litigation of earlier decisions).

267. It is also a good idea to save all documents related to these procedures because if your complaints are ignored, the writings may be evidence of the prison officials' indifference that can be used in your § 1983 suit. Their responses might also admit things, like explanations for their behavior, which you can use later at trial.

268. *See* Jenkins v. Morton, 148 F.3d 257, 259 (3d Cir. 1998) (holding that the PLRA does not require exhaustion of state judicial review procedures and noting that the same is true of § 1983 claims); *see also* Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999) (*per curiam*) ("A prisoner's administrative remedies are deemed exhausted [under the PLRA] when a valid grievance has been filed and the state's time for responding thereto has expired.").

269. Visit http://www.uscourts.gov/court_locator.aspx (last visited Sept. 18, 2010) for help in locating your local federal district court.

270. 28 U.S.C. § 1391(b) (2006) (describing requirements for district court jurisdiction).

271. 28 U.S.C. § 1391(b) (2006).

of the *JLM* contains the addresses of all federal district courts. Appendix I also tells you the federal district for each of the New York state prisons.

5. When to File

The statute of limitations is the amount of time you have after the harm occurs before your right to file a lawsuit expires forever. Because there is no federal statute of limitations for Section 1983 claims, such claims use the *state statute of limitations for personal injury suits* in the state in which the court is located.[272] This may seem strange, but it is because the Supreme Court has found that Section 1983 claims are most similar to tort claims for personal injury.[273] New York law says that personal injury suits have to be brought within three years from the date you suffered the wrong,[274] so you have three years to file a Section 1983 suit in New York as well.[275] You should look up the statute of limitations for personal injury suits in the state where you are filing your claim (you can usually find this information in the state code of statutes). The statute of limitations for personal injury suits is also the amount of time you will have to bring your Section 1983 suit.

The statute of limitations period begins to run when you find out (or should have found out) about the injury that you are complaining about.[276] If the injury that violated your rights continues over a period of time—for example, failure to treat a medical condition despite repeated requests for medical care—the statute of limitations may not start to run until the end of the period of injury.[277] However, it is better not to gamble that the court will agree that your injury is continuing. If you can, bring your lawsuit early enough so that all actions that you are complaining about occurred during the limitations period.

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272. *See* Wilson v. Garcia, 471 U.S. 261, 276, 105 S. Ct. 1938, 1947, 85 L. Ed. 2d 254, 266 (1985) (holding that the statue of limitations for a § 1983 claim is the same as for state tort actions for personal injuries), *superseded by statute on other grounds*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5114 (codified as amended at 28 U.S.C. § 1658 (2000 Supp. II)), *as recognized in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377–81, 124 S. Ct. 1836, 1842–45, 158 L. Ed. 2d 645, 653–56 (2004). If your state has different statutes of limitations for different types of personal injury actions, courts will apply the state's general or residual personal injury statute of limitations to your § 1983 case. *See* Owens v. Okure, 488 U.S. 235, 249–50, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (1989) ("[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."). General statutes of limitations apply to all personal injury claims, but have some exceptions. *Residual* personal injury statutes of limitation are those that apply to types of personal injuries not specified elsewhere. Note that Congress has recently created a four-year "catch-all" statute of limitations applicable to "civil action[s] arising under an Act of Congress enacted after" December 1, 1990. 28 U.S.C. § 1658(a) (2000 Supp. II). This four-year limitations period applies to all claims "made possible by a post-1990 [congressional] enactment" that do not themselves contain a statute of limitations provision. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382, 124 S. Ct. 1836, 1845, 158 L. Ed. 2d 645, 656 (2004). *Do not be confused* by this new four-year catch-all provision: § 1983 has not been amended after December 1, 1990, so courts still apply the statute of limitations given by state law.

273. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709, 119 S. Ct. 1624, 1638, 143 L. Ed. 2d 882, 904–05 (1999) (finding that "there can be no doubt that claims brought pursuant to § 1983 sound in tort.").

274. N.Y. C.P.L.R. 214 (McKinney 2003); *see* Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994) (finding that "[f]or § 1983 actions arising in New York, the statute of limitations is three years.").

275. *See* Owens v. Okure, 488 U.S. 235, 251, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (holding that in New York, the time limit on bringing a § 1983 claim is three years, which comes from the statute of limitations for personal injury suits, rather than the one year limitation that applies to claims for assault, battery, or false imprisonment).

276. Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994) ("Section 1983 claims accrue, for the purpose of the statute of limitations, when the plaintiff knows or has reason to know of the injury which is the basis of his action.") (citation omitted).

277. Federal courts are required to apply state rules regarding when the statute of limitations begins running. Therefore, you should look at the specific provisions of your state's statute of limitations. *See* Hardin v. Straub, 490 U.S. 536, 539, 109 S. Ct. 1998, 2000, 104 L. Ed 2d 582, 588 (1989) (holding that a federal court should have applied Michigan's law that tolls (pauses the running of) statutes of limitation for prisoners until they are released); Beck v. Caterpillar Inc., 50 F.3d 405, 406 (7th Cir. 1995) (noting that federal courts generally borrow states' tolling and savings provisions, and where the timeliness of a federal cause of action (including § 1983 claims) is governed by a state statute of limitations, "it only makes sense to apply the state's tolling and savings provisions, for they are interrelated.") (citations omitted). The *Beck* court also warned, however, that "[t]he same cannot be said when the *federal* claim in question is governed by a federal statute of limitations … If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter." (emphasis added). Beck v. Caterpillar Inc., 50 F.3d 405, 407 (7th Cir. 1995).

6. What to File

(a) Your Complaint

Your lawsuit begins when you file your "complaint." Many districts provide model complaint forms for Section 1983 actions. After you figure out which district you have to file in, write to the clerk of that district and ask for the model forms (in New York, you should write to the *pro se* clerk). If you cannot get the forms, make your own using the examples in Appendix A of this Chapter. You should also read the local rules of practice for the federal district court where you decide to file. You can get the local rules for a small fee from the court clerk and possibly through your prison law library.

In your complaint, you must identify yourself as the plaintiff (the party who is bringing the suit). You also have to identify the defendant(s) (the party or parties you are suing)[278] and state the grounds for your complaint (the defendant's actions that violated your constitutional or other rights). You must specifically state which of your constitutional or federal statutory rights were violated. You also must inform the court what laws give it the power or "jurisdiction" to hear your suit. If you are suing in federal court, you must state in your complaint that 28 U.S.C. §§ 1331[279] and 1343(a)(3)[280] give the federal district courts jurisdiction over 42 U.S.C. § 1983 cases. You also have to inform the court of the type of relief you are seeking—damages, injunctive relief, or declaratory relief. See Part C(1) of this Chapter for information on the types of relief available.

The Federal Rules of Civil Procedure require you to make a "short and plain statement" of your claim in the complaint.[281] In your complaint, you should include a reasonably specific description of the incident or practice that is the basis for your claim. Give the court specific details such as names, dates, locations, and injuries suffered. Details help convince the court that you "state a claim for relief" and that your claim should not be dismissed. In particular, your complaint should indicate how each person you name as a defendant was involved in the violation you are complaining about. Being clear about the facts will allow the court to apply the law more accurately to your claim. The federal courts are under a duty to read prisoner *pro se* complaints generously, giving you every benefit of the doubt in stating a claim for which relief can be granted.[282] Still, it is in your best interest to write your complaint and state its legal basis as clearly as you can.

You are not legally required to prove the facts behind your complaint at the time that you file it. But remember, it is very important to *explain what happened or is happening to you as clearly as possible*. You can use affidavits to do this. If you do, your complaint must refer to the affidavits and you must include copies of them with your complaint for each defendant to get along with your complaint. Appendix A-3 of this Chapter contains a sample affidavit.

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278. You should name the defendants using their full, proper names. If you do not know a defendant's full name, write down whatever identifying information you do know, such as his nickname, badge number, official position or duties, etc. Only defendants who have been adequately identified can be served with the summons and complaint. For more information on what you should do if you do not know a defendant's name, see Part C(2)(a) of this Chapter.

279. 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

280. 28 U.S.C. § 1343(a)(3) (2006) ("The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States.").

281. Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief … shall contain (1) a short and plain statement of the grounds for the court's jurisdiction … (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief").

282. *See* Haines v. Kerner, 404 U.S. 519, 520–21, 92 S. Ct. 594, 595–96, 30 L. Ed. 2d 652, 654 (1972) (stating that prisoner should be allowed opportunity to offer proof unless it appears beyond doubt that prisoner can prove no facts to support his claim); Pabon v. Wright, 459 F.3d 241, 248 (2d Cir. 2006) ("We construe complaints filed by pro se litigants liberally and interpret them to raise the strongest arguments that they suggest.") (internal quotations and citations omitted); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so.").

(b) Including Supplemental State Claims in Your Complaint

You may want to add some supplemental state law claims to your federal claim. A state law claim is "supplemental" to a federal constitutional or statutory violation if it involves the same facts.[283] A federal court will consider a supplemental state claim if it is attached to a non-frivolous federal claim.[284] For example, you could file a single complaint claiming that prison officials failed to prevent another prisoner from assaulting you in violation of your Eighth Amendment rights *and* that the officials were negligent under state tort law.[285]

Note that in New York you cannot add a supplemental claim when suing a *state* corrections officer in his individual capacity in federal or state court for acts he committed within the scope of his employment.[286] But if your claim is based on conduct that was not within the scope of the officer's employment, you can add a supplemental state law claim.[287] You can also add a supplemental state claim when suing county or city corrections personnel. If you want to add supplemental state claims to your lawsuit, you should research the law in your own state to find out whether your state also limits your ability to add state claims to Section 1983 suits against particular kinds of defendants.

Bringing a supplemental state claim in federal court can save you time and effort, but there are three potential disadvantages. First, the federal courts cannot grant an injunction against a state official when the claim against that official is based on a supplemental state law claim.[288] If you want to get an injunction against a state official based on a state law claim, you must bring that state law claim in state court. Second, you cannot use Section 1983 to sue a state official in his *official* capacity for damages in federal court.[289] Similarly, you cannot use state law to sue a state official in his *official* capacity for damages in federal court. However, most federal courts permit damage claims against state officials sued in their *individual* capacities based on state law.[290]

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283. 28 U.S.C. § 1367 (2006) (describing the requirements for a federal court to exercise supplemental jurisdiction over a state law claim).

284. 28 U.S.C. § 1367 (2006).

285. For more information on state tort claims, see Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

286. This is because New York state law does not permit such suits—it requires claims of that type to be brought in the State Court of Claims. N.Y. Correct. Law § 24 (McKinney 2003) (prohibiting civil suits brought by individuals in state court against employees of the Department of Correctional Services in their personal capacities for damages arising out of any act performed within the scope of the employment); Baker v. Coughlin 77 F.3d 12, 14–16 (2d Cir. 1996) (holding that N.Y. Correct. Law § 24 also prohibits such actions from being brought in federal court); Riviello v. Waldron, 47 N.Y.2d 297, 303, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 303 (1979) (When determining an employee's scope of employment, New York courts have considered such factors as: "the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated.").

287. *See* Ierardi v. Sisco, 119 F.3d 183, 188 (2d Cir. 1997) (holding that sexual harassment of a co-worker by a state corrections officer is not within the scope of the officer's employment and therefore allowing plaintiff's supplemental state law claim); Degrafinreid v. Ricks, 452 F. Supp. 2d 328, 334 (S.D.N.Y. 2006) (finding plaintiff's negligence claim against corrections officers barred because, while the officers were negligent in not replacing plaintiff's hearing aids, such negligence occurred in the course of "doing the employer's work … While it is true that both New York and federal courts have, on occasion, found that the on-the-job conduct of DOCS employees was outside the scope of employment, such holdings generally have been limited to cases in which the conduct 'was prompted purely by personal reasons unrelated to the employer's interest.'") (internal citation omitted).

288. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911, 79 L. Ed. 2d 67, 82 (1984) (holding that the 11th Amendment prevents a federal court from ordering state officials to abide by state law), *overruled in part* by Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 2312 n.10, 105 L. Ed. 2d 45, 58 n.10 (1989) (affirming that state officials can be sued in their official capacity for injunctive relief), *as recognized in* Nelson v. Miller, 170 F.3d 641, 645 n.5 (6th Cir. 1999) (recognizing that Will v. Michigan Dept. of State Police "reaffirmed that state officers who are violating a federal law may always be sued for purely injunctive relief-'capacity' and 'party in interest' are irrelevant.") *see also* Part C(3)(a) of this Chapter.

289. See Part C(3)(a) of this Chapter.

290. *See* Williams v. Kentucky, 24 F.3d 1526, 1543 (6th Cir. 1994) (permitting plaintiff to go forward with supplemental state law damages claim against state officials sued in their individual capacity); Wilson v. Univ. of Tex. Health Ctr., 973 F.2d 1263, 1271 (5th Cir. 1992) (holding that federal courts may hear state law claims for damages against officials sued in their individual capacity).

Third, if your state claim depends on state law that is unclear, the federal court may refuse to decide both your state and federal claims until the state court clarifies the state law, which takes time.[291] Even if you then win your state claim in state court, the federal court may still refuse to decide your federal claim because your state victory has made federal relief "unnecessary." The bottom line is that you should be very careful when adding anything but the most routine state claim to your Section 1983 action.

7. How to File Your Complaint

Each court has its own detailed procedures for filing a complaint. You should try to obtain a copy of the local Rules of the Court for the court where you are filing your lawsuit. These can be obtained from your prison's law library or by writing to the clerk of the court and (sometimes) paying a small fee.

You can also ask the clerk of the district court for model Section 1983 forms and *in forma pauperis* papers. Be sure to ask the clerk how many copies of each document you need to file and if you need to submit a summons for each defendant you are naming in the complaint. A summons is the document that orders the defendant to respond to or "answer" your complaint with his own legal papers. Appendix A-1 of this Chapter has a sample summons form.

You should file your complaint by mailing the complaint, your *in forma pauperis* papers (described below), the summonses, and as many copies as the court requires in a sealed envelope to the clerk of the court for the federal district in which the wrongful act took place. The clerk will request a United States Marshal to deliver a copy of the complaint and a summons to each defendant. The court clerk will return one copy of each paper to you marked "received by the clerk," so that you will have a record of all papers that you have officially filed with the court. Although the amount of time it will take for you to receive this copy varies from court to court, it should range from one to two weeks. Make sure to keep all the documents you receive from the court.

An *in forma pauperis* declaration is a sworn statement in which you tell the court that you cannot afford the filing fee and other legal expenses. If the court approves your *in forma pauperis* declaration, you do not have to pay certain court expenses, including a fee and travel expenses (a mileage charge) for each summons delivered by the U.S. Marshal.

In forma pauperis status does not relieve you from having to pay the filing fees associated with filing a complaint. These fees will no longer be waived in the same manner in which they were in the past.[292] See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act." to determine how you are required to pay filing fees. If you cannot obtain a form for an *in forma pauperis* declaration from the clerk of the district court, use the form in Appendix A-5 of this Chapter as a model (fill in your answers to the questions) and file it with an *in forma pauperis* motion, an example of which is also contained in Appendix A-5.

If you wish the court to appoint an attorney for you, you should also make this request when filing to proceed *in forma pauperis*. See Appendix A-6 of this Chapter for a sample form to request an attorney.

To summarize, the following are the general steps required to file a complaint:

(1) Determine the federal district court in which you must file. (See Appendix I of the *JLM* if you are in New York.)
(2) Write to the clerk of that district court (the *pro se* clerk if there is one). Ask:
    (a) For a model Section 1983 complaint form;
    (b) For *in forma pauperis* papers;
    (c) For the local rules of practice for that district;
    (d) Whether you need a summons for each named defendant; and

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291. 28 U.S.C. § 1367(c)(1) (2006) ("The district courts may decline to exercise supplemental jurisdiction ... if the [state] claim raises a novel or complex issue of State law"); *see also* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501–02, 61 S. Ct. 643, 645–46, 85 L. Ed. 2d 971, 974 (1941) (holding that federal court should refuse to hear unsettled state law issue until the issue is resolved by the state courts and that, on the facts of the case, the federal constitutional claim could not be heard by the federal court because the question of whether a constitutional violation occurred depended on the outcome of the state law issue). In practice, federal courts will often ask the state's highest court to resolve unsettled state law issues instead of refusing to hear the state law question at all. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 79–80, 117 S. Ct. 1055, 1075, 137 L. Ed. 2d 170, 201 (1997) (encouraging federal courts to certify unsettled questions of state law to state courts). When a federal court asks a state's highest court to decide a state law issue, it is called "certification." Most states have a provision allowing certification. Hart and Wechsler's The Federal Courts and The Federal System, 1072 n.6 (Richard H. Fallon, Jr., et al. eds., 6th ed. 2009).

292. 28 U.S.C. § 1915(b) (2006) (outlining procedures for prisoner payment of filing fees).

(e) How many copies of each document (complaint, *in forma pauperis* declaration, and summons) you must file.

(3) Complete and mail to the clerk of the court:

(a) Complaint and copies of the complaint, including any affidavits (use the sample complaints in Appendix A of this Chapter as a guide for drafting your complaint if the clerk does not send you model forms);

(b) *In forma pauperis* papers and copies (use the forms for an *in forma pauperis* motion and an *in forma pauperis* declaration found in Appendix A-5 of this Chapter if you cannot obtain model forms from the clerk of the district court); and

(c) Summonses (if necessary) and copies (see Appendix A-1 of this Chapter).

By mailing these documents to the clerk, you have filed your Section 1983 lawsuit.

8. What to Expect After Your Legal Papers Have Been Filed in Court

Once you file your complaint, your lawsuit has officially begun. However, it is your responsibility to make sure that your lawsuit continues to move forward. It is not enough to simply file your complaint and then wait for something to happen. Nothing will happen unless you stay involved.

After you file your complaint and serve the defendant(s), the defendant(s) must respond by filing an "answer."[293] Defendants are supposed to file answers within twenty-one days of receiving the complaint,[294] but some defendants ask for extra time. The defendant's answer usually denies the truth of your factual statements or allegations. The defendant may also file a motion to dismiss your complaint under Federal Rule of Civil Procedure 12(b)(6).[295] In the motion to dismiss, a defendant may argue that even if your allegations are true, they do not make out a legal claim upon which relief can be granted. Basically, the defendant argues that your complaints are not violations of statutory or constitutional rights that can be enforced using Section 1983. The court should give you the opportunity to amend (make changes to) your complaint if you left something important out of your original complaint. If the district does not let you amend your complaint, you may have grounds for an appeal.[296] If the defendant does not respond to your complaint at all, you can move for a "default judgment." If the court grants you a default judgment, you win your case because the defendants did not answer. Although the court will probably not grant your motion for a default judgment, it may force the defendant to respond.

Another way a defendant might seek to end your lawsuit is by filing for summary judgment under Federal Rule of Civil Procedure 56.[297] In a summary judgment motion, the defendant argues that there is no real factual dispute and, on the undisputed facts, they would win. For example, the defendant may claim that he or she is immune from suit for your claim.[298] If the defendant makes a summary judgment motion, you must raise a "genuine issue of material fact."[299] To raise a genuine issue of material fact, you must provide factual support that would be admissible in evidence for each element of your claim against each defendant. For example, if you are suing supervisory officials, you must provide some evidence that the

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293. For more information, see Chapter 6 of the *JLM*, "An Introduction to Legal Documents."

294. Fed. R. Civ. P. 12(a)(1)(A)(i) ("A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint.").

295. Fed. R. Civ. P. 12(b)(6) ("Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion … (6) failure to state a claim upon which relief can be granted.").

296. *See* Platsky v. CIA, 953 F.2d 26, 29 (2d Cir. 1991) (holding that the *pro se* plaintiff whose claim was dismissed should be given an opportunity to amend his pleadings and refile his complaint). *But see* Woodard v. Hardenfelder, 845 F. Supp. 960, 969 (E.D.N.Y. 1994) (holding that "leave to file an amended complaint is only appropriate when, based on the plaintiff's first complaint, it is conceivable that an amended complaint could state a cause of action for a violation of the plaintiff's civil rights"). Taken together, these cases mean that you should be given a chance to amend your original complaint with additional facts that support your legal claim, unless the court determines that based upon what you wrote in your original complaint, there is no possible way that you can prove additional facts to strengthen your legal claim.

297. Fed. R. Civ. P. 56(b) ("A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.").

298. See Part C(3) of this Chapter for information on other possible defenses.

299. Fed. R. Civ. P. 56(c) ("The [summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.").

particular official is responsible for what happened. Factual support can be your own affidavit or declaration, the affidavit or declaration of other people who witnessed the event, or relevant documents.[300] If you need discovery in order to defend against a summary judgment motion, you can ask to delay the motion, but you will have to explain to the court what discovery you want and why you think it would help. Since statements in response to a summary judgment motion must be sworn to, you cannot just rely on the complaint unless the complaint is verified, and if the verified complaint does not address all relevant issues, you will still need to supplement it with a declaration.[301]

The defendants in your lawsuit may try to stop your case by making it "moot." A lawsuit is moot when it presents claims that no longer exist. Courts will not hear lawsuits that become moot. For example, if you ask for an injunction against certain bad prison conditions and the prison then improves the conditions, your lawsuit would be moot. Mootness is usually decided when the defendant files a summary judgment motion. To avoid having your claim dismissed because of mootness, you can request money damages for injuries you have already received—a damages claim is never moot—or ask the court to decide if the changes made by prison officials really solve the problem and are not just temporary.[302]

If your suit is not dismissed, the next stage of the proceedings may be the "discovery" or investigation stage. Discovery is the process by which each party requests information from the other about the case. See Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery," for more information on discovery in a federal civil case. It is your responsibility, not the court's, to keep your case moving. Once you have filed your complaint, you should begin discovery. Defendants often ignore discovery requests from *pro se* plaintiffs such as prisoners. If so, you should write a letter to the defendant(s), requesting a response "in a timely manner," and stating that if you do not hear from them you will write to the judge. Most courts now have what are called "meet and confer" requirements. Under these requirements, you must try to settle any discovery disputes with the defendant before you ask the court for help. If you do not hear from the defendants after you write to them, or if you are otherwise unable to resolve a discovery dispute with them, after a week or two you should write to the judge. Judges want cases to move quickly. If your discovery demands are proper, the judge should order defendants to fulfill these demands or assist you in narrowing them so they may be met. See Appendix A of Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery," for examples of letters that you may send to defendants and judges.

If you receive discovery requests from the defendants, you should make sure to respond in a timely and honest manner because you are obligated to follow the rules of the court when you file a lawsuit. In addition, if you ignore discovery requests or delay your response to them, you might damage your case and compromise your credibility before the judge.

If you are threatened or punished by prison officials for bringing your suit, you should tell the court as soon as possible or, if you have been assigned an attorney, your attorney. You should also tell the court if your appointed attorney has not communicated with you.

If, at any time, the court dismisses your suit, make sure that you understand the reasons for the dismissal. Your lawsuit may be dismissed with or without prejudice. If the court dismissed your suit "without prejudice," you can file your suit again.[303] If your suit is dismissed "with prejudice" you cannot re-

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300. If you give the court documents, you must provide a proper "foundation" (explanation) for the documents so the court knows what the document is, when you received it, who gave it to you, etc. You must explain in an affidavit or declaration what the documents are (for example, that the document is the notice the lieutenant gave you that you were found guilty of a particular disciplinary offense, or that it is the grievance you filed and the decision you received, etc.).

301. See Chapter 6 of the *JLM*, "Introduction to Legal Documents," for explanations of documents such as affidavits and declarations.

302. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 n.1, 109 S. Ct. 706, 713 n.1, 102 L. Ed. 2d 854, 872 n.1 (1989) (stating that the expiration of an affirmative action program did not make a challenge to the program moot because the plaintiff had asserted a claim for monetary damages); Weinstein v. Bradford, 423 U.S. 147, 148–49, 96 S. Ct. 347, 348–49, 46 L. Ed. 2d 350, 352–53 (1975) (holding that the release of the plaintiff prisoner on parole mooted his challenge to earlier parole board proceedings, but also noting that where an issue is so short-lived that it will not continue throughout the time it takes to litigate, the issue will not be declared moot if there is a "reasonable expectation that the same complaining party would be subjected to the same action again.").

303. For example, if you filed in the wrong district court, you may be allowed to re-file in the right court. Your suit could also be dismissed without prejudice because of a technical problem in your pleadings. If the statute of limitations has not ended, you may have the chance to fix your pleadings and re-file your complaint.

file your complaint. Instead you must appeal the court's decision to dismiss your complaint—*before the deadline to appeal*.

D. Alternate Ways to Bring Lawsuits

1. Filing Your Lawsuit as a Class Action

Section 1983 claims can also be brought as "class action" suits. A class action is a lawsuit brought on behalf of a group of people who experience the same harm or have the same complaint—in other words, all persons who are "similarly situated."[304]

Class actions are very complicated and can take years. Practically speaking, you need an attorney to bring a class action. Losing a class action affects the rights of all class members, so having a good lawyer is very important. Courts will probably not "certify" a case as a class action if you do not have a lawyer. If you believe that other prisoners like you are experiencing similar mistreatment, you should talk with a lawyer about whether bringing a class action would be appropriate.

A class action will only be recognized by the court if it meets *all* of the following conditions:

(1) The class of similarly situated persons must be too large for each person to bring his own lawsuit or even join individual lawsuits;
(2) The prison officials must have acted or refused to act on grounds that apply to the entire class;
(3) The personal claims of the main plaintiff(s), the "class representative," must be typical of the other plaintiffs; and
(4) The class representative must adequately protect the rights of the other members of the class.[305]

Class actions are appropriate only if the wrong you suffered was also suffered by the other plaintiffs in the suit. All of you together will be considered a "class." The class members do not need to know each other, but you must have a way to reasonably identify most of them, so they can be given notice of the suit and an opportunity to consider whether to participate in it.[306] Again, in order to have your class "certified" (recognized by the court), you will probably need to retain a lawyer or ask the court to appoint one because class actions are so complicated.

If you decide to proceed on your own and feel that the case fits the requirements of a class action suit, you should name yourself and "all others similarly situated" as the plaintiffs. In the complaint, you should state all the facts concerning the wrongs done to you and also state whatever information you have about similar treatment of other prisoners. The court will then decide, on the basis of the facts you provide, whether or not a class action would be proper. If the court allows the class action, it may appoint an attorney to represent the class. If the court does not recognize the class action, you will be allowed to amend your complaint and sue by yourself.

2. Using State Law and/or State Courts

There are certain advantages to suing in federal court, such as liberal discovery rules and potentially higher damage awards. But you may want to file in state court if you only have state law claims or if there are advantages to bringing your Section 1983 claim in a particular state court.

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304. Fed. R. Civ. P. 23. There are two main advantages offered by a class action. First, the suit will not become "moot" if one plaintiff is transferred or released. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402, 100 S. Ct. 1202, 1211, 63 L. Ed. 2d 479, 494 (1980) (holding that even without class certification, the resolution of the named plaintiff's substantive claim does not necessarily moot all other issues in the case); Sosna v. Iowa, 419 U.S. 393, 401, 95 S. Ct. 553, 558, 42 L. Ed. 2d 532, 541 (1975) (holding that when a claim is no longer relevant for a named plaintiff in a class action suit, the claim is still alive and not moot for the class of persons the named plaintiff has been certified to represent); Sze v. I.N.S., 153 F.3d 1005, 1010 (9th Cir. 1998) (noting two exceptions to *Sosna's* mootness doctrine: where, in a proposed class action, plaintiffs' claims are "inherently transitory" and "there is a constantly changing putative class," leaving the court no time to certify the class; and where "but for the 'relation back' of a later class certification, putative class members' claims would be barred by the statute of limitations."). The second advantage of bringing a class action is that, if you win, each member of the class can enforce the judgment or injunction on behalf of the other class members, which avoids separate enforcement actions.

305. Fed. R. Civ. P. 23(a)–(b).

306. Fed. R. Civ. P. 23(c)(2).

(a) Turning Your Federal Civil Rights Claim into a State Law Claim

By bringing a state claim (instead of a federal civil rights claim) in state court, you can avoid the Prison Litigation Reform Act ("PLRA"), since the PLRA applies only to claims arising under federal law. You can do this by converting your federal civil rights claim into a state tort claim or other state law claim.[307] For example, a claim for "deliberate indifference to serious medical needs" in violation of the Eighth Amendment could be brought in state court instead as a tort action for medical malpractice. Similarly, if a disciplinary hearing denied you due process, you could file in state court for violation of the state regulations governing prison disciplinary proceedings.

In addition to avoiding the PLRA, you may have a better chance of winning if you file in state court because of the lower standard that you, as the plaintiff, will have to meet to prove your case. For example, a state court may find that you have a valid state medical malpractice tort claim even if you cannot show the prison officials were "deliberately indifferent" as required in a Section 1983 claim.[308] However, many state statutes contain PLRA-like restrictions as well.[309] You need to research the law in your own state before deciding to file a claim in state court.

Another advantage of bringing your claim in state court is that you may be able to enforce rights that are not granted under federal law. State constitutions may protect rights that are not recognized by the U.S. Constitution. This is because the Constitution protects a minimum level of individual rights and allows the states to provide greater rights for state citizens through their own "constitutions, statutes, and rule-making authority."[310]

(b) Bringing Your Section 1983 Action in State Court

Even if you have a federal law claim, you may want to consider bringing your Section 1983 action in state court. The advantages and disadvantages of federal court compared with state court vary depending upon the state. Some state courts might have more sympathetic judges, more favorable procedural rules, or fewer cases to hear than federal courts. There may, however, be restrictions on damages or the amount recoverable for attorney fees. State courts also have different immunity rules than federal courts, which might be helpful or harmful to your lawsuit depending on what state you are in and who you want to sue.

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307. For more information on state tort claims, see Chapter 16 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

308. *See* Estelle v. Gamble, 429 U.S. 97, 104–05, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 261 (1976) (describing the "deliberate indifference" standard that must be met to prove a § 1983 claim against a prison official for denial of medical care).

309. *See, e.g.*, Cal. Civ. Proc. Code §§ 391–91.7 (West 2004) (governing vexatious (troublesome) litigants in general, and preventing those litigants that a court has found to be troublesome from filing future lawsuits without the permission of a judge); Fla. Stat. Ann. § 57.085(6)–(7) (West 2006) (allowing a court to dismiss a prisoner's claim if it is frivolous, malicious, or harassing, and requiring that a prisoner who has litigated as an indigent twice within the previous three years receive permission from a judge before going ahead with another suit); Ga. Code Ann. §§ 42-12-1–9 (1997 & Supp. 2009) (governing payment of certain court fees and costs by a prisoner, and requiring that any prisoner who has filed three or more actions that were later dismissed as frivolous or malicious be barred from filing any future actions unless the prisoner is under imminent danger of serious physical injury); Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001–.014 (Vernon 2002 & Supp. 2009) (requiring that prisoners exhaust their administrative remedies before filing a claim in state court and that the state court claim be filed within 31 days of when the prisoner receives a written decision from the administrative grievance system, allowing courts to dismiss claims that are frivolous or malicious, and governing costs and fees that the court may require a prisoner to pay).

310. *See* Hernandez v. Robles, 7 N.Y.3d 338, 362, 855 N.E.2d 1, 9, 821 N.Y.S.2d 770 778 (2006) ("We have at times found our Due Process Clause to be more protective of rights than its federal counterpart, usually in cases involving the rights of criminal defendants, or prisoners … [W]e have used the same analytical framework as the Supreme Court … though our analysis may lead to different results.") (internal citations omitted); New York v. LaValle, 3 N.Y.3d 88, 129, 817 N.E.2d 341, 366, 783 N.Y.S.2d 485, 510 (2004) ("It bears reiterating here that on innumerable occasions this Court has given the State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution.") (internal quotations omitted); Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1193, 424 N.Y.S.2d 168, 174 (1979) ("We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority.") (internal citations omitted).

You should research the law and practice of your state to see if it has any of these advantages or disadvantages.

Bringing your Section 1983 action in state court will also avoid some, but not all of the restrictions of the PLRA. For example, the barriers in the PLRA for prisoners filing *in forma pauperis* will not apply in state court (although, as mentioned above, many states have their own PLRA-like laws that may restrict *in forma pauperis* filing). However, the requirement that you exhaust all of your administrative remedies prior to bringing your Section 1983 claim will apply even in state court.

E. Special Concerns for Prisoners in Federal Prisons

1. *Bivens* Actions

There is no statute similar to Section 1983 that explicitly provides individuals with a means to sue *federal* officials who violate federal rights while acting under color of federal law. However, the Supreme Court held that, even without a specific statute, federal officials may be sued for damages and injunctive relief for violations of your constitutional rights.[311] These lawsuits are usually referred to as *Bivens* actions.

Federal courts have jurisdiction to hear *Bivens* actions under 28 U.S.C. § 1331(a). A *Bivens* action is the federal equivalent of a Section 1983 action. Therefore, most of the discussion of Section 1983 in Part B also applies to a federal *Bivens* action under Section 1331. Before proceeding, you should review all of Part B. Appendix A of this Chapter provides two sample Section 1983 complaints, which can also be used for a *Bivens* action. This Part explains the differences between Section 1983 suits and *Bivens* actions.

2. Exhaustion of Remedies

In a *Bivens* suit against federal officials, you must exhaust (use up) any and all available administrative remedies, such as internal grievance procedures, before going to court, regardless of whether you are suing for injunctive relief, declaratory relief, or monetary damages.[312] See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information.

3. Whom You Can Sue

In bringing a *Bivens* action, you are generally limited to suing the federal official who violated your rights. You can sue the official only in his *individual* capacity, not in his *official* capacity.[313] This is because "official capacity" suits are considered to be the same as suits against the government and the federal government has "sovereign immunity" (a type of absolute immunity) from being sued.[314] Neither can you bring a *Bivens* action against a federal agency[315] or a private corporation which contracts with the federal

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311. *See* Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 389, 91 S. Ct. 1999, 2001, 29 L. Ed. 2d 619, 622 (1971) (holding that suit for 4th Amendment violation is permitted against a federal agent); *see also* Carlson v. Green, 446 U.S. 14, 18–19, 100 S. Ct. 1468, 1471, 64 L. Ed. 2d 15, 23–24 (1980) (finding that the widow of deceased federal prisoner had a *Bivens* remedy directly under the Constitution). *But see* FDIC v. Meyer, 510 U.S. 471, 484–86, 114 S. Ct. 996, 1004–06, 127 L. Ed. 2d 308, 315 (1994) (refusing to extend *Bivens* doctrine to suits against federal agencies).

312. *See* Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 966–67 (2001) (holding that the Prison Litigation Reform Act required that all administrative remedies be exhausted before filing suit, regardless of the form of relief sought).

313. *See* Tapia-Tapia v. Potter, 322 F.3d 742, 746 (1st Cir. 2003) (holding that Postmaster General cannot be sued in his official capacity under *Bivens*); Affiliated Prof'l Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999) (noting that *Bivens* "provides a cause of action only against government officers in their individual capacities"); Buford v. Runyon, 160 F.3d 1199, 1203 (8th Cir. 1998) (holding that a *Bivens* claim cannot be brought against a federal official in his official capacity); Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996) (noting that *Bivens* actions must be against federal officials individually); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d. Cir. 1994) (stating that a *Bivens* action "must be brought against the federal officers involved in their individual capacities.").

314. *See* Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d. Cir. 1994) ("Under the doctrine of sovereign immunity, an action for damages will not lie against the United States absent consent. Because an action against federal officers in their official capacities is essentially a suit against the United States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived."). See the discussion of state sovereign immunity under the 11th Amendment immunity in Part C(3)(a) of this Chapter. The discussion generally applies to the federal government as well.

315. *See* FDIC v. Meyer, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 323 (1994) (finding a damages remedy against federal agencies inappropriate and inconsistent with *Bivens* because of the "potentially enormous financial burden for the Federal Government.").

government to operate prison facilities.[316] In *Corrections Services Corporation v. Malesko*, the Supreme Court held that it would be unfair to allow *Bivens* suits against private corporations and not federal agencies. Violations by these private corporations, the Court said, are best handled through tort remedies available to prisoners.[317] It is not yet clear whether *employees* of private corporations contracting with the federal prisons may be sued under *Bivens*. While some courts have found that *Malesko* only excluded private entities and not private individuals from *Bivens* actions,[318] others have found that neither private entities nor their employees can be sued.[319]

4. What You Can Complain About

In a *Bivens* action under Section 1331, like a Section 1983 action, you may complain about conditions and/or treatments that violate your federal constitutional rights. Parts B(2) and (3) of this Chapter, which explain possible Section 1983 actions, apply equally to *Bivens* actions. Who you can sue (name as a defendant) in *Bivens* actions is also similar to Section 1983 lawsuits, although remember that federal agencies cannot be sued.[320]

Federal courts may refuse to hear *Bivens* complaints based on the Fifth Amendment's Due Process Clause[321] if they fall within the category of less serious harms such as deprivation or removal of personal items.[322] For harms that are simple tort violations, you will need to sue using the Federal Tort Claims Act ("FTCA")[323] instead of a *Bivens* action. The FTCA is a statute that authorizes damages suits against the federal government for actions by federal employees who, within the scope of their employment, negligently or wrongfully inflict harm on persons or their property. You begin a FTCA claim by submitting Form 95, "Claim for Damage, Injury, or Death," and requesting money damages from the federal agency whose employee allegedly committed the harmful action(s).[324] Many FTCA cases are resolved at the agency level through negotiation and an eventual settlement. However, if your claim is denied, you may file suit in federal court. But remember, the judge will dismiss your case if you go to federal court without exhausting this administrative remedy.[325]

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316. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 122 S. Ct. 515, 517, 151 L. Ed. 2d 456, 461 (2001) (refusing to extend *Bivens* to allow recovery against a private company operating a halfway house under contract with the Federal Bureau of Prisons).

317. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71–73, 122 S. Ct. 515, 521–22, 151 L. Ed. 2d 456, 466–67 (2001) ("Nor are we confronted with a situation in which claimants … lack effective remedies … For example, federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in government facilities.").

318. *See* Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 58–60 (D.R.I. 2003) (finding private prison guards to be federal actors under *Bivens* because they are considered state actors within the meaning of § 1983 and act under the color of federal law). *But see* LaCedra v. Donald W. Wyatt Det. Facility, 334 F. Supp. 2d 114, 141 (D.R.I. 2004) (holding that no *Bivens* action can be brought against employees of a public corporation because they are not federal agents).

319. *See* Holly v. Scott, 434 F.3d 287, 296 (4th Cir. 2006) (dismissing *Bivens* lawsuit brought by prisoner in a privately run federal correctional facility because he could seek relief under state law); Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1105 (10th Cir. 2005) (finding *Bivens* actions are not available against private prison employees because there are other remedies, such as negligence actions), *aff'd by an equally divided court,* 449 F.3d 1097 (10th Cir. 2006) (*per curiam*).

320. *See* FDIC v. Meyer, 510 U.S. 471, 484–86, 114 S. Ct. 996, 1004–06, 127 L. Ed. 2d 308, 322–24 (1994) (holding that federal agencies, such as the FDIC, are immune from *Bivens* actions).

321. The 5th and 14th Amendments to the Constitution each contain a Due Process Clause. The 5th Amendment's clause applies to the federal government, while the 14th Amendment's applies to the states. The Due Process protections described in Part B(2)(e) of this Chapter will apply to federal prisoners through the 5th Amendment rather than the 14th Amendment.

322. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 526, 533, 104 S. Ct. 3194, 3200, 3204, 82 L. Ed. 2d 393, 402–03, 407–08 (1984) (holding that the 4th Amendment's prohibition of unreasonable searches and seizures did not apply to searches of prison cells or seizures of prisoner property and such seizures did not violate the 14th Amendment's Due Process Clause if a post-deprivation remedy was available); Daniels v. Williams 474 U.S. 327, 328, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662, 666 (1986) (holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

323. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006).

324. You may obtain this form by writing to the clerk of the federal district court in which you plan to file your action. Form 95 is also available at http://www.justice.gov/civil/forms.htm (last visited October 10, 2010).

325. *See* Deutsch v. Fed. Bureau of Prisons, 737 F. Supp. 261, 266 (S.D.N.Y. 1990) (holding that failure to file an administrative claim will bar a plaintiff from suing under the Federal Torts Claims Act).

5. What You Should File

If you are suing for injunctive relief in a *Bivens* action under Section 1331, you must serve a copy of the summons and complaint on: (1) the named defendants, (2) the U.S. Attorney for the district in which you bring your suit, and (3) the Attorney General of the United States in Washington, D.C.[326] If you are suing under Section 1331 for only money damages, you need to serve the summons and complaint on: (1) the U.S. Attorney for the district in which you bring your suit, (2) the Attorney General of the United States in Washington D.C., and (3) the officer or employee being sued.[327] All service must be by registered or certified mail.[328]

6. Where to File

If you are seeking injunctive or declaratory relief, you may file your lawsuit in the federal district where *any* defendant resides, where the events complained of occurred or are occurring, or where you presently reside.[329] If, however, you are suing for money damages only, you must file suit in the federal district in which *all* the defendants reside or the district in which your claim arose (where the events you are complaining about occurred).[330]

F. Conclusion

If your constitutional rights have been violated, you may be able to obtain relief by suing state and local officials under 42 U.S.C. Section 1983 or by suing federal officials under 28 U.S.C. Section 1331. Through these suits, prisoners may receive monetary relief, injunctive relief, and/or declaratory judgment. In a Section 1983 claim against state and local officials, you can sue officials in their official capacities as representatives of the state. However, when suing federal officials under Section 1331, you may only sue the federal officials in their individual capacities. Refer to Part E of this chapter to review the special requirements for filing Section 1331 claims. Appendix A of this chapter provides helpful examples of forms for making your claim, such as a summons form, a sample temporary restraining order, and a sample full complaint. Remember to read Chapter 13 of the *JLM* on the Prison Litigation Reform Act before starting your 1983 claim.

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326. Fed. R. Civ. P. 4(i).

327. Fed. R. Civ. P. 4(i)(2)(B).

328. Fed. R. Civ. P. 4(i)(1).

329. 28 U.S.C. §1391(e) (2006) ("A civil action in which a defendant is an officer or employee of the United States ... may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.").

330. *See* Stafford v. Briggs, 444 U.S. 527, 544, 100 S. Ct. 774, 785, 63 L. Ed. 2d 1, 15 (1980) (finding that under 28 U.S.C. § 1391(b), "suits against private persons for money damages must be brought in the judicial district where all defendants reside, or in which the claim arose").

APPENDIX A

This Appendix contains the following materials:

A-1. Sample Summons Form
A-2. Sample Section 1983 Complaint Form[331]
A-3. Form for an Affidavit
A-4. Order to Show Cause and Temporary Restraining Order ("TRO")
A-5. *In Forma Pauperis* ("IFP") Papers
  a. Notice of Sample Motion to Proceed *In Forma Pauperis*
  b. Declaration in Support of Request to Proceed *In Forma Pauperis*
A-6. Application for Appointment of Counsel
A-7. Prisoner Authorization
A-8. Sample Language for Statement of Facts
A-9. Sample Full Complaint

Parts B and C of this Chapter contain instructions on when and how to use each of the following forms. **DO NOT USE THESE FORMS UNTIL YOU HAVE READ PARTS B AND C OF THIS CHAPTER.**

You may obtain free model forms for Section 1983 complaints and supporting papers by writing to the clerk of the district court in which you plan to file your action. These model forms are designed to make your work less confusing, and will help the district court process your case. If for some reason you cannot obtain model forms, draft your own papers based on the samples in this section. The endnotes following the sample documents (on the last two pages of this chapter) tell you how to fill in the necessary information. **DO NOT TEAR THESE FORMS OUT OF THE *JLM*.**

If you are in New York and need to know the name or address of the court to which you should send these papers, consult Appendix I at the end of the *JLM* for the federal courts in New York and Appendix II for the state courts in New York.

For sample forms for *state* court *In Forma Pauperis* Motions and Declarations in Support of Request to Proceed *In Forma Pauperis*, see Appendix A of Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

331. Federal prisoners can also use this form for a *Bivens* action. Just cross out the reference to "42 U.S.C. § 1983" and replace it with "28 U.S.C. § 1331(a) (*Bivens* action)."

A-1. SAMPLE SUMMONS FORM[332]

This is based on the official form. You can get as many free copies as you need from the clerk of the U.S. district court for your district.

In the United States District Court
For the_____[1]

[*Name(s) of the Prisoner(s) Who Are Bringing the Suit*], Plaintiffs,	
v.	Summons
[*Names and Titles of All the People and Governments Whom You Are Suing*], individually and in their official capacities,[3] Defendants.	Civil Action No.____[2]

To the Above-Mentioned Defendants:

You are hereby summoned and required to serve upon plaintiffs, whose address is _____,[4] an answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

_____
Clerk of the Court

Date: _____

332. *See* Admin. Office of the U.S. Courts, Form No. AO 440, Summons in a Civil Action (2001), *available at* http://www.uscourts.gov/forms/AO440.pdf (last visited Feb. 5, 2011); *see also* Nat'l Ctr. for State Courts, Pro Se: Self Represented Litigants, *available at* http://www.ncsc.org/topics/access-and-fairness/self-representation/resource-guide.aspx (last visited Feb. 5, 2011) (listing helpful resources and state court websites with limited state court forms); WashLaw: Legal Research on the Web, Legal Forms, *available at* http://www.washlaw.edu/legalforms/#fedcts (last visited Feb. 5, 2011) (a legal form resource page with links to federal court forms, state court forms, and form databases).

A-2. SAMPLE SECTION 1983 COMPLAINT FORM[333]

In the United States District Court
For the_____[5]

[*Name(s) of the Prisoner(s)*	
Plaintiffs,	
	Complaint
v.	
[*Names and Titles of All the People and Governments Whom You Are Suing*], individually and in their official capacities[7],	Civil Action No.____[6]
	Jury Trial Demanded
Defendants.	

I. Complaint

Plaintiffs, [*your name and the name of any other plaintiffs*], pro se, for their complaint state as follows:

II. Parties, Jurisdiction and Venue

1. Plaintiff [*your name*] was confined[8] in the [*type of facility*: municipal (city) jail, federal penitentiary, state correctional institution], located at [*address of the facility*] in the city of ____ in the state of _____ from [dates of confinement at that facility] to _____ of 20___. Plaintiff is currently confined at [*your current address*].
2. Plaintiff [*your name*] is, and was at all times mentioned herein, an adult citizen of the United States and a resident of the state of _____.
3. [If other prisoners are complaining, you should repeat paragraphs 1, 2 and 3 for their names and addresses].
4. Defendant [*name of first defendant*][9] was at all relevant times herein mayor of the city of ____ .[10]
5. Defendant [*name of second defendant*] was at all relevant times herein the commissioner of adult services for the city of ___ , with responsibility for operating and maintaining detention, penal, and corrective institutions within the City of _____, including the city jail.[11]
6. Defendant [*name of third defendant*] is and was at all relevant times herein the warden or "superintendent" of the municipal prison for the City of _____. As Superintendent of the prison, Defendant manages its day-to-day operations and executes its policies.
7. Defendant [name of fourth defendant] is and was at all relevant times herein an employee of the prison.
8. Defendant _____is employed as [job of defendant, such as prison guard, mayor, warden or doctor] at [name of prison or other place that this defendant works]. Defendant _____is employed as [job of defendant, such as prison guard, mayor, warden or doctor] at [name of prison or other place that this defendant works].
9. Defendant City of ___ is and was at all relevant times herein a municipal corporation of the State of ___.
10. This action arises under and is brought pursuant to 42 U.S.C. Section 1983 to remedy the deprivation, under color of state law, of rights guaranteed by the Eighth and Fourteenth Amendments[12] to the United States Constitution. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331 and 1343.
11. Plaintiff's claims for injunctive relief are authorized by Rule 65 of the Federal Rules of Civil Procedure.
12. This cause of action arose in the _____ District of _____.[13] Therefore, venue is proper under 28 U.S.C. Section 1391(b).

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333. This sample complaint uses the complaint forms found in John W. Witt et al., § 1983 Litigation: Forms 1-5–1-8.2 (1994 & Jonathan M. Purver, ed., Aspen Publishers 3d ed. Supp. 2006) as a guide and source of sample language. *See also* U.S. District Court, EDNY, Civil Rights Complaint-Prisoner (2006), *available at* http://www.nyed.uscourts.gov/General_Information/Court_Forms/CivilRightsCmpPrisoner.pdf (last visited Feb.5, 2011).

III. Previous Lawsuits by Plaintiff

13. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.[14]

Use these paragraphs if you have filed a lawsuit before:

14. Plaintiff has filed other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.
15. [Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)] The parties to the previous lawsuit were Plaintiffs [names of all of the plaintiffs in that lawsuit] and Defendants [names of all of the defendants in that lawsuit] in the [if federal court, name the district; if state court, name the county] Court, Docket Number __, under [name of judge to whom case was assigned]. The case was [disposition (outcome) of the cases: dismissed? appealed? still pending?]. The lawsuit was filed on _____, 20 __ and I learned of the outcome on _____, 20___.

IV. Exhaustion of Administrative Remedies[15]

16. [Read Chapter 13 of the *JLM*, "The Prison Litigation Reform Act," to determine whether you need to include any description here of how you exhausted your administrative remedies and in what detail. It may depend on your jurisdiction.]

V. Statement of Claim

17. At all relevant times herein, defendants were "persons" for purposes of 42 U.S.C. Section 1983 and acted under color of law to deprive plaintiffs of their constitutional rights, as set forth more fully below.

VI. Statement of Facts

18. [State here fully but as briefly as possible the facts of your case. Describe how each defendant is involved. The facts should be in clear, chronological order, like you are telling a story. Try to start out each paragraph with the date of the events you are describing. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes.[16] If you intend to allege a number of related claims, number and give each claim a separate paragraph. Use as much space as you need. Attach extra sheet(s) if necessary. See the examples of language given for each kind of violation given in Appendix A-8. You should also look at the full sample complaint in Appendix A-9.]

VII. Prayer for Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. Some sample things you might want are:

19. Plaintiffs request an order declaring that the defendants have acted in violation of the United States Constitution.
20. Plaintiffs request an injunction[17] compelling defendants to provide or stop _____ .
21. Plaintiff requests $ ___as compensatory damages.

Signed this _day of _____, 20__.

_____
[Name of Plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

_____
PLAINTIFF'S NAME

_____
DATE

A-3. FORM FOR AN AFFIDAVIT[334]

This form is for plaintiffs, other prisoners, or anyone else who wants to make a sworn statement on behalf of plaintiffs.

In the United States District Court
For the_____[18]

[*Name of First Prisoner in Complaint*[19], et al., Plaintiffs,	
	AFFIDAVIT
v.	
[*Name of First Defendant in Complaint*[21], et al. Defendants.	Civil Action No.____[20]

AFFIDAVIT OF [NAME OF PERSON MAKING STATEMENT]

I, [*Full name of prisoner or other person making the statement*], being duly sworn according to the law depose and say [that I am the Plaintiff in the above entitled proceeding].

[Write statement here. Use numbered paragraphs.]

All of the information I have submitted [*in support of my request, Plaintiff's case, etc.*] is true and correct.

_____
Sign Here Before Notary Public

Sworn to before me this
____ day of ____ , 20__ .

_____[22]
NOTARY PUBLIC

334. *See, e.g.*, U.S. District Court, EDNY, Affidavit in Support of Application for Appointment of Counsel, *available at* http://www.nyed.uscourts.gov/General_Information/Court_Forms/apptcnsl.pdf (last visited Feb. 5, 2011).

A-4. ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER ("TRO")[335]

Be sure to submit, along with this paper, an affidavit (Form A-3) stating how you will be hurt if you do not get temporary relief and how you tried to notify the defendants of your request for temporary relief.

In the United States District Court
For the_____[23]

[*Name of First Prisoner in Complaint,* et al., Plaintiffs,	
v.	Order to Show Cause for Preliminary Injunction and Temporary Restraining Order
[*Name of First Defendant in Complaint,* et al. Defendants.	Civil Action No.____

Upon the complaint, supporting affidavits of plaintiffs sworn to the ____ day of _____, 20___, and the memorandum of law submitted herewith, it is:

ORDERED that the above named defendants [*names of defendants against whom you need immediate court action*] show cause in room ____ of the United States Courthouse, [*address*] on the __day of ____ , 20__ , at _ o'clock,[24] or as soon thereafter as counsel may be heard, why preliminary injunction should not issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from [*a precise statement of the actions you want the preliminary injunction to cover*].

IT IS FURTHER ORDERED that effective immediately, and pending the hearing and determination of this order to show cause, the defendants [*names of defendants against whom you want temporary relief*] and each of their officers, agents, employees, and all persons acting in concert or participation with them, are restrained from [*statement of actions you want the preliminary injunction to cover*].

IT IS FURTHER ORDERED that personal service of a copy of this order and annexed affidavit upon the defendant(s) or his counsel on or before [*date*], shall be deemed good and sufficient service thereof.

[leave this space blank for judge's signature]

_____
Dated: [*leave blank*]
United States District Judge

335. *See, e.g.*, U.S. District Court, SDNY, Order to Show Cause for Preliminary Injunction and Temporary Restraining Order (1999), *available at* http://www.nysd.uscourts.gov/forms.php (last visited Feb. 5, 2011); John W. Witt, et al., Section 1983 Litigation: Forms 4-1, 4-2, 252–54 (1994).

A-5. *IN FORMA PAUPERIS* ("IFP") PAPERS[336]

You should ask for this form from the district court clerk where you will be filing your complaint. They will also send you the paperwork (A-7, "Prisoner Authorization," below) for you to fill out regarding your prison account that is required by the Prison Litigation Reform Act. *Each* plaintiff prisoner must fill out IFP *and* Prisoner Authorization forms.

a. Notice of Motion to Proceed In Forma Pauperis[25]

In the United States District Court
For the_____

[*Name(s) of the Prisoner(s) Who Are Bringing the Suit*], Plaintiffs,	
v.	Request to Proceed *In Forma Pauperis*
[*Names and Titles of All the People and Other Entities Whom You Are Suing]* Defendant.	Civil Action No.____ [26]

PLEASE TAKE NOTICE, that upon the declaration [*or affidavit or affirmation*] of [*your name*], sworn to on the _____ day of _____, 20__, a motion will be made at a term of this court, for an order permitting plaintiff to pursue this action as a poor person, upon the ground that said plaintiff has insufficient income and property to enable [*him/her*] to pay the costs, fees, and expenses to pursue said action, and for such other and further relief as this Court may deem just and proper.

Signed this ___ day of _____, 20__.

_____
(Signature of Plaintiff)

To: _____
Clerk
United States District Court
For the _____[27]

336. *See, e.g.*, U.S. District Court, EDNY, In Forma Pauperis Form-Prisoner (2002), *available at* http://www.nyed.uscourts.gov/pub/docs/courtforms/ifppris.pdf (last visited Feb. 5, 2011); John W. Witt, et al., Section 1983 Litigation: Forms 7-1, 310 (1994).

b. Declaration in Support of Request to Proceed In Forma Pauperis[28]

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS[337]

In the United States District Court
For the _____ 29

[*YOUR NAME IN CAPITAL LETTERS*]	:
	:
	:
(Petitioner/Plaintiff)	:
	:
	:
	:
[RESPONDENT'S NAME IN ALL CAPS]	:
	:
(Respondent(s)/Defendant(s))	:
	:

I, [*Your Name*], am the petitioner/plaintiff in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefore, I state that because of my poverty I am unable to pay the costs of the said proceeding or to give security therefore, that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. If you are presently employed, state the amount of your salary wage per month, and give the name and address of your last employer. YOU MUST ANSWER THIS QUESTION EVEN IF YOU ARE INCARCERATED.

2. If you are NOT PRESENTLY EMPLOYED, state the date of last employment and amount of the salary per month that you received AND how long the employment lasted. YOU MUST ANSWER THIS QUESTION EVEN IF YOU ARE INCARCERATED. IF YOU HAVE NEVER BEEN EMPLOYED, SAY SO.

3. Have you ever received, within the past twelve months, any money from any of the following sources?

(a) Business, profession, or form of self-employment?	**YES**	**NO**
(b) Rent payments, interest, or dividends?	**YES**	**NO**
(c) Pensions, annuities, or life insurance payments?	**YES**	**NO**
(d) Gifts or inheritances?	**YES**	**NO**
(e) Any form of public assistance?	**YES**	**NO**
(f) Any other sources?	**YES**	**NO**

If the answer to any of the questions (a) through (f) is yes, describe each source of money and state the amount received from each during the past months.

4. Do you own any cash or do you have money in a checking or savings account? Include any funds in prison accounts.
__If the answer is yes, state the total value owned.

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337. *See, e.g.*, U.S. District Court, SDNY, Request to Proceed In Forma Pauperis, *available at* http://www.nysd.uscourts.gov/forms.php (last visited Feb. 5, 2011).

5. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (including ordinary household furnishings and clothing)?
___If the answer is yes, state the total value owned.

6. List the person(s) who are dependent upon you for support, state your relationship to those person(s), and indicate how much you contribute toward their support at the present time.

7. If you live in a rented apartment or other rented building, state how much you pay each month for rent. Do not include rent contributed by other people.

8. State any special financial circumstances which the court should consider in this application.

I understand that a false statement or answer to any questions in this declaration will subject me to the penalties of perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this ____ day of ___ , 20___.

_____
(signature)

_____
Social Security No.

_____
Date of birth

A-6. APPLICATION FOR APPOINTMENT OF COUNSEL[338]

In the United States District Court
For the _____ [30]

[*YOUR NAME IN CAPITAL LETTERS*]	:	
	:	APPLICATION
	:	FOR APPOINTMENT
(Petitioner/Plaintiff)	:	OF COUNSEL
	:	
	:	No. _____[31]
	:	
[RESPONDENT'S NAME IN ALL CAPS]	:	
	:	
(Respondent(s)/Defendant(s))	:	
	:	

(a) Your Name and Mailing Address _____[32]

(b) Explain why you feel you need a lawyer in this case. (For example, you don't know the law well, you don't have access to the law library, you have a disability, your case is very complicated, etc. Use additional paper or include an affidavit supporting your application if necessary.)[33]

(c) Explain what steps you have taken to find an attorney and with what results. (Use additional paper if necessary.)

(d) If you need a lawyer who speaks in a language other than English, state what language you speak: _____

I declare under penalties of perjury that my answers to the foregoing questions are true to the best of my knowledge.

I understand that if I am assigned a lawyer and my lawyer learns, either from myself or elsewhere, that I can afford a lawyer, the lawyer may give this information to the court.

I understand that if my answers on my application to Proceed *in Forma Pauperis* [or Affidavit in Support of Application for Appointment of Counsel] are false, my case can be dismissed.

I understand that making this application does not excuse me from litigating my case, and that it is still my responsibility to have the defendants served with a summons and complaint, if I have not already done so.

Dated: _____

_____
[*Your Signature*]

338. *See, e.g.*, U.S. District Court, EDNY, Application for Appointment of Counsel, *available at* http://www.nyed.uscourts.gov/General_Information/Court_Forms/apptcnsl.pdf (last visited Feb. 5, 2011); John W. Witt, et al., Section 1983 Litigation: Forms 7-3, 7-4 312–13 (1994).

A-7. PRISONER AUTHORIZATION[339]

This is the form that should be sent to you after you submit your complaint to the district court. If you do not receive it within two weeks of submitting your complaint, you should copy the information found here and send it to the court so that your complaint is not dismissed because you did not comply with the Prison Litigation Reform Act.

****

Mailed to the Plaintiff by the Court on this date:

RE: _____ v. _____

NOTICE IS HEREBY GIVEN THAT THIS ACTION WILL BE DISMISSED UNLESS PLAINTIFF COMPLETES AND RETURNS THIS AUTHORIZATION FORM TO THIS COURT WITHIN FORTY-FIVE DAYS FROM THE DATE OF THIS NOTICE.

On April 26, 1996, the Prison Litigation Reform Act ("PLRA" or "Act") was signed into law. This Act amends the *in forma pauperis* statute (28 U.S.C. Section 1915) and requires you to pay the full filing fee when bringing a civil action if you are currently incarcerated or detained in any facility. If you do not have sufficient funds in your prison account at the time your action is filed, the Court must assess and collect payments until the entire filing fee of $ ___[34] has been paid, **no matter what the outcome of the action**.

****

SIGN AND DATE A COPY OF THE FOLLOWING AUTHORIZATION:

I, _____ , request and authorize the agency holding me in custody to send to the Clerk of the United States District Court for the _____[35] a certified copy of my prison account statement for the past six months. I further request and authorize the agency holding me in custody to calculate the amounts specified by 28 U.S.C. Section 1915(b), to deduct those amounts from my prison trust fund account (or institutional equivalent), and to disburse those amounts to the United States District Court for the _____.[36] This authorization shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT BY SIGNING AND RETURNING THIS NOTICE TO THE COURT, THE ENTIRE COURT FILING FEE OF $ ___[37] WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY PRISON TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

_____
Signature of Plaintiff

_____
Date Signed
State I.D. #
Local Prison I.D. #
Federal Bureau of Prisons I.D. #

339. *See, e.g.*, U.S. District Court, EDNY, In Forma Pauperis Form-Prisoner (2002), *available at* http://www.nyed.uscourts.gov/pub/docs/courtforms/ifppris.pdf (last visited Feb. 5, 2011).

A-8. SAMPLE LANGUAGE FOR STATEMENT OF FACTS

The following paragraphs are examples of how to explain different types of complaints that you may want to bring.[340] **DO NOT COPY ANY OF THESE as your facts will be different than this example.**

INADEQUATE AND UNSANITARY HOUSING[341]

1. Numerous insects, rats, mice, and other vermin were in the prison throughout the period of plaintiffs' confinement from November, 2002 until the time of this complaint.
2. An exterminator did visit the prison in March of 2005, but only the common areas and guard areas were sprayed. Individual cells were never sprayed. When the common areas were sprayed, roaches and other vermin simply moved into the individual cells. Once the fumes dissipated, the vermin returned unharmed to again infest the entire prison.
3. The exterminator wore a mask and gloves, but prisoners remained in their cells and were not given masks or protective clothing.
4. There was no ventilation to prevent prisoners from inhaling the fumes. Plaintiff and fellow prisoner [Plaintiff #2], as well as several others, suffered severe headaches and nausea after the extermination.
5. Inadequate lighting in the cells made reading for more than a few minutes at a time extremely difficult and nearly impossible. Requests for lamps or stronger light bulbs were denied on [*insert dates and name of person who denied the lightbulb*].

INADEQUATE VISITATION AND TELEPHONE ACCESS[342]

1. Plaintiff attempted to telephone his attorney beginning in March, 2005, because he wished to tell him about new evidence in his case. On or about March 3, 2005, plaintiff asked [Defendant #1] to allow plaintiff to make a telephone call to his attorney. Defendant refused.
2. Plaintiff continued to request telephone access throughout the month of March. On April 1, 2005, he was given access to the telephone, but only after 7:30 p.m. Because his attorney works only during business hours, plaintiff was unable to contact him that day.
3. The refusal of the prison staff to allow plaintiff access to telephone contradicted stated prison policy regarding telephone use for prisoners in the general population posted in the cafeteria. Plaintiff was a part of the general population for the entire time that he could not access a telephone.
4. The official prison policy regarding telephone use is also insufficient for purposes of contact with prisoners' attorneys. While confined in the prison, each prisoner was allowed to make only one 5-minute call during the week and one 10-minute call on the weekend. The weekday phone calls were restricted to the daytime one week and the evening the next. Each prisoner was allowed only one long-distance telephone call per month, even if that was the only way to contact that prisoner's attorney.
5. On January 17, 2006, plaintiff [Plaintiff #2] met with his attorney in the common area. Despite numerous requests by plaintiff [Plaintiff #2] and plaintiff's attorney for privacy, defendants [Defendant #2 and #4] refused to keep other prisoners away from plaintiff and his attorney. In addition, defendants [Defendant #2 and #4] were also observed to be listening to plaintiff and attorney conversing.
6. The short amount of time allotted for the calls and the complete lack of privacy markedly decreased the quality of discussions between prisoners and their attorneys. The only phone was located in the common area. It was not only difficult to have a conversation over the noise of the guards and other prisoners, but also nearly impossible to have a private conversation. On numerous occasions prisoners complained that the guards were listening to their phone conversations.
7. The prison's attorney visitation policy was unduly restrictive during the period of plaintiffs' confinement. Prisoners were forced to converse either in the common area where other prisoners and guards could overhear conversations or in a meeting room observed by guards through two-way mirrors. Since

340. These fact patterns are based in large part upon examples taken from the sample complaints in John W. Witt, et al., Section 1983 Litigation: Forms (1994).

341. *See* John W. Witt, et al., Section 1983 Litigation: Forms, Form 1-5, 31 (1994).

342. *See* John W. Witt, et al., Section 1983 Litigation: Forms, Form 1-5, 32 (1994).

attorneys often felt uncomfortable conversing openly in the common area, surrounded by other prisoners, meetings often occurred under the watchful eye of the prison guards.

INADEQUATE MEDICAL CARE[343]

SPECIFIC INSTANCE

1. On August 23, 2004, plaintiff injured his ankle and foot while playing basketball with other prisoners. At approximately 2:00 p.m., he asked [Defendant #1] to be allowed to attend sick call at the infirmary. [Defendant #1] denied plaintiff's request, stating that sick call was at 8:30 a.m. and that plaintiff would have to wait until the following morning. Plaintiff then returned to his cell, his injury untreated.
2. In the early afternoon of August 23, 2004, plaintiff, still in his cell, saw [Defendant #2] making his rounds on plaintiff's floor. Plaintiff told [Defendant #2] about his foot injury and asked to see the prison nurse. [Defendant #2] replied that in order to see the nurse, his pain would have to be an emergency. Otherwise, plaintiff would have to wait until the next day for sick call. Plaintiff immediately told him it was an emergency. However, [Defendant #2] said that he did not think it was an emergency because plaintiff was not bleeding and told plaintiff to wait for sick call. [Defendant #2] then left to continue his rounds.
3. Later on in the afternoon of August 23, 2004, plaintiff was in severe pain from his foot and noticed that it had swelled and become discolored. He called [Defendant #4], the shift supervisor at the time. He responded to plaintiff's call and asked him what was wrong. Plaintiff told him about his symptoms and asked to see the prison nurse. Instead, [Defendant #4] went to get some Advil for plaintiff.
4. On the evening of August 23, 2004, [Defendant #3] gave two Advil to plaintiff. Plaintiff took the Advil and told [Defendant #3] that his pain was so bad that he could not stand or walk. [Defendant #3] responded that he could only follow [Defendant #4]'s orders, and told plaintiff that sick call was at 8:30 a.m.
5. On the morning of August 24, 2004, prison staff members found plaintiff in his bed. He was unable to move his foot. Plaintiff was finally seen for the first time by the prison's staff nurse, at which time plaintiff was moved to _____County Hospital. At _____County Hospital, plaintiff's foot was examined and operated on. Plaintiff remained hospitalized for the next five days as a result of the prison's unprofessional and inappropriate treatment of his injury.
6. Plaintiff [Plaintiff #2] experienced earaches in both ears for the entire month of November, 2002, and was unable to obtain medical attention.
7. Plaintiff [Plaintiff #2] also suffered severe migraines from approximately December 2, 2005 through February 14, 2005 that were completely crippling. He was denied prompt medical care by the prison. When [Plaintiff #2] was finally taken to the hospital on February 14, 2005, he was diagnosed as suffering from cluster migraine headaches resulting from physical problems, namely, his ear infections.
8. Plaintiff [Plaintiff #3] suffered from severe neck pain as a result of a factory work accident prior to plaintiff's prison confinement. [Plaintiff #3] has been unable to get any medical attention for this physical ailment to date.
9. Plaintiff [Plaintiff #4] had pieces of broken knife lodged in his shoulder. While in the prison, the shards began causing him immense pain. Despite numerous complaints, [Plaintiff #4] has not received any medical attention to date.
10. Plaintiff [Plaintiff #5] suffered from an open, infected sore four inches in diameter on his leg. Plaintiff [Plaintiff #5] showed this sore to defendants [Defendants #1 and #2] on January 12, 2005. Prison authorities did not provide him with treatment or medication until February 1, 2005.
11. Plaintiff [Plaintiff #6] suffered severe migraine headaches resulting from stress and spiritual problems. He also had several stomach ulcers. He was unable to obtain adequate or timely medical care. Plaintiff reported these problems to defendant [Defendant #3] on December 1, December 15, and December 30, 2004. Defendant has not received any medical attention until the present time.

12. Plaintiff [Plaintiff #5] suffered a head wound in a shootout a few years prior to his sentence in prison. When the wound became painful during [Plaintiff #5]'s stay at the prison, he asked defendants

343. *See* John W. Witt, et al., Section 1983 Litigation: Forms, Form 1-8, 47–48; Form 1-5, 33–48 (1994); *see also* Chapter 22 of the *JLM*, "Your Right to Adequate Medical Care."

[Defendants #2 and #5] on January 25, 2005 for a medical exam. He did not receive any medical care until two months after his first request. As a consequence of the delay in treatment, [Plaintiff #5] underwent a complicated surgical procedure on April 15, 2005 and was hospitalized for two weeks.

IN GENERAL

13. In general, defendants showed deliberate indifference to the medical needs of prisoners, and particularly neglected those of the plaintiffs.
14. Medical care at the prison was inadequate and unprofessional. Medical records, vital in assessing a patient's potential for future sickness, were not used to assist diagnoses. Deficiencies were the norm, and plaintiffs were unable to obtain examinations or care upon request. Prisoners had to often submit grievances to receive medical care from a physician or hospital.
15. Sick call occurred only once a week, the screening process for determining whether a patient needed attention was inadequate, and in the interim, plaintiffs would have to beg guards or other staff for basic medical attention.

INADEQUATE LAW LIBRARY AND FACILITIES[344]

1. Plaintiff [Plaintiff #1] filed a case in the district court on May 15, 2003 regarding injuries he received from a prison guard during a prison riot. Plaintiff's case was dismissed because he failed to use the Inmate Grievance Program prior to filing his case, as required by the Prison Litigation Reform Act ("PLRA").
2. Plaintiff was unable to file his lawsuit again because the statute of limitations in New York had passed by the time he received notice that his case had been dismissed.
3. Plaintiff did not know about the PLRA because the legal materials available to him in prison contained no cases or information regarding the state of the law after 1995.
4. The prison library was woefully inadequate. The most recent case reporters in the library dated from 1994 and several volumes were missing, specifically all of the United States reporters from 1990 and 1992.
5. Plaintiffs, relying on these reporters, suffered actual injury because they could have prevailed under a different claim if they had access to current statutory and case law.
6. The prisoners on each block were supposed to have access to the law library at least three times a week. However, they were regularly called only once a week or less. Five prisoners at a time were sent to the library for a period of ninety minutes, not enough time to adequately conduct research and prepare legal documents. No books were allowed to be checked out of the library. As a result, it was extremely difficult for the prisoners to get more than a small amount of work done each time they went to the library.

INADEQUATE MAIL FACILITIES (CORRESPONDENCE)[345]

1. The mail processing system at the prison was extremely inadequate. Mail was frequently lost or misplaced.
2. Plaintiff [Plaintiff #2] prepared a petition for a writ of habeas corpus. Three weeks after giving it to prison authorities to be mailed, plaintiff discovered it at the bottom of a three foot stack of undelivered mail. In addition, the envelope was battered and dirty.
3. Plaintiff [Plaintiff #3] notified the mail clerk that he was expecting a letter and photographs from his wife and children. Three months later Plaintiff [Plaintiff #3] received a torn envelope with no photographs. The envelope was marked "Received" with the date of two months before stamped on it. Plaintiff [Plaintiff #3] suffered extreme emotional harm and depression due to this lack of expected correspondence with his family.
4. In addition, the prison did not have any secure place for incoming or outgoing mail to protect against the mail being stolen or lost.

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344. *See* John W. Witt, et al., Section 1983 Litigation: Forms, Form 1-5, 34 (1994).
345. *See* John W. Witt, et al., Section 1983 Litigation: Forms, Form 1-5, 34 (1994).

INADEQUATE OPPORTUNITY TO PRACTICE RELIGION[346]

1. Plaintiffs were not permitted to meet or practice their religion. Even though numerous grievances were filed and the majority of the prisoners were usually Muslim, the prison did not allow any Muslim services.
2. Despite the fact that plaintiffs' religion strictly forbids them from eating pork and foods cooked with pork fat, the prison offered no vegetarian or alternative diet plan.

UNSAFE ENVIRONMENT[347]

1. From approximately April 2005 through December 2005 plaintiff was mercilessly beaten and savagely raped by defendant [Defendant #1] and other fellow prisoners whose names are unknown to plaintiffs.
2. As a result of these assaults, plaintiff [*name*] suffered [*describe injuries such as: broken jaw, severe facial lacerations requiring stitches, anal bleeding, and severe anxiety*]. Defendant [Defendant #2] knew about the injuries; despite plaintiff's request for hospitalization, defendant [Defendant #2] denied plaintiff access to medical care.
3. [Specify other acts or omissions that defendants knowingly and negligently committed, which tended to cause the injuries received by plaintiff, such as: A number of prison guards knowingly and negligently opened the cell doors of _____and allowed the intermingling of prisoners, many of them in prison for the commission of extremely violent crimes. These guards were well aware of the severe danger to plaintiff. The prison guards failed to properly supervise the prison and provide for plaintiff's safety. They also purposely and recklessly failed to provide plaintiff with medical assistance, thereby depriving plaintiff of his civil rights, guaranteed by the Constitution and Laws of the United States and of the State of _____.].
4. Defendants' [Defendants #2, #3, and #4] recklessness, failure to properly train and manage [*prison guards or medical doctor*] of the County of _____, State of _____, and failure to adequately supervise and protect plaintiffs from the acts complained of caused the deprivation of plaintiffs' rights.

346. *See* John W. Witt, et al., Section 1983 Litigation: Forms, Form 1-5, 34 (1994).

347. *See* John W. Witt, et al., Section 1983 Litigation: Forms 1-7.1, 36 (Jonathan M. Purver, ed., Aspen Publishers 3d ed. Supp. 2006).

A-9. SAMPLE FULL COMPLAINT

The following is a sample full complaint. **DO NOT COPY ANY OF THESE as your facts will be different than this example.** NOTE, you will want to DOUBLE SPACE the body of your complaint. This complaint is single spaced.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF STATE

Scott Martin, Plaintiff, v. Captain Jack Williams, Sergeant John Doe, Acting Sergeant Joseph Franks, Correctional Officer Steve Doe, Dr. Stanley Thomas, Correctional Officer Ronald C. Smith, and Warden Justin A. Kent, individually and in their official capacities. Defendants.	COMPLAINT Jury Trial Demanded No. 12345

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Scott Martin, by his attorneys, for his second amended complaint against defendants Captain Jack Williams, Sergeant John Doe, Acting Sergeant Joseph Franks, Correctional Officer Steve Doe, Dr. Stanley Thomas, Correctional Officer Ronald C. Smith, and Warden Justin A. Kent, alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under 28 U.S.C. Sections 1331 and 1343(3) and (4). The matters in controversy arise under 42 U.S.C. Section 1983.

2. Venue properly lies in this District pursuant to 28 U.S.C. Section 1391(b)(2), because the events giving rise to this cause of action occurred at Plaineville Correctional Center ("Plaineville") in City, State, which is located within the Northern District of State.

PARTIES

3. Plaintiff Scott Martin is and was, at all times relevant hereto, a prisoner in the custody of the State Department of Corrections ("SDOC"). At the time of the events relevant hereto, Martin was incarcerated at Plaineville. Martin is currently incarcerated at the Smithville Correctional Center ("Smithville").

4. Defendant Jack Williams is an SDOC officer with the rank of captain, who at all times relevant hereto was assigned to Plaineville.

5. Defendant Dr. Stanley Thomas was, at all times relevant hereto, a physician employed or retained by SDOC to provide medical services at Plaineville.

6. Defendant Sergeant John Doe is an SDOC officer with the rank of Sergeant, who at all times relevant hereto was assigned to Plaineville.

7. Defendant Acting Sergeant Joseph Franks was, at all times relevant hereto, a correctional officer at Plaineville, who at the time of the events described below was serving as an acting sergeant.

8. Defendant Officer Steve Doe was, at all times relevant hereto, a correctional officer at Plaineville.

9. Defendant Ronald C. Smith was, at all times relevant hereto, a correctional officer at Plaineville.

10. Defendant Justin A. Kent was, at all times relevant hereto, Warden of Plaineville. As Warden of the prison, Defendant manages its day-to-day operations and executes its policies.

PREVIOUS LAWSUITS BY PLAINTIFF

11. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his/her imprisonment.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

[Read Chapter 13 of the JLM, "The Prison Litigation Reform Act."]

FACTS

12. On or about January 1, 2003, plaintiff was assigned to and resided in cell 1, Unit 1, at Plaineville with his cellmate, Mr. Joshua Nixon ("Nixon").

12. On several occasions prior to January 1, 2003, plaintiff informed defendant Williams that he feared for his personal health and safety due to serious conflicts he was having with Nixon, and plaintiff requested that one of them be transferred as soon as possible.

13. Prior to January 1, 2003, plaintiff wrote a letter to defendant Williams that again informed Williams of his fear for his personal health and safety due to the situation between plaintiff and Nixon and asked that plaintiff be transferred from the cell.

14. On January 1, 2003, Nixon also made a request to defendant Williams for a cell transfer due to conflicts between himself and plaintiff. Defendant Williams denied the request.

15. On January 1, 2003, plaintiff personally asked defendant Williams if he could be transferred from his cell because he feared for his personal health and safety due to conflicts between himself and Nixon. Defendant Williams refused plaintiff's request.

16. On January 1, 2003, Nixon asked Correctional Officer Washington whether he could be transferred from his cell to an adjoining cell occupied only by Charles Jones, because he and plaintiff were having serious problems living together. Officer Washington agreed to make such a transfer. However, without explanation, defendant Sergeant John Doe refused to permit Officer Washington to supervise the move.

17. Charles Jones also discussed with both Officer Washington and defendant Williams Nixon's request for a move into Jones's cell, and he notified Washington and Williams that he was not opposed to Nixon moving into his cell.

18. On January 1, 2003, the same day that plaintiff and Nixon repeatedly asked various correctional officers at Plaineville for a cell transfer, the two engaged in a verbal argument about the volume level of Nixon's radio. A few hours later, plaintiff was sleeping when he heard his cellmate making noise. Plaintiff awoke to see Nixon putting on his boots. After Nixon had put on his boots, he attacked plaintiff without provocation. Nixon struck plaintiff numerous times, causing injuries to his eyes, nose, mouth, and chest.

Nixon also used various objects to strike plaintiff, including the radio and a property box. During the attack, Nixon stomped on plaintiff's bare feet with his heavy boots, causing injury to plaintiff's feet.

19. As Nixon beat him, plaintiff yelled for a "med tech" and summoned prison officials for assistance via a buzzer in his cell. When Acting Sergeant Franks and Correctional Officer Steve Doe arrived, they refused to open the cell door while plaintiff was being attacked. The two officers acknowledged to plaintiff that they saw that he was being attacked but failed to intervene until later.

20. Immediately following this assault, plaintiff was taken to the emergency room at Plaineville Hospital. Plaintiff suffered from cuts and lacerations on his body and his face, as well as multiple bruises and swelling on his face and body. Plaintiff was informed by medical personnel that a deep, 1.25 inch cut in his mouth required stitches. In addition, plaintiff was given an X-ray to determine whether or not his nose was broken, but the amount of blood in plaintiff's nose rendered the X-ray inconclusive.

21. Despite the severity of his injuries and the excruciating pain plaintiff suffered as a result of these injuries, only two Tylenol were administered to plaintiff after the attack. Plaintiff endured severe pain throughout the night from his extensive injuries. The next day, despite the serious pain, Dr. Thomas prescribed only Motrin for pain relief. Although plaintiff's pain was not alleviated, no stronger pain killer was administered.

22. Notwithstanding the opinion of other medical personnel that plaintiff required stitches, defendant Dr. Thomas refused to administer any stitches for the deep cut in plaintiff's mouth. He instead told a colleague that plaintiff was "a crybaby" and discharged him from any further care. Despite plaintiff's repeated requests, defendant Dr. Thomas refused to arrange for any follow-up care for his injuries.

23. At plaintiff's request, he was given a pass permitting him to return to the Hospital the following day for follow-up medical care, but he was never called to return to the Hospital. Plaintiff wrote to defendants Warden Kent and Dr. Thomas to tell them that he had not been taken back to the Hospital for follow-up treatment for his injuries and to request such treatment, but he never was sent back to the Hospital for follow-up care. The only further action any member of the prison staff took with respect to plaintiff's injuries was to advise plaintiff in the future to avoid going to sleep before resolving disagreements with a cellmate.

24. Following his visit to the emergency room, plaintiff continued to suffer from migraine headaches, dizziness, and general physical pain as a result of his injuries. He continued to bleed from the unstitched cut in his mouth for days afterwards, making it difficult or impossible to eat.

25. Soon after, plaintiff filed a grievance and a civil suit against the above-named defendants for their deliberate indifference to harm caused to him throughout the above-mentioned period.

26. After filing the civil suit, plaintiff was the target of harassment and retaliation from both defendant Williams and defendant Smith.

27. On January 14, 2004, plaintiff exited his cell and approached defendant Smith to ask him when lunch was being served. Defendant Smith stuck out his arm and threw plaintiff backwards, nearly causing him to fall. Plaintiff then approached defendant Williams, who witnessed the event, to ask him if he would let this act go without reprimand. Defendant Smith then threatened plaintiff by telling him that "next time, I will bust your head." To this, defendant Williams responded to plaintiff, "you know what you've got to do, take care of your business." On subsequent occasions, defendant Smith verbally harassed plaintiff for filing grievances and lawsuits.

28. Defendant Williams also harassed plaintiff in retaliation for grievances plaintiff had filed against Williams. For example, on February 1, 2004, during an alcohol "shake down," plaintiff and only two other prisoners were forced to submit to a strip search, even though plaintiff had never had an alcohol violation, nor had he ever failed any drug test administered by the prison.

29. Similarly, on March 12, 2004, defendant Williams loudly berated plaintiff from the gallery for accusing him of being a racist in one of the grievances plaintiff had filed against him. Defendant Williams

then approached plaintiff's cell, opened the cell door, and told plaintiff that he does not harass prisoners and only tries to help and protect them. In doing so, Williams used the precise language that plaintiff had used in his grievance against Williams, thus emphasizing that he was acting in retaliation for the grievance.

COUNT ONE: BREACH OF DUTY TO PROTECT

31. Defendant Williams exercised deliberate indifference to plaintiff's health and safety by failing to protect him from a prison attack even though he had been informed of a threat to plaintiff's health and safety. Defendant Williams received repeated requests, oral and in writing, from both plaintiff and his cellmate, Nixon, for a cell transfer due to conflict between the two and refused to act upon them. Defendant Williams' deliberate indifference to plaintiff's health and safety was further demonstrated when he spoke to plaintiff the day after plaintiff had been attacked and laughed at plaintiff's injuries.

32. Defendant Sergeant John Doe exercised deliberate indifference to plaintiff's health and safety by refusing, for no reason, to authorize a cell transfer of either plaintiff or Nixon to an available cell, when he knew that there were serious conflicts between plaintiff and Nixon and that plaintiff's health and safety were at risk.

33. Defendants Acting Sergeant Franks and Correctional Officer Steve Doe exercised deliberate indifference to plaintiff's health and safety by failing immediately to protect plaintiff from an attack by his cellmate as soon as they knew it was occurring. Instead, these defendants merely acknowledged to plaintiff that they saw the attack and, despite seeing that plaintiff had suffered and was suffering serious injuries, the defendants failed to stop the attack immediately.

34. As a result of the deliberate indifference exercised by the aforementioned defendants, plaintiff suffered serious harm at the hands of his cellmate. Plaintiff sustained multiple physical injuries, including deep cuts in his mouth and upon his face, bruises upon his face and body, as well as migraine headaches and dizziness. Plaintiff also suffered extreme emotional distress from the incident.

COUNT TWO: FAILURE TO ADMINISTER ADEQUATE MEDICAL REMEDY

36. Defendant Dr. Thomas exercised deliberate indifference to plaintiff's health by failing to provide adequate medical care to him following the attack by Nixon. Defendant Dr. Thomas intentionally did not administer stitches to a deep cut in plaintiff's mouth and refused to fulfill any of plaintiff's requests for follow-up care. Instead, defendant Dr. Thomas mocked plaintiff in front of other medical personnel.

37. As a result of Dr. Thomas's deliberate indifference to plaintiff's condition, plaintiff suffered further pain and mental anguish. He continued to suffer from migraine headaches and general pain throughout his body, and Dr. Thomas refused to provide adequate pain medication for plaintiff. In addition, plaintiff was unable to eat properly for days after receiving care from defendant Dr. Thomas, because the unstitched cut in his mouth did not properly heal.

COUNT THREE: RETALIATORY TREATMENT FOR FILING SECTION 1983 CLAIM AND FOR FILING GRIEVANCES

39. Almost immediately after plaintiff filed grievances against him, defendant Williams repeatedly harassed and caused harm to plaintiff in retaliation for the grievances. Defendant Williams forced plaintiff to submit to a strip search, even though he had no reason to do so. Defendant Williams came on the gallery and loudly berated plaintiff for allegations he made in one of the grievances filed against Williams.

40. After plaintiff filed a civil rights action against defendant Williams, plaintiff suffered retaliation by defendants Williams and Smith. When plaintiff approached defendant Smith to speak with him, defendant Smith stuck his arm out straight and struck plaintiff, throwing him backward and nearly knocking him down. Defendant Williams looked on and failed to correct or chastise defendant Smith as a result of this battery, merely warning plaintiff that "you know what you've got to do, take care of your business."

41. A few months later, after plaintiff had filed a grievance against defendants Smith and Williams for the above incident, Officer Smith verbally harassed plaintiff in retaliation for plaintiff's filing of the grievance. Defendant Smith told plaintiff that he "was the type who liked to file grievances and that it didn't matter if [Martin] filed a [lawsuit] because [Martin] wasn't going to be getting any money and that nothing [was] going to be done."

42. These acts represent a pattern of events demonstrating intentional retaliation against plaintiff by defendants Williams and Smith for filing grievances and a civil rights action and have caused plaintiff further mental anguish as a result.

WHEREFORE, Scott Martin prays for judgment in his favor and damages in his favor against all defendants in an amount sufficient to compensate him for the pain and mental anguish suffered by him due to the deliberate indifference and intentional misconduct of defendants, but in no event less than $300,000, together with his attorneys' fees and costs, and such additional relief as the Court may deem just and proper.

Respectfully submitted,

_____

Scott Martin, Plaintiff

Fill in the forms shown in Appendix A as follows:

---

1. Name of the federal district where the prison is located in which the alleged offense occurred, for example, "Southern District of New York" or "District of Colorado."

2. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

3. See Section C(2) of this Chapter for information on whom to name as proper defendants.

4. Your complete prison address.

5. Name of the federal district where the prison is located in which the alleged offense occurred, for example, "Southern District of New York" or "District of Colorado."

6. Leave this blank. This will be filled in by the clerk of the court where you file the form.

7. See Section C(2) of this Chapter for information on whom to name as proper defendants.

8. Add "as a pretrial detainee" if that applied to you *at the time* about which you are complaining.

9. If you do not know the names of the defendants, you should refer to them as either John or Jane Doe. See Section C(2) for more information.

10. In this and the following paragraphs, use the descriptions and titles of defendants that are correct for your case.

11. Include the type of prison about which you are complaining, such as federal penitentiary or state correctional institute.

12. Use the name of whatever part of the Constitution or federal statute that protects your rights.

13. Fill in the name of the District and State where you are filing, for example, "Southern District of New York" or "District of Colorado."

14. Use this paragraph if you have never filed a lawsuit before.

15. Whether you will need to include this section and what you will need to include in it varies greatly depending on where you are filing your lawsuit. For an explanation of how to indicate to the court that you exhausted your administrative remedies, see Chapter 13 of the *JLM*, "The Prison Litigation Reform Act." Pay particular attention to whether the courts in your jurisdiction require you to plead and prove in your complaint that you exhausted the administrative grievance procedures available to you. Depending on where you are, you may be able to omit this section entirely. However, in some circuits, such as the 6th Circuit, you will need to include quite a bit of information in this section.

16. You should try to write the facts in such a way that they satisfy the appropriate legal standard. See Appendix A-8 of this Chapter for a full complaint.

17. An order from the court making the defendants do or stop doing something.

18. Name of the federal district where the prison is located in which the alleged offense occurred, for example, "Southern District of New York" or "District of Colorado."

19. Your name.

20. Leave this blank.

21. The name of the first defendant against whom you are bringing suit.

22. Leave blank. You should have this affidavit notarized. The notary public will fill in the date here.

23. Name of the federal district where the prison is located in which the alleged offense occurred, for example, "Southern District of New York" or "District of Colorado."

24. Leave these blank. The court clerk will fill these in.

25. This format is only a sample. You should request what is usually called a T-1080 Form of Motion from the court and use it to make your motion to file *in forma pauperis*.

26. Leave this blank. This entry will be filled in by the clerk of the court where you file the form.

27. Name of the federal district where the prison is located in which the alleged offense occurred, for example, "Southern District of New York" or "District of Colorado."

28. The Prison Litigation Reform Act ("PLRA") requires you to submit a certified copy of your prison account statement showing your balance for the last six months along with this declaration. For more information on complying with the PLRA, see Chapter 13 of the *JLM*, "The Prison Litigation Reform Act."

29. Name of the federal district in which your prison is located and the alleged violation occurred, for example, "Southern District of New York" or "District of Colorado."

30. Name of the federal district in which your prison is located and the alleged violation occurred, for example, "Southern District of New York" or "District of Colorado."

31. Leave this blank. The clerk of the court will write in a number.

32. Your name.

33. The most obvious reason prisoners need legal representation is that § 1983 claims involve complex legal issues that are difficult to understand and litigate effectively for non-lawyers.

34. Filing fees may differ depending upon the federal district court in which you file your claim.

35. Fill in the district in which the court is located, such as "Southern District of New York" or "District of Colorado."

36. Once again, fill in the federal district in which the court is located.

37. Fill in the fee charged by the district court in which your case is filed.

A JAILHOUSE LAWYER'S MANUAL

Chapter 17: The State's Duty to Protect You and Your Property: Tort Actions

Columbia Human Rights Law Review

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CHAPTER 17

THE STATE'S DUTY TO PROTECT YOU AND YOUR PROPERTY: TORT ACTIONS*

A. Introduction

This Chapter explains your rights to protect your body and your property while you are in prison, and the steps you can take if you believe someone has violated those rights. Part B of this Chapter will introduce you to the general law of personal injury, called *tort law*. It covers injuries caused by excessive force, the failure of prison officials to protect you from other prisoners, improper or inappropriate medical care, and poorly maintained facilities. Part B also covers damage to your personal property. Part C of this Chapter will help you determine whom you can sue, where to sue, and what kind of relief you can get. It also explains how to complete your institution's internal grievance procedures (or *exhaust* your administrative remedies) before filing a case in court. Part D explains how to proceed with your case step-by-step, from filing the right papers to obtaining evidence and appealing a decision. Part D is very important because if you wait too long to file a claim or file it in the wrong place, you could lose the claim for good. Keep in mind that prisoners face additional hurdles in bringing lawsuits about injuries suffered in prison.

At the end of this Chapter there is an Appendix with examples of forms you may need to fill out and submit at various stages of the court process. DO NOT RIP THESE FORMS OUT OF THE *JLM*.

JLM, Chapter 24, "Your Right To Be Free From Assault," gives more information about excessive force by correction officers and failure to protect prisoners from assault. If you believe you have been assaulted in prison, Chapter 24 will explain your rights and what action you can take.

Please note that this Chapter details the procedures under New York State law. Prisoners outside New York State should use this Chapter to learn about the basic concepts of tort law, and then do careful research about their own state's laws. Chapter 2 of the *JLM*, "Introduction to Legal Research," will help you perform this task.

B. Know Your Rights: Tort Actions

The law recognizes that, in general, people have a duty not to injure one another, and not to damage or destroy one another's property. When someone breaks that duty, it is called a *tort*.[1] A tort can be either intentional or negligent. An intentional tort is when one person hurts another person (or their property) on purpose. A negligent tort, on the other hand, is often the result of failing to take proper precautions to protect other people and their property. The person who commits a tort, whether intentionally or through negligence, is called a *tortfeasor*.[2]

Once you conclude that you have suffered a tort, you must decide whether it was an intentional or negligent tort. This distinction determines what you will have to prove in order to win your case.

1. Intentional Torts

For most intentional torts, you must prove: 1) that the tortfeasor hurt you or damaged your property, and 2) that he intended to do so. These two elements are sometimes called the "results prong" and the "intent prong." Some examples of intentional torts include assault, false arrest, false imprisonment, intentional infliction of emotional distress, libel, and slander. Intentional torts against property include trespass[3] (wrongful entry onto another's property) and conversion (taking something that does not belong to you and acting like it is yours).[4]

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1. Black's Law Dictionary 1626 (9th ed. 2009).
2. Black's Law Dictionary 1627 (9th ed. 2009).
3. Black's Law Dictionary 1642 (9th ed. 2009).
4. Black's Law Dictionary 381 (9th ed. 2009).

2. Negligent Torts

The biggest difference between intentional torts and negligent torts is the mental state of the person causing the injury. Unlike an intentional tortfeasor, a negligent tortfeasor does not intend to cause damage or injury. Instead, a negligent tortfeasor creates an unreasonably unsafe situation by doing something an ordinary person would not do, or by failing to take some precaution he should have taken. When this unreasonable behavior causes injury or destruction of property, we call it a negligent tort.

To prove a negligent tort, you must first show that the tortfeasor had a responsibility to keep you from being injured, called a "duty of care." Second, you must show that the tortfeasor violated (or *breached*) this duty of care by acting *negligently*, or failing to do what a reasonable person would have done under the circumstances.[5] Third, you must show that your injury was *foreseeable*, meaning that a reasonable person would have known that the tortfeasor's behavior could cause the type of injury that you suffered.

(a) Duty and Breach

Even if you can show that someone was negligent towards you and caused you injury, you must also show that they had a legal duty to treat you with care. Whether or not someone owes you a duty of care depends on the particular situation and your relationship to that person. For example, a supervisor in a job owes you a duty of care to maintain a safe workplace, and you can therefore sue him if he fails to do so. A coworker, however, does not owe you that duty, and you could not sue him, even if he gave you a piece of defective equipment and you got injured using it. To decide whether or not the person responsible for your injuries owed you a duty of care, you can look to what other courts have said about similar situations. The cases mentioned in the footnotes of this Chapter are a good place to start your research.

There may also be laws in your state that define what duties people owe one another in certain situations and what counts as a breach of those duties. If a law or statute says that a certain type of behavior constitutes negligence, then that behavior is called *per se* negligence.[6] All you need to show in such cases is that the tortfeasor engaged in the behavior described in the statute.

As a prisoner, the state and its employees will owe you a duty of care in most situations. But, to make sure that the state or a specific state employee owed you a duty of care in your case, you will have to look for cases or laws that apply to your specific situation.

(b) Reasonableness and Foreseeability

In court, ordinary words like reasonable and foreseeable have special legal meanings. You should look to cases with facts like yours to determine how courts would define those terms in your case. As with a duty of care, certain written laws and statutes may define standards of reasonableness and foreseeability.

To determine whether your injury was foreseeable and whether the alleged tortfeasor acted reasonably, courts will examine the situation *before* you were injured. This is called an *ex ante* perspective. You must show your injury was predictable apart from the fact that you ended up injured; in other words, you cannot use the fact that you were injured to show that an injury was foreseeable.

(c) Checklist for General Tort Claims

Before filing a tort claim, make sure you can establish the following elements in your case:

(1) In the case of an intentional tort:
  (a) The person causing the injury meant to cause it; *and*
  (b) The person causing the injury had no established right to do what he or she did.[7]
(2) In the case of a negligent tort:
  (a) The person causing the injury could have prevented the harm; *and*
  (b) The person's action or inaction caused your harm directly and foreseeably; *and*

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5. Negligence is defined as the "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." Black's Law Dictionary 1133 (9th ed. 2009). *See also* Black's Law Dictionary 1627 (9th ed. 2009) (defining negligent tort).

6. Black's Law Dictionary 1135 (9th ed. 2009).

7. *See*, *e.g.*, N.Y. Correct. Law § 137(5) (McKinney 2003) ("No inmate … shall be subjected to degrading treatment, and no officer or other employee … shall inflict any blows … upon any inmate, unless in self-defense, or to suppress a revolt or insurrection."). Thus, if a guard hits you and was not acting in self-defense, the guard would be acting outside the scope of his authority.

(c) If the person causing the injury is a state or prison employee, he or she, in his or her official capacity, owed you a greater duty of care than you received.[8]

(3) In both intentional and negligent torts, you must prove actual injury.
   (a) It is not enough to show a prison official intended to harm you if you were not actually injured.
   (b) You must show signs of injury to your body, or proof of loss or damage to your property. Medical records will be helpful in proving this element. It is possible to show that emotional distress you have suffered is an actual injury, but this is very difficult. The act necessary to produce such emotional distress must be "extreme and outrageous."[9]

3. Constitutional Torts

The violation of your constitutional rights constitutes another type of tort. The state officers and employees you encounter have the same duty not to harm you and your property that other citizens have. However, because they are state actors, they also have a duty not to violate your federal or state constitutional rights. You should also read *JLM*, Chapter 13, "Federal Habeas Corpus," and Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law" if you believe your constitutional rights have been violated.

(a) Violation of State Constitutional Rights

When the state government violates your rights under the state constitution, you may be able to sue the state for damages.[10] Part C of this Chapter explains more about choosing the right court in which to file your claim, but if you wish to sue the State of New York, you must file your case in the New York Court of Claims.[11] To prove a constitutional tort against the state, you must show that the state harmed you and that the state's actions violated specific rights listed in the state constitution. For example, you can sue the state government if the state discriminated against you because of your race or religion.[12]

The New York Court of Appeals[13] established the right to bring claims for violations of the state constitution in the 1996 case *Brown v. State*.[14] However, *Brown* only addressed tort claims based on the equal protection clause and the search and seizure clause of the New York Constitution.[15] The court did not decide whether individuals can sue for damages based on violations of other parts of the state constitution.[16]

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8. *See*, *e.g.*, Kagan v. State, 221 A.D.2d 7, 11–12, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (finding State liable for failure of prison employees to bring complaining prisoner to see nurse in a timely fashion, and of the nurse to refer prisoner to a physician, when both actions were required by prison regulations).

9. *See*, *e.g.*, Shenandoah v. Hill, 9 Misc. 3d 548, 553, 799 N.Y.S.2d 892, 896–97 (Sup. Ct. Madison County 2005) (defining extreme and outrageous behavior as conduct "so outrageous of character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community") (citing Howell v. New York Post Co., 81 N.Y2d 115, 612 N.E. 699 (1993)).

10. Not all states permit civil suits based on violations of the state constitution, but New York does. *See* Brown v. State, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

11. *See* Brown v. State, 89 N.Y.2d 172, 183, 674 N.E.2d 1129, 1136, 652 N.Y.S.2d 223, 230 (1996) ("[D]amage claims against the state based upon violations of the State Constitution come within the jurisdiction of the Court of Claims.").

12. N.Y. Const. art. I, § 11: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

13. The New York Court of Appeals is the highest court in the State of New York. The intermediate court is the New York Appellate Division, and the trial level court is called the New York Supreme Court.

14. *See* Brown v. State, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

15. *See* Brown v. State, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1139, 652 N.Y.S.2d 223, 233 (1996) ("[W]e conclude that a cause of action to recover damages may be asserted against the State for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution."); *see also* N.Y. Const. art. I, § 11 (equal protection clause); N.Y. Const. art. 1, § 12 (search and seizure clause); Bin Wahad v. FBI, 994 F. Supp. 237, 239 (S.D.N.Y. 1998) (stating that *Brown* recognized a "narrow remedy" against the State of New York for violations of the equal protection and search and seizure guarantees of the New York State Constitution).

16. *See* Augat v. State, 244 A.D.2d 835, 837, 666 N.Y.S.2d 249, 251–52 (3d Dept. 1997) (stating that the availability of damages under New York's due process and freedom of association protections was "not specifically resolved in Brown").

So far, only one New York court has allowed damages based on another part of the state constitution (the "cruel and unusual punishment" provision).[17]

After *Brown*, New York courts have refused to award damages for state constitutional violations if other remedies are available.[18] This means that if you can bring a regular tort claim or a federal civil rights claim under 42 U.S.C. § 1983,[19] New York courts may not allow you to bring a state constitutional tort claim. However, you can still sue the state in the Court of Claims for violations of ordinary tort law. Since it is usually easier to prove a simple tort law claim than a constitutional claim, your chance of success is also better under tort law.

(b) Federal Constitutional Violations

If you want to recover damages for a violation of your rights under the U.S. Constitution, you must file a claim in either a federal district court or in the New York Supreme Court—not in the Court of Claims. See *JLM* Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," for more information about using Section 1983 to bring a claim for violations of federal constitutional rights. Remember that the New York State Constitution has similar provisions to the U.S. Constitution, so you may be able to use the same facts to sue in the Court of Claims by alleging violations of the state constitution.

4. Examples of Common Tort Actions

This Section describes five torts that can happen in prison and the elements you must prove to win damages for these torts. Excessive force and failure to protect from other prisoners are two types of actions that are not included in this Chapter, because they are covered in *JLM*, Chapter 24, "Your Right to be Free From Assault." You should read that Chapter if you have been assaulted by a corrections officer or if you feel that the prison failed to protect you from assault by another prisoner. While the footnotes for this Section include citations to relevant cases, you should use these cases only as a starting point for your research. If you use the cases cited here, you should read the full text of those cases.

This Chapter only includes cases from New York and some federal cases. While New York cases are not binding on the courts of any other state, the tort law of most states is very similar to New York's. For that reason, the case summaries in this Chapter should serve as a useful starting point for determining the types of claims that other states' courts will hear. However, you should make sure to research the law in your state so that you know which cases to cite in your lawsuit.

The following are just a few examples of claims that you can bring; there are many other torts that happen in prison that can form the basis of a lawsuit. Look for cases with similar facts to your situation where the prisoner won, and use those cases to support your claim.

(a) Injuries Relating to Work and Work-Release Programs

Injuries sustained during the course of work within the prison or while on work release are considered work injuries. Tort actions under this category include the state's failure to provide reasonably safe equipment, as well as the state's failure to warn prisoners of specific dangers they might face when using the equipment.[20]

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17. *See* De La Rosa v. State, 173 Misc. 2d 1007, 1010–11, 662 N.Y.S.2d 921, 924 (N.Y. Ct. Cl. 1997) (holding that a state's violation of the cruel and unusual punishment provision in Article I, § 5 of the New York Constitution can give rise to a civil rights cause of action under 42 U.S.C. § 1982, provided that injunctive and declaratory relief are inadequate and money damages would further the constitutional purpose).

18. *See* Bin Wahad v. FBI, 994 F. Supp. 237, 240 (S.D.N.Y 1998) (refusing to imply a cause of action for violation of the State Due Process Clause because plaintiffs had alternative remedies under 42 U.S.C. § 1983); *see also* Augat v. New York, 244 A.D.2d 835, 837–38, 666 N.Y.S.2d 249, 251–52 (3d Dept. 1997) (holding that plaintiff's constitutional tort claims were related to existing common-law torts for which there were adequate remedies); Remley v. State, 174 Misc. 2d 523, 527–28, 665 N.Y.S.2d 1005, 1009 (N.Y. Ct. Cl. 1997) (refusing to imply private right of action for violations of State Due Process Clause under *Brown* analysis because plaintiff had alternative remedies under State tort law).

19. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," for more information on how to obtain relief for violations of federal law under 42 U.S.C. § 1983.

20. *See* Kandrach v. State, 188 A.D.2d 910, 913, 591 N.Y.S.2d 868, 871 (3d Dept. 1992) (finding that when a prisoner participates in a prison work program, the State has a duty to provide reasonably safe equipment and warn prisoners of any potential dangers).

For example, one court awarded damages to a prisoner who lost his fingers working in an on-site prison sawmill because his woodchipping machine was missing a safety guard.[21] The missing safety guard violated the state's duty to maintain safe machinery. Similarly, another court awarded damages to a prisoner who was injured in the course of repair work when the scaffolding beneath him collapsed.[22]

Just as the state has a duty to maintain a safe workplace, you too have a responsibility to take proper care of yourself while working in the prison or work-release program. If the court finds that your carelessness played a role in your injury, it can reduce your damages by the amount for which it believes you were responsible, or even prevent you from recovering altogether. This is called *comparative negligence* or *contributory negligence*.[23]

For example, in the woodchipping case above, the court only awarded half of the total damages to the prisoner, because the prisoner should not have climbed onto the chipping machine in the first place.[24] In another case, the court reduced damages because the prisoner did not follow safety instructions.[25] However, if you were ordered to do the dangerous act that caused your injury, courts may not reduce your damages under contributory negligence theory.[26] This is because courts know that prisoners can be punished for disobeying instructions.[27]

Furthermore, if the court believes that you behaved recklessly in a work-related setting, it can refuse to award you damages at all. *Recklessness* in this context means ignoring a known or obvious risk.[28] Whether the court considers that you were reckless depends partially on how knowledgeable you were about the field or area in which you were working. For instance, one court denied a prisoner damages for injuries suffered after touching live wiring because his previous electrical training made him aware that touching wires was dangerous.[29] By contrast, a prisoner who had received only minimal training was not held responsible for his own injuries.[30]

Note that you may be unable to recover from the state for work-release injuries that do not occur on prison grounds, especially if the state was not the owner or contractor at the work site.[31] Also, if recommending a prisoner for a work-release job is a discretionary action within the scope of a correctional employee's duties, the state is not responsible. Finally, the state has no duty to inspect possible work sites for work-release programs.[32]

You may be able to determine whether the state is liable for your injury by researching New York State labor laws, which courts have found applicable to prison work.[33]

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21. Kandrach v. State, 188 A.D.2d 910, 912, 915, 591 N.Y.S.2d 868, 870, 872 (3d Dept. 1992) (recommending that damages be split between the prisoner and the State because, although the State failed to provide a safe environment, the plaintiff ignored safety warnings).

22. Shulenberg v. State, 35 Misc. 2d 751, 751–52, 231 N.Y.S.2d 816, 817 (N.Y. Ct. Cl. 1962).

23. Black's Law Dictionary 1134 (9th ed. 2009). States that use a contributory negligence rule will not grant damages if the plaintiff was negligent in a way that contributed to his injury. Comparative negligence systems are less harsh and allow the plaintiff to recover partial damages even if he shared in responsibility for the accident. New York and thirteen other states employ comparative negligence systems. N.Y. C.P.L.R. 1411, 1413 (McKinney 2010).

24. Kandrach v. State, 188 A.D.2d 910, 914–15, 591 N.Y.S.2d 868, 872 (3d Dept. 1992).

25. Hicks v. State, 124 A.D.2d 949, 949–50, 509 N.Y.S.2d 152, 152–53 (3d Dept. 1986) (upholding a damages award as reasonable but reducing it because the prisoner had not followed instructions).

26. *See* Lowe v. State, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (finding that the prisoner faced an unfair choice between disobeying orders and risking injury).

27. *See* Lowe v. State, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (finding that the prisoner faced an unfair choice between disobeying orders and risking injury).

28. Black's Law Dictionary 1385 (9th ed. 2009); *see* People v. Angelo, 246 N.Y. 451, 455, 159 N.E. 394, 396 (1927) (explaining that culpable negligence is something more than the slight negligence necessary to support a civil action for damages, and involves disregard of consequences and indifference to the rights of others).

29. Martinez v. State, 225 A.D.2d 877, 879, 639 N.Y.S.2d 145, 147 (3d Dept. 1996).

30. *See* Kandrach v. State, 188 A.D.2d 910, 910–11, 591 N.Y.2d 868, 869 (3d Dept. 1992) (upholding partial damages for a prisoner who had received only five minutes' training on how to operate a woodchipper).

31. *See* Gress v. State, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990).

32. *See* Gress v. State, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990).

33. *See* Callahan v. State, 19 A.D.2d 437, 438, 243 N.Y.S.2d 881, 882–83 (3d Dept. 1963), (holding that the Labor Law establishes a standard of care against which the state should be judged), *aff'd*, 14 N.Y.2d 665, 198 N.E.2d 903, 249 N.Y.S.2d 871 (1964).

(b) Medical Care Provided to Prisoners[34]

Claims relating to inadequate or inappropriate medical care are negligence claims. The state has a duty to provide prisoners with reasonable and adequate medical care in a timely manner.[35] If you believe the state has violated this duty towards you in a way that caused you real harm, you may have a successful medical tort claim.

In order to pursue a tort claim for medical negligence, you will have to prove that the treatment the state gave you (or failed to give you) was not standard—that it was not within "accepted medical practice."[36]

Second, you will have to prove that the state's action or inaction directly caused your injury and that the injury would not have happened anyway. This is called *proximate cause*.[37] For example, even if you had to wait a long time for treatment, you would not be able to recover damages unless the waiting caused your injury or made it significantly worse.[38] In order to prove the cause of your injury, you will almost always need testimony from medical experts.[39] As in other negligence tort claims, you must also show that the injury you suffered was a foreseeable result of the improper treatment you received.[40]

If you believe you have been injured due to improper or inadequate medical care, you can also seek damages under the theory of *ministerial neglect*, which means that when the state makes rules governing its duty to provide medical care and then fails to follow those rules, it is liable for the resulting harm.[41] For example, if the prison has a formal process by which prisoners can see medical staff and fails to follow that process for you, the prison may have automatically breached its duty towards you.[42]

The court may decide to eliminate or reduce damages if your actions contributed to your medical injury. For example, if you know that you have tuberculosis but do not inform prison officials of this fact, you might not receive damages if your condition goes untreated.[43]

A court may also refuse to hold the state liable if your injuries were due to the negligence of a private physician not directly employed by the state.[44] In this case, you may have to take legal action against the medical official or private hospital that treated you instead. However, the state could potentially be held

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34. For more information about inadequate medical care claims in federal court, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

35. *See*, *e.g.*, Kagan v. State, 221 A.D.2d 7, 11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d. 251, 259 (1976), which provides that prisoners have the right to adequate and timely medical care).

36. *See*, *e.g.*, Larkin v. State, 84 A.D.2d 438, 445–46, 446 N.Y.S.2d 818, 823 (4th Dept. 1982) (holding the state liable where a doctor failed to diagnose and treat a prisoner's headaches, resulting in the prisoner's death by aneurysm).

37. Black's Law Dictionary 250 (9th ed. 2009).

38. *See*, *e.g.*, Brown v. State, 192 A.D.2d 936, 938–39, 596 N.Y.S.2d 882, 884–85 (3d Dept. 1993) (refusing to award damages for delay in treatment to prisoner who had to have his larynx (voice box) removed because it was determined that by the time he complained the larynx would have had to be removed anyway), *appeal denied*, 82 N.Y.2d 654, 622 N.E.2d 304, 602 N.Y.S.2d 803 (1993).

39. *See* Zi Guang v. State, 263 A.D.2d 745, 747, 695 N.Y.S.2d 142, 145 (3d Dept. 1999) (finding that prisoner failed to establish medical malpractice by prison officials in part because the prisoner's medical expert at trial "often … appeared unfamiliar with [prisoner's] medical records"); Duffen v. State, 245 A.D.2d 653, 654, 665 N.Y.S.2d 978, 980 (3d Dept. 1997) (dismissing prisoner's claim against the State because medical expert's testimony was too speculative to prove causation).

40. *See* Kagan v. State, 221 A.D.2d 7, 16–17, 646 N.Y.S.2d 336, 342 (2d Dept. 1996) (finding that prisoner's loss of hearing was foreseeable result of not treating the pain or bleeding in her ear); Williams v. State, 164 Misc. 2d 783, 785, 626 N.Y.S.2d 659, 661 (N.Y. Ct. Cl. 1995) (stating that court would not award damages for delay in receiving dental care unless prisoner could show the delay was "a deviation from good and accepted dental practice.").

41. *See* Kagan v. State, 221 A.D.2d 7, 10–11, 646 N.Y.S.2d 336, 338–39 (2d Dept. 1996) (finding that there is "no governmental immunity for the negligent performance of … ministerial duties" and that "whenever delays in diagnosis and/or treatment are a proximate cause or aggravating cause of a claimed injury, the State may be liable"); *see also* Ogle v. State, 191 A.D.2d 878, 881 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (stating the State's failure to administer a tuberculosis treatment consistent with its policies made it liable for damages when surgery was ultimately necessary).

42. *See* Kagan v. State, 221 A.D.2d 7, 11–12, 17, 646 N.Y.S.2d 336, 339, 343 (2d Dept. 1996) (finding negligence where, contrary to policy, prison officials failed to allow prisoner to make appointment for next available screening, to make her medical records available to the screening nurse, and to properly enter her complaints into the record).

43. *See* Ogle v. State, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (stating that it is "well established that culpable conduct, including the failure to reveal part of one's medical history, may diminish a victim's recovery in a medical malpractice case.").

44. *See* Williams v. State, 164 Misc. 2d 783, 785, 626 N.Y.S.2d 659, 661 (N.Y. Ct. Cl. 1995) (holding that the state was not liable for the negligence of a private dentist not working for the state).

liable for the actions of a private physician if you reasonably believed the physician worked for the state and had no reason to believe otherwise.[45]

(c) Destruction or Loss of Prisoner Property

State employees have an obligation not to take, damage, or destroy your property without just cause—whether intentionally or through negligence. If they do, you may be able to sue the state in the Court of Claims.[46] Remember that before you can file a claim for damages in any court, you must first exhaust all of your prison's administrative remedies.[47] A full description of when you can access the courts and what courts you should use is contained in Part C below.

If your items were stolen from you, you may be able to hold the state responsible for failing to provide adequate security in the area from which your property was taken.[48] However, you also have a responsibility for securing your own belongings. If you fail to lock a footlocker or leave your valuables in an open space, the court may reduce your damages to the degree they feel you were responsible, or may prevent you from recovering damages at all.[49] If you believe that prison officials have intentionally taken or destroyed your property without authorization, refer to Part B(1) above (intentional torts). If you believe that your property was destroyed due to negligently maintained prison facilities, see Part B(4)(d) below.

(d) Negligently Maintained Prison Facilities

As with injuries in the workplace, the state is not responsible for preventing all injuries that could occur on its property.[50] The state is only responsible for maintaining facilities in a "reasonably safe condition."[51] To determine what reasonably safe means, a court might consider how likely it was that an injury would occur, how serious that injury was likely to be, and how much it would have cost the state to prevent the injury.[52]

For example, a court refused to award damages to a prisoner who was injured in an icy exercise yard because prison staff had taken reasonable precautions to prevent such injuries by checking the area daily and salting it when slippery.[53] To recover in that case, the prisoner would have had to show that the particular area of the track was abnormally dangerous, and that officials knew or should have known about the danger.[54]

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45. *See* Soltis v. State, 172 A.D.2d 919, 920, 568 N.Y.S.2d 470, 471–72 (3d Dept. 1991) (refusing to dismiss case against state where prisoner could reasonably have believed that the private physician was a state employee).

46. *See* Tigner v. New York, 559 F. Supp. 25, 27 (W.D.N.Y. 1983), *aff'd*, 742 F.2d 1432 (2d Cir. 1983) (holding that the Court of Claims provides a remedy for lost and damaged property claims that is sufficient to satisfy constitutional guarantees of due process).

47. N.Y. Ct. Cl. Act § 10(9) (McKinney 2007) (also providing that such a claim must be filed within 120 days after the date in which the prison's administrative remedies have been exhausted).

48. *See* Foy v. State, 182 A.D.2d 670, 671, 582 N.Y.S.2d 262, 263 (2d Dept. 1992) (holding that the State is not immune from liability in a prisoner's claim for loss of personal property when the prisoner alleged that the State negligently failed to properly secure the area of his cell).

49. *Cf.* Pollard v. State, 173 A.D.2d 906, 907–08, 569 N.Y.S.2d 770, 771 (3d Dept. 1991) (addressing the State's contributory negligence defense, but deferring to findings of trial court that prisoner had locked his locker and was thus not contributorily negligent).

50. *See*, *e.g.*, Killeen v. State, 66 N.Y.2d 850, 851–52, 489 N.E.2d 245, 246, 498 N.Y.S.2d 358, 359 (1985) (holding that while the State "owes patients in its institutions a duty of reasonable care to protect them from injury, whatever the source," that does not "render the State an insurer or require it to keep each patient under constant surveillance," and finding the state not liable for injury that resulted when a patient in a state mental facility accidentally spilled hot water on himself (internal citation omitted)).

51. Basso v. Miller, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) ("A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances.") (quoting Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 100 (D.C. Cir. 1972)).

52. Basso v. Miller, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) (quoting Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 100 (D.C. Cir. 1972)).

53. Condon v. State, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993).

54. Condon v. State, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993).

(e) False Arrest and False Imprisonment

False imprisonment primarily applies to prisoners who are wrongfully confined in special housing units or on keeplock.[55] For additional information on confinement to special housing units, refer to *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings."

A plaintiff making a false arrest claim must prove four elements: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was aware of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged.[56] The elements for proving false imprisonment are essentially the same as the elements for proving false arrest.[57]

The Court of Appeals has found that when prison employees discipline prisoners under the authority of and in compliance with statutes and regulations, both the employees and the state have absolute immunity from suit.[58] This means that even if you are placed on keeplock or in administrative segregation for charges that are eventually dismissed, you may not be able to recover damages.[59]

Note also that a judge is not a state officer within the meaning of the Court of Claims Act, and thus you cannot sue in the Court of Claims for an erroneous decision by a judge.[60]

(f) Excessive Force and Failure to Protect

Perhaps the most common tort lawsuits by prisoners are those alleging that corrections officers used excessive force against them or failed to protect them from other prisoners. Actions to recover for excessive force and failure to protect are covered in detail in *JLM*, Chapter 24, "Your Right to be Free From Assault."

C. Protecting Your Rights

This section provides an overview of the ways that you can go about seeking relief for your tort claim. It covers both administrative remedies available through the prison and remedies available through the courts.

1. Facility Grievance Procedures

(a) Exhaustion

If you are filing a claim for damages based on loss or damage to personal property, you cannot file in the Court of Claims until you have exhausted the prison's own administrative remedies for personal property claims.[61] This means that you must use all Department of Correctional Services (DOCS) internal procedures for compensating prisoners for loss or damage to property before suing in the Court of Claims. If DOCS grants your claims as requested, then you will not be able to pursue a suit in the Court of Claims.[62] After you have used all those procedures, you have 120 days to file and serve your claim in the Court of Claims.[63] Part D describes how to file a claim in the Court of Claims.

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55. *See*, *e.g.*, Gittens v. State, 132 Misc. 2d 399, 406–07, 504 N.Y.S.2d 969, 974 (N.Y. Ct. Cl. 1986) (finding that prisoner held in keeplock nine days beyond the penalty imposed by a disciplinary hearing could sue the state for false imprisonment).

56. *See* Broughton v. State, 37 N.Y.2d 451, 456, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 93 (1975). Note that in some jurisdictions, the plaintiff does not need to show that he was aware of the confinement. *See* Scofield v. Critical Air Med., Inc., 52 Cal. Rptr. 2d 915, 923–24, 45 Cal. App. 4th 990, 1003–07 (Cal. Ct. App. 1996).

57. *See* Broughton v. State, 37 N.Y.2d 451, 455–56, 335 N.E.2d 310, 313–14, 373 N.Y.S.2d 87, 92–93 (1975).

58. *See* Arteaga v. State, 72 N.Y.2d 212, 217–21, 527 N.E.2d 1194, 1197–99, 532 N.Y.S.2d 57, 60–62 (1988) (finding that acts by employees in compliance with regulations constitute discretionary conduct for which the State has absolute immunity); *see also* Gittens v. State, 132 Misc. 2d 399, 403, 504 N.Y.S.2d 969, 972 (N.Y. Ct. Cl. 1986) (finding prison employee's disciplinary confinement of prisoner to be in compliance with applicable regulations and thus not false imprisonment).

59. *See* Arteaga v. State, 72 N.Y.2d 212, 220–21, 527 N.E.2d 1194, 1198–99, 532 N.Y.S.2d 57, 61–62 (1988) (finding the state and prison officers not liable for confinement of prisoners even though charges against prisoners were later dismissed); *see also* Gittens v. State, 132 Misc. 2d 399, 403 n.5, 504 N.Y.S.2d 969, 972 n.5 (N.Y. Ct. Cl. 1986) ("[R]egardless of a disposition ultimately favorable to the inmate, [confinement during the period when the charges are pending] does not constitute an actionable deprivation.").

60. *See* Murph v. State, 98 Misc. 2d 324, 326, 413 N.Y.S.2d 854, 856 (N.Y. Ct. Cl. 1979).

61. N.Y. Ct. Cl. Act § 10(9) (McKinney Supp. 2007).

62. In order to preserve your claim, it may be necessary to begin the filing process even though your DOCS procedures are not yet completed.

63. N.Y. Ct. Cl. Act § 10(9) (McKinney Supp. 2007).

(b) Administrative Remedies

DOCS may pay you if (1) another prisoner has damaged or destroyed your personal property or (2) an employee of DOCS has damaged or destroyed your personal property. According to Directive #2733, claims are limited to $350 if another prisoner caused the loss of property and $5000 if a DOCS employee is responsible for the loss or damage. You should ask prison officials for a copy of Directive #2733, which includes sample forms for applying for reimbursement.[64]

2. Pursuing a Remedy in Court

(a) Choosing a Court

Where you file suit depends on the circumstances of your case, whom you want to sue, and what kind of relief you are seeking. Generally, the Court of Claims hears suits against the state, including people acting as representatives of the state, and the New York State Supreme Court hears suits against people acting as individuals. If you want to sue individuals for violating your federal constitutional rights, you would sue in federal court.

(i) Filing in the Court of Claims

If you wish to sue the State of New York (if, for example, you are a prisoner in a state prison and you believe the state's employees have harmed you), you must sue in the New York Court of Claims.[65] In fact, the State of New York is the *only* defendant you can name in a suit before the Court of Claims. If a state guard or other employee has harmed you in the course of his employment, you may sue the state for damages in the Court of Claims.[66] As long as the employee was acting in his official capacity, you may not sue him personally.[67] If, however, an employee does something to you that is clearly outside the scope of his

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64. N.Y. State Fin. Law § 8(12), (12-a) (McKinney 2007) (establishing that (1) heads of state departments are authorized to pay out of a cash advance account up to $250 at their own discretion through facility grievance procedures; (2) payments over $250 must be submitted to the State comptroller; (3) payments over $1000 must be approved by the State Attorney General; and (4) payments from internal grievance procedures cannot exceed $5000).

65. N.Y. Ct. Cl. Act § 9(2) (McKinney Supp. 2007) (giving the Court of Claims jurisdiction to hear cases against the State for damages).

66. N.Y. Correct. Law § 24(2) (McKinney 2010) ("Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the [D]epartment [of Correctional Services] shall be brought and maintained in the court of claims as a claim against the state."). Note that if you seek a remedy other than money damages, such as injunctive relief, you do not have to sue in the Court of Claims. Furthermore, the above requirement does not apply to § 1983 actions, which may be filed in any court of general jurisdiction. Haywood v. Drown, 129 S. Ct. 2109, 2113, 173 L.Ed.2d 920 (2009).

67. N.Y. Correct. Law § 24 (McKinney 2010). The test for whether an employee can be held personally liable, or whether the State must instead be sued for the employee's tortious acts, is "whether the act was done while the [employee] was doing [the State]'s work, no matter how irregularly, or with what disregard of instructions." *See*, *e.g.*, Riviello v. Waldron, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 302 (1979) (considering employee to be within the scope of his employment so long as he is discharging his duties, "no matter how irregularly, or with what disregard of instructions") (quoting Jones v. Weigand, 134 A.D. 644, 645, 119 N.Y.S. 441, 443 (2d Dept. 1909)). This test is complicated, however. An employee is not personally liable for an act simply because he was not ordered to do that act. Rather, you may be able to find liability against New York State instead of the individual employee if the tort can be explained as a necessary step to the employee's ordered task or responsibility. In deciding whether an employee's conduct falls within the definition of "employment," the New York Court of Appeals has listed the following factors for consideration:

(1) The time, place and occasion of the act;
(2) The history of the relationship between employer and employee in actual practice;
(3) Whether the act is one commonly done by such an employee;
(4) The extent of departure from normal methods of performance; and
(5) Whether the employer could have "reasonably anticipated" the act.

Riviello v. Waldron, 47 N.Y.2d 297, 303, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 303 (1979). The Court of Appeals of New York has applied these factors liberally to a range of situations. *See*, *e.g.*, Riviello v. Waldron, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 302 (1979) (considering employee to be within the scope of his employment so long as he is discharging his duties, "no matter how irregularly, or with what disregard of instructions."); Cepeda v. Coughlin, 128 A.D.2d 995, 996, 513 N.Y.S.2d 528, 530 (3d Dept. 1987) (finding that corrections officers' use of force when supervising movement of prisoners was within the scope of their employment), *appeal denied*, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987). While these cases do not establish a clear point at which a state employee becomes personally liable, it is clear that the level of violence or disregard must be very high to satisfy the test. Courts have

employment (for example, a criminal act unrelated to any part of the employee's duty), you may then sue that individual in the New York Supreme Court (New York's general trial court) or in federal court under Section 1983.[68] Remember that in federal prisons, officials are employed by the federal government rather than the state; you cannot bring suit against a state for the actions of federal employees.[69]

Though there are some exceptions that will be discussed below, the Court of Claims can generally only award money damages. It cannot prohibit the prison from using punishment that violates your constitutional rights, or fix unconstitutional conditions in the prison. You must address these concerns in either a Section 1983 proceeding or an Article 78 claim.[70]

You also cannot bring suit in the Court of Claims to attack your sentence or any decision made by prison or parole officials regarding your status. Such complaints must be made under New York Civil Practice Article 78 (proceedings against body or officer) or Article 70 (state habeas corpus), or New York Criminal Procedure Law Article 440 (post-judgment motions).[71] You may, however, attack your conviction under the Court of Claims Act § 8-b, which allows a suit for damages if the prosecutor used improper means to secure your conviction.[72] But, to win this suit, you must prove by clear and convincing evidence that you have served all or any part of your sentence resulting from your felony or misdemeanor conviction(s),[73] that you have been pardoned of the crime,[74] or that the judgment of conviction against you has been reversed or vacated and the document that accuses you has been dismissed.[75] You must also prove that you did not commit the charged acts or that your acts did not constitute a felony or misdemeanor,[76] and that you did not cause your conviction by your own conduct.[77]

(ii) Filing in the New York State Supreme Court

You can sue an individual state employee (for example, a prison employee) in the New York Supreme Court (the trial court) only if that employee (1) owes you a duty as an individual, and (2) was not acting in an official capacity in the exercise of governmental functions. If the employee does not owe you a duty as an individual or was acting in his official capacity when he injured you, you will have to sue the state in the

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determined that custody and control of prisoners and the maintenance of safety and security in prisons are the main responsibilities of prison employees. Cepeda v. Coughlin, 128 A.D.2d 995, 997, 513 N.Y.S.2d 528, 530 (3d Dept. 1987). A New York Supreme Court has held that "it is entirely foreseeable that correction officers will be called upon to quell disturbances and subdue violence among inmates." Mathis v. State, 140 Misc. 2d 333, 340, 531 N.Y.S.2d 680, 684 (Sup. Ct. Albany County 1988). *But see* Sharrow v. State, 216 A.D.2d 844, 846, 628 N.Y.S.2d 878, 880 (3d Dept. 1995) (finding that no justification existed for correction officers to use force after they had already quelled a disturbance among the prisoners because, at this point, the use of force was counter to the goal of maintaining order and discipline in the facility). The Court of Appeals of New York has found that even some intentional torts can be considered within the scope of an employee's job if they were foreseeable. Riviello v. Waldron, 47 N.Y.2d 297, 304, 391 N.E.2d 1278, 1282, 418 N.Y.S.2d 300, 304 (1979). This means that even if a prison employee means to harm or injure you, if the employee can prove that situations in the past led the employee to think the act was necessary to keep control, the employee will not be found personally liable.

68. For a discussion of how to sue state officials in federal court, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

69. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," for more information on how to sue federal prison officials if you are a federal prisoner.

70. See *JLM* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for a discussion of Article 78 proceedings. For more information on injunctive relief in the Court of Claims, see Part C(2)(b)(iii) of this Chapter.

71. See *JLM* Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," and Chapter 21, "State Habeas Corpus: Florida, New York, and Texas," for more information. In brief, you may challenge your sentence using Article 440, decisions made by prison officials using Article 78, and decisions made by parole officials using Article 78 or state habeas corpus.

72. *See* N.Y. Ct. Cl. Act § 8-b(3)(b)(ii)(A) (McKinney 2007). § 8-b(3)(b)(ii)(A) states that a violation of N.Y. Crim. Proc. § 440.10(1)(b) (McKinney 2005) gives rise to a claim for damages. N.Y. Crim. Proc. § 440.10(1)(b) (McKinney 2005) provides that a court can vacate a conviction if "the judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor."

73. N.Y. Ct. Cl. Act § 8-b(5)(a) (McKinney 2007).

74. N.Y. Ct. Cl. Act § 8-b(5)(b)(i) (McKinney 2007).

75. N.Y. Ct. Cl. Act § 8-b(5)(b)(ii) (McKinney 2007).

76. N.Y. Ct. Cl. Act § 8-b(5)(c) (McKinney 2007).

77. N.Y. Ct. Cl. Act § 8-b(5)(d) (McKinney 2007).

Court of Claims.[78] You cannot sue the State of New York for damages in the New York Supreme Court; as discussed above, those suits must be brought in the Court of Claims. However, if you are suing the state in order to receive something *other than money damages*, such as injunctive relief, you may sue in New York Supreme Court.

(iii) Filing in Federal Court

If you want to sue an individual state employee for violating your federal constitutional rights, federal court is an appropriate place to file suit. In federal court, you may receive damages and injunctive relief. For a full discussion of how to file a claim in federal court against a state employee for the violation of your federal rights, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

(b) Pursuing Your Case in the Court of Claims

(i) Types of Relief

If you prove that you were the victim of a tort, whether intentional or negligent, the court will order the tortfeasor to compensate you for the loss you suffered, most likely by paying a sum of money. Such a court-ordered payment is called *damages*.[79] A court may award you three kinds of damages: compensatory, punitive, and nominal.[80]

Compensatory damages, the most common form of damages, attempt to match the amount of your loss. For example, the court might order payments sufficient to replace personal items that were destroyed (such as a wristwatch), or to reimburse the plaintiff for money that was spent on medical bills after the injury. The court can also order payments to compensate you for your pain and suffering,[81] which can include a period after the injury during which you continue to suffer.

Punitive damages are court-ordered payments that exceed whatever amount would compensate you for the loss or injury suffered. These extra damages are generally awarded when the tort was aggravated by violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the tortfeasor.[82] Punitive damages are intended to punish the tortfeasor, rather than compensate the injured party.[83] It is important to note that the Court of Claims will not award you punitive damages against the State.

Nominal damages are very small quantities of money awarded by courts in order to recognize that a right has been violated, even if there is no substantial loss or injury to be compensated for.[84] Nominal damages can also be granted when a real injury is found, but the evidence fails to show the amount of the injury.

Aside from these monetary awards, the Court of Claims may order institutions to take or cease specific actions. This is called an *injunction*.[85] The Court of Claims may only issue injunctions if they are authorized by statute or included as part of a judgment to pay damages.[86] Otherwise, you must bring your suit for an

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78. *See* Morell v. Balasubramanian, 70 N.Y.2d 297, 300, 514 N.E.2d 1101, 1102, 520 N.Y.S.2d 530, 531 (1987) (deeming "actions against State officers acting in their official capacity in the exercise of governmental functions" to be essentially "claims against the State, and, therefore, arguable only in the Court of Claims").

79. Black's Law Dictionary 445 (9th ed. 2009).

80. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," for more information on damages.

81. Black's Law Dictionary 446 (9th ed. 2009) (defining "discretionary damages" as damages "such as mental anguish or pain and suffering").

82. *See* Restatement (Second) of Torts § 908 (1979):

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

83. Black's Law Dictionary 448 (9th ed. 2009).

84. Black's Law Dictionary 447 (9th ed. 2009).

85. For more discussion of injunctive relief, see *JLM* Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

86. *See* Doe v. State, 86 Misc. 2d 639, 641, 383 N.Y.S.2d 172, 174 (N.Y. Ct. Cl. 1976); *see also* N.Y. Ct. Cl. Act § 9, Notes of Decisions, n.59 (McKinney 1989 & Supp. 2006).

injunction in the New York Supreme Court or in federal court. You cannot bring a suit in the Court of Claims to complain generally about conditions in your prison because the Court of Claims cannot order the state to correct those prison conditions.[87]

(ii) Settlements in the Court of Claims

There is no limit to the amount of damages the Court of Claims may award.[88] It is also possible to settle your claim against the State out of court. When the State offers you a settlement, it is not necessarily agreeing that it did something wrong, but is offering to pay you a certain amount of money instead of going to trial. When you reach a settlement with the State, you give up your right to ask the court for additional damages. By contrast, if you go to trial and are awarded damages that you think are too low, you may then appeal to the Appellate Division of the Supreme Court of New York requesting additional damages.

(iii) Filing Time Limits

When you want to file a claim because a state employee's negligent or intentional act injured your body, you have ninety days from the time of the injury or loss[89] in which to either (1) file your claim, or (2) serve a Notice of Intention to File a Claim with the Attorney General.[90] You must serve at least the Notice of Intention within this period of time or you may not be permitted to file at all.[91] Whether you are filing a claim or serving a Notice of Intention, the document must be *received* within the ninety day deadline. Part D(1)(c) below explains how to make sure your document has been received within the filing deadline. *These time limits exist even if you are still proceeding with the administrative remedies required by your institution.* See Appendix A-1 of this Chapter for a sample "Notice of Intention" form.

The reason you must file a Notice of Intention is to alert the State of your claim so it has an opportunity to address your complaint or prepare for its defense. If you are asking for permission to file a late claim, you should tell the court why your late filing has not prevented the State from preparing its defense.

Serving a Notice of Intention is not the same as actually beginning a lawsuit; it only preserves your right to file a lawsuit against the State in the future. Once you serve a Notice of Intention to File a Claim with the Attorney General, you have two years to file a claim for a negligent or unintentional tort, and one year to file a claim for an intentional tort.[92] These time limits start counting at the moment your claim *accrues*.[93]

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87. To get an injunction either (1) to prevent forms of punishment which violate your constitutional rights, or (2) to fix unconstitutional conditions in the prison, you must bring another kind of lawsuit. This lawsuit must either be in a § 1983 proceeding or Article 78 proceeding. *See JLM* Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

88. N.Y. Ct. Cl. Act § 20-a (McKinney Supp. 2010) (stating that settlements must be approved by the court); *see also* N.Y. Ct. Cl. Act § 20(6-a) (McKinney Supp. 2010) ("[I]n any case where a judgment … is to be paid to an inmate … the comptroller shall give written notice, if required pursuant to subdivision two of [§ 632-a] of the executive law, to the office of victim services ….").

89. For more information on the time of injury or loss and the discovery of injury or loss, see N.Y. Ct. Cl. Act § 10(7) (McKinney Supp. 2001) (stating that claim against the state that would be governed by N.Y. C.P.L.R. 214-c (McKinney 2003), which applies to non-visible effects of exposure to any substance upon or within the body or upon or within property, such as a toxic substance, shall be deemed to have accrued either on the date of discovery of the injury by the claimant or when the injury *should have been discovered through reasonable diligence*, whichever is earlier). Note that if you are assaulted by a corrections officer, for example, but the full extent of the injuries does not become apparent immediately, the 90 days begin when the assault happens, not when the injuries become apparent. The court has been very hesitant to extend a filing deadline to 90 days from the point at which an injury was realized, finding that it can be extended only when the injury is "reasonably ascertainable." Augat v. State 244 A.D.2d 835, 836, 666 N.Y.S.2d 249, 251 (3d Dept. 1997), *appeal denied*, 91 N.Y.2d 814, 698 N.E.2d 956, 676 N.Y.S.2d 127 (1998). Therefore, you should be very careful not to delay filing.

90. N.Y. Ct. Cl. Act § 10(3) (McKinney Supp. 2001). See Appendix A-1 of this Chapter for a sample Notice of Intention.

91. The claim itself should state the time and place where such claim arose, the nature of the claim, the damage or injuries claimed to have been sustained, and the total sum claimed. In your Notice of Intention to File a Claim, you should state the same matters, except that you do not have to state the items of damage or the total sum claimed. N.Y. Ct. Cl. Act § 11(b) (McKinney Supp. 2007). Therefore, you do not have to know the extent and severity of your injuries in order to file a Notice of Intention. Atterbury v. State, 26 Misc. 2d 422, 424, 210 N.Y.S.2d 460, 463 (N.Y. Ct. Cl. 1961) (explaining that claimant could have filed a notice of intention prior to being referred to a specialist because neither the severity of the injuries nor the sum claimed must be included in the notice and visiting a physician in the first instance shows she knew she had some injuries).

92. N.Y. Ct. Cl. Act § 10(3) (McKinney Supp. 2001).

If you are filing a claim for damage or loss of your personal property, the process is a little different. The time limit for filing is not ninety days after the injury, but 120 days after you have exhausted all administrative remedies. Within this 120 days you must file *the claim itself*—NOT a Notice of Intention.[94]

Courts strictly enforce the time limitations on filing a claim and serving the Notice of Intention to File a Claim.[95] The Court of Claims will not accept late filing of claims relating to loss of property.[96] However, there are some circumstances in which the Court may permit late claims.[97] Section 10(6) of the New York Court of Claims Act lists factors that may be considered by the Court in determining whether to permit a late filing. There is no requirement that each of the factors be satisfied in order for the court to exercise its discretion to permit the late filing of a claim.[98] The factors listed by the Court of Claims Act are:

(1) Whether the delay in filing was excusable;
(2) Whether the State had notice of the essential facts of the claim;
(3) Whether the State had an opportunity to investigate the circumstances of the claim;
(4) Whether the claim appears to be meritorious;[99]
(5) Whether the failure to file a timely claim or Notice of Intention resulted in substantial prejudice to the State;
(6) Whether the claimant has any other available remedy; and
(7) Any other relevant factors.[100]

With respect to the first factor, case law suggests that delay is excusable when it was caused by the claimant's treatment for physical or mental disabilities resulting from the injuries alleged in the lawsuit.[101]

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93. N.Y. Ct. Cl. Act § 10(3-b) (McKinney Supp. 2001). A claim "accrues" when the amount of damage can be determined. Bronxville Palmer, Ltd. v. State, 36 A.D.2d 647, 647–48, 318 N.Y.S.2d 412, 413 (3d Dept. 1971) (holding that, "where a continuing injury or other circumstance prevents an evaluation of damages at the time of the occurrence of the wrong, the time for filing a claim does not begin to run until such an evaluation can be made."); *see also* Mahoney v. Temp. Comm'n of Investigation of N.Y., 165 A.D.2d 233, 240–41, 565 N.Y.S.2d 870, 874–75 (3d Dept. 1991) (holding that causes of action were not limited to conduct that occurred within 90-day period before filing because the violations were ongoing and interrelated and evaluation of damages could not be made within that period).

94. N.Y. Ct. Cl. Act § 10(9) (McKinney Supp. 2001); *see also* Wright v. State, 195 Misc. 2d 597, 598, 760 N.Y.S.2d 634, 635 (N.Y. Ct. Cl. 2003) ("[C]laims for property losses by inmates are no longer measured from the date of loss, but rather within a 120-day period commencing upon exhaustion of institutional remedies." (internal citation omitted)), *appeal dismissed*, 11 A.D.3d 1000, 782 N.Y.S.2d 209 (4th Dept. 2004).

95. *See* Conquest v. State, 58 Misc. 2d 121, 121, 294 N.Y.S.2d 892, 893 (N.Y. Ct. Cl. 1968) (holding that, where notice of intention to file claim was filed on the 92nd day after claim arose, the claim itself was not filed within statutory period and court did not have jurisdiction to hear the case). *But see* Killeen v. State, 12 Misc. 2d 89, 92, 174 N.Y.S.2d 1000, 1002 (N.Y. Ct. Cl. 1958) (excusing minor lateness per N.Y. Ct. Cl. Act § 10(5), where there was slight error in attorney's computation of time and State was not prejudiced).

96. *See* Roberts v. State, 11 A.D.3d 1000, 1001, 783 N.Y.S.2d 190, 191–92 (4th Dept. 2004) (holding that, because § 10(6) of the Court of Claims Act only allows a court discretion to permit the late claims mentioned in §§ 10(1)–(4), and loss of property claims are addressed in § 10(9), the court may never allow late claims for loss of property). *But see* Wright v. State, 195 Misc. 2d 597, 602, 760 N.Y.S.2d 634, 638 (N.Y. Ct. Cl. 2003) (holding that it was within the spirit of the Court of Claims Act to allow the court discretion over late loss of property claims). A subsequent Court of Claims case disagreed with *Wright* and read the 90-day time limit strictly. Murray v. State, 5 Misc.3d 398, 403–04, 781 N.Y.S.2d 724, 728–29 (N.Y. Ct. Cl. 2004) (strictly adhering to the 90-day filing period and dismissing § 10(9) claim that was filed late).

97. N.Y. Ct. Cl. Act § 10(6) (McKinney Supp. 2001); *see also* Gavigan v. State, 176 A.D.2d 1117, 1119, 575 N.Y.S.2d 217, 218 (3d Dept. 1991) (upholding Court of Claims' broad discretion under N.Y. Ct. Cl. Act § 10(6) to grant permission to file a late Notice of Claim where an employee of the State Office of General Services knew of an accident and, therefore, the State could not be said to have been prejudiced by the lateness). *But see* Jerrett v. State, 166 A.D.2d 907, 907, 560 N.Y.S.2d 568, 568 (4th Dept. 1990) (holding that Court of Claims abused its discretion in granting motion to serve a late claim where there was no valid excuse for claimant's delay in filing the claim, the state did not have timely notice of the essential facts constituting the claim nor the opportunity to investigate the circumstances underlying the claim, and the three other factors in N.Y. Ct. Cl. Act § 10(6) did not weigh heavily in claimant's favor).

98. *See* Butler v. State, 81 A.D.2d 834, 834, 438 N.Y.S.2d 834, 834 (2d Dept. 1981) (explaining that there is no requirement that claimant comply with all six requirements of § 10(6) for the Court of Claims to grant permission to file a late notice).

99. Black's Law Dictionary 1010 (8th ed. 2004) (defining "meritorious" as "meriting a legal victory; having legal worth").

100. N.Y. Ct. Cl. Act § 10(6) (McKinney 1989 & Supp. 2010).

101. *See* De Olden v. State, 91 A.D.2d 1057, 1057, 458 N.Y.S.2d 666, 666 (2d Dept. 1983) (acknowledging a reasonable excuse for delay in filing a claim where the claimant's extensive physical therapy and extreme psychological

Furthermore, Section 10(5) of the New York Court of Claims Act permits late filing where the claimant has a legal disability, such as insanity or infancy (age). In such a situation, the claim must be presented within two years after the disability has been removed (although, as explained below in this Section, you will not get to use all of this two-year extension because of the statute of limitations on injury claims).[102] Imprisonment is not in and of itself a legal disability. Incarceration and ignorance of the filing requirements of the New York Court of Claims Act do not excuse you for filing late. However, since prisoners have a right to hire counsel and the right to sue the State, if you are denied an opportunity to contact an attorney or are denied access to the prison's law library to learn your rights, you may have a reasonable excuse for filing late.[103]

In addition, if you served a Notice of Intention within the time limit but then failed to file the claim on time, you may apply to the court for permission to treat the Notice of Intention as a claim.[104] The court may grant your application to treat the Notice of Intention as a claim if:

(1) The application meets certain time limits in article two of the Civil Practice Law and Rules;
(2) The Notice of Intention was timely served and filed, and contains facts sufficient to constitute a claim; *and*
(3) Granting the application would not prejudice the state, meaning it would not damage the state's legal rights or ability to defend itself.[105]

The Court of Claims will *not* allow you to file a negligence tort claim more than three years after an injury,[106] or more than one year after the injury in the case of an intentional tort claim (for example, assault and battery).[107] Furthermore, even if the Court of Claims has the power to allow late claims in some cases, it cannot waive the New York statutes of limitations for the claims you are filing.[108] For example, the statute of

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trauma after amputation of his leg seriously affected his ability to function after being discharged from the hospital); Schweickert v. State, 64 A.D.2d 1026, 1026–27, 409 N.Y.S.2d 308, 309 (4th Dept. 1978) (holding that the amendment to the Court of Claims Act contained in § 10(6), which grounds and lengthens the time limits for allowing late claims, makes the failure to show a reasonable excuse for the delay no longer fatal to a claim for late filing); Cole v. State, 64 A.D.2d 1023, 1024, 409 N.Y.S.2d 306, 307–08 (4th Dept. 1978) (finding excuse to be reasonable when claimant was completely immobilized by his injuries and heavily medicated).

102. N.Y. Ct. Cl. Act § 10(5) (McKinney 1989 & Supp. 2010); N.Y. C.P.L.R. 208 (McKinney 2003 & Supp. 2010); *see* Vitello v. State, 66 Misc. 2d 582, 585, 321 N.Y.S.2d 787, 790 (N.Y. Ct. Cl. 1971) ("Infancy, along with incompetency, habitual drunkenness, and the like, are legal disabilities."), *aff'd*, 39 A.D.2d 792, 332 N.Y.S.2d 289 (3d Dept. 1972). For an application of insanity to the tolling of statutes of limitations, see *McCarthy v. Volkswagen of America, Inc.,* 78 A.D.2d 849, 849, 432 N.Y.S.2d 722, 722–23 (2d Dept. 1980) (finding plaintiff's claim to be time-barred because plaintiff's college attendance and participation in athletic activities showed that he was not suffering from a temporary mental incapacity which prevented him from understanding or protecting his legal rights), *aff'd*, 55 N.Y.2d 543, 548–49, 435 N.E.2d 1072, 1075, 450 N.Y.S.2d 457, 460 (1982); Vitello v. State, 66 Misc. 2d 582, 586, 321 N.Y.S.2d 787, 791 (N.Y. Ct. Cl. 1971) (holding that plaintiff was under a legal disability at the time of his conviction even though his status changed from "hospitalization under commitment" to "voluntary hospitalization," and thus was entitled to file within two years after the legal disability ceased), *aff'd*, 39 A.D.2d 792, 332 N.Y.S.2d 289 (3d Dept. 1972).

103. *See* Plate v. State, 92 Misc. 2d 1033, 1038, 402 N.Y.S.2d 126, 129 (N.Y. Ct. Cl. 1978) (stating that denial of claimant's access to attorney and the law library for a substantial part of the 90-day period could constitute an excuse for not filing on time).

104. N.Y. Ct. Cl. Act § 10(8)(a) (McKinney 1989 & Supp. 2010). § 10(8)(a) provides a claimant who timely serves and files a notice of intention, but who fails to timely serve or file a claim, may apply for permission to treat notice of intention as a claim. *See* Wright v. State, 195 Misc. 2d 597, 602, 760 N.Y.S.2d 634, 638 (N.Y. Ct. Cl. 2003) (clarifying debate in previous cases over § 10(8)(a) and affirming that courts do have the discretion to treat a notice of intention as a claim). *But see* Murray v. State, 5 Misc. 3d 398, 401, 781 N.Y.S.2d 724, 726–27 (N.Y. Ct. Cl. 2004) (construing subdivision literally, as opposed to more broadly, thus implying there should be no discretion to treat notice of intention as a claim).

105. N.Y. Ct. Cl. Act § 10(8)(a) (McKinney 1989 & Supp. 2010). Prejudice is defined as "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary 1299 (9th ed. 2009).

106. N.Y. C.P.L.R. 214 (McKinney 2003 & Supp. 2010).

107. N.Y. Ct. Cl. Act § 10(3-b) (McKinney 1989 & Supp. 2007); N.Y. C.P.L.R. 215(3) (McKinney 2003 & Supp. 2010). In addition, property claims have shorter deadlines for filing—they must be filed within 120 days of the administrative decision on the claim (that is, after the Directive #2377 decision). N.Y. Ct. Cl. Act § 10(9) (McKinney 1989 & Supp. 2010).

108. *Statutes of limitations* are time limits for certain types of claims.

limitations for personal injury actions is three years after the incident.[109] The statute of limitations for malpractice claims is two and a half years.[110]

(iv) Filing Fees

All individuals must pay a fifty dollar filing fee whenever they bring a claim in the New York State Court of Claims.[111] If you cannot afford the fee, the court can reduce or waive it. Prisoners follow the same steps as everyone else to ask for reduced or excused filing fees.[112]

To get the reduced filing fee, you must submit an affidavit to the court explaining why you cannot afford the full filing fee.[113] You should include in your affidavit detailed information about your financial situation, including the amount of money in your prison account, any income you receive from a prison job or work release program, and any property you own.[114] Tell the court if you are unable to work because you are physically or mentally ill, or because you are living in protective custody due to personal danger. Additionally, you must indicate whether any other person has an interest in the monetary award you may win (for example, if a lawyer is representing you in exchange for a percentage of any damages awarded).[115] You should also list any outstanding financial obligations you have, especially court-ordered obligations such as child support or restitution. If your case has already begun, you will have to give notice to the State, as the party you are suing, that you have filed this motion.[116]

See Appendix A-5 for a sample affidavit requesting a reduced filing fee. If the court denies your request for the reduced filing fee, it will notify you. You will then have 120 days to pay the full fee (fifty dollars) or else your case will be dismissed.[117]

If you win your case, the court will refund you any filing fee that you paid.

(v) Where and How to File

If you are proceeding by Notice of Intention, you must serve the Attorney General with the Notice of Intention.[118] *This is very important—if your case goes to trial, you must show that the Notice of Intention was served on the Attorney General.* You do not need to file your Notice of Intention in the Court of Claims.

Your claim, by contrast, must be filed at the office of the Clerk of the Court of Claims in Albany.[119] You must also serve your claim on the defendant, the State of New York, by serving the Attorney General. After you serve the Attorney General, you must file proof of service with the Clerk of the Court of Claims within ten days. You can do this by filing an Affidavit of Service describing the service.[120] Filing is accomplished by delivering the necessary papers to:

Clerk of the Court of Claims
P.O. Box 7344
Capitol Station
Albany, New York 12224

When you file the original claim, you must also file two copies of each document with the Clerk's office. One copy of each must also be served on the Attorney General. The address is:

Office of the Attorney General
Department of Law
Capitol Building
Albany, New York 12224

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109. N.Y. C.P.L.R. 214 (McKinney 2003 & Supp. 2010).
110. N.Y. C.P.L.R. 214-a (McKinney 2003 & Supp. 2010).
111. The fee requirements can be found in N.Y. Ct. Cl. Act § 11-a (McKinney 1989 & Supp. 2010).
112. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2010).
113. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2010).
114. N.Y. C.P.L.R. 1101(a) (McKinney 1997 & Supp. 2010).
115. N.Y. C.P.L.R. 1101(a) (McKinney 1997 & Supp. 2010).
116. N.Y. C.P.L.R. 1101(c) (McKinney 1997 & Supp. 2010).
117. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2010).
118. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010).
119. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010).
120. N.Y. Comp. Codes R. & Regs. tit. 22, § 206.5(a) (2010). "Service" means you have delivered copies of the legal complaint to the person or government entity you are suing. In the Court of Claims, service is accomplished by sending a copy of the claim to the State Attorney General.

Keep at least one copy of each document concerning your suit for your own records. Sample claim and notice forms appear at the end of this Chapter in Appendix A.

Your papers can be personally delivered to the clerk's office or the Attorney General.[121] They can also be sent by certified mail with a return receipt requested. This means that the postal service will mail you a receipt to prove that the documents were delivered. Do not lose this receipt, because it is the only way to prove that you completed service. If you do not receive a return receipt from both the Court of Claims and the Attorney General's Office within a reasonable period of time, you should send a follow-up letter to one or both of these offices asking if they have received your claim.[122]

Service on the State is not considered complete until papers have been received by both the clerk and the Attorney General's Office (the Notice of Intention need only be received by the Attorney General).[123] Remember, putting your papers in the mail is NOT the same as filing them. You must mail your documents early enough so that they are *received* within the time limits mentioned earlier. Allow enough time for delays in the mail. Do not forget: your claim may be dismissed if you fail to serve the State in the manner and time the law requires.[124]

(vi) What Documents to File

In Appendix A of this Chapter, you will find sample copies of papers that you may need to file, including sample claims and Notices of Intention.

Your claim must be clearly typed or printed on 8½-by-11 inch paper. You should specifically include:

(1) Your name and address;
(2) Where the incident happened;
(3) When the incident happened;
(4) The manner in which New York State (through its employees' actions) was negligently or intentionally responsible for your injury;
(5) A description of the incident (include the names of the individuals responsible, if you know);
(6) A detailed description of the injuries you received as a result of the incident;
(7) The date and place you served your Notice of Intention to File a Claim (if you served a Notice of Intention);
(8) A statement that you are filing this claim within the time limits in the Court of Claims Act; and
(9) An itemized listing of the damages you are claiming.[125]

If you are filing a claim initially, rather than filing a Notice of Intention to File a Claim, you do not need to include step (7) above, and step (8) should read that your claim is being filed within the ninety-day statutory limit. At the bottom of your claim form you must include and sign a *verification*, which states that all of the information included in your claim is true.[126] You must sign this verification in the presence of a notary public, who then must sign his name. The prison librarian may be a notary public or may be able to direct you to the person who provides that service within the prison.

If you are filing a motion for permission to file a late claim, your motion should describe the facts that will convince the Court of Claims that it should permit you to file late and, among other things, that the

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121. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010).

122. The Court of Claims sends a letter of acknowledgment once a claim has been received. The Attorney General's Office does not; therefore, if your claim was served in person, make sure that you get an affidavit that the claim was served. If the claim was sent Return Receipt Requested, keep the green card.

123. N.Y. Ct. Cl. Act § 11(a) (McKinney 1989 & Supp. 2010); *see also* Aetna Cas. & Sur. Co. v. State, 92 Misc. 2d 249, 252, 400 N.Y.S.2d 469, 471 (N.Y. Ct. Cl. 1977) (dismissing claim that was mailed 88 days after accident but not received by the Court of Claims clerk until the 93rd day).

124. *See* Mingues v. State, 146 Misc. 2d 412, 413, 550 N.Y.S.2d 802, 803 (N.Y. Ct. Cl. 1990) (dismissing claim when notice of intention and claim were sent by regular mail). *But see* Colon v. State, 146 Misc. 2d 1034, 1035–36, 553 N.Y.S.2d 979, 980 (N.Y. Ct. Cl. 1990) (holding that the issue of method of service under § 11 is one of personal jurisdiction that may be waived).

125. N.Y. Ct. Cl. Act § 11(b) (McKinney 1989 & Supp. 2010) ("The claim shall state the time when and place where such claim arose, the nature of same, [that a negligent or intentional action by a state employee has injured you or your property], and the items of damage or injuries claimed to have been sustained and … the total sum claimed.").

126. N.Y. Ct. Cl. Act § 11(b) (McKinney 1989 & Supp. 2010); N.Y. C.P.L.R. 3020, 3021 (McKinney 1991 & Supp. 2010). For a sample Verification, see Appendix A-2 of this Chapter.

State will not be substantially prejudiced by the delay, which means that the State will not have a harder time defending itself because you filed late.[127]

See Figure 1, below, to determine how many copies you need to file of each document.

	Clerk of Court	N.Y. Attorney General	Self	Total Number of Copies You Will Need
Notice of Intention to File Claim	0 copies	1 copy	1 copy	2 copies
Claim and Any Supporting Affidavits	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies
Motion for Permission to File Late Claim	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies
Affidavit in Support of Reduction of Fees	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies

Figure 1: Copies needed when filing notices, claims, motions, or affidavits.

(vii) How to Obtain Help from a Lawyer

Since a tort claim filed against New York State is not a criminal action, you do not have the right to be assigned a lawyer. While the court may, at its discretion, require an attorney to represent poor people without providing for the attorney's compensation, it is not likely to do so.[128]

It is often difficult to find a lawyer who will take your case. If it seems likely that you will win a large amount of money from the State, you may be able to find a private attorney to represent you on a contingency fee basis, which means the attorney only charges you if you win the case. If you win, the attorney takes his fee (usually a percentage of the money you won), and any additional costs of representing you, from your award. You may be able to find the phone number of an attorney through the New York State Bar Association. If you cannot find a lawyer, you can bring your own claim in the Court of Claims and even appeal to the Appellate Division of the New York Supreme Court.

(viii) Examinations Before Trial: Obtaining Testimony from Witnesses

Like other civil cases, you are allowed to engage in some forms of pretrial discovery. Chapter 8 of the *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery," discusses the processes of discovery for federal and New York State trials. Chapter 8 will help you decide if you need to take discovery in your case. Discovery may include any of the following methods to obtain evidence to support your claim before trial: interviewing witnesses, requesting documents, and demanding physical and mental examinations.[129] The state must follow the same discovery rules as individuals.[130]

You must pay any fees and expenses required in obtaining testimony.[131] Poor person status does not permit you to avoid paying these costs.

(ix) Reopening Trial Before Decision

If you discover new evidence favorable to you after you have closed your case in the Court of Claims but before the court has made a decision, you can submit a Notice of Motion to Reopen a Claim. Use a Notice of Motion to Reopen a Claim only if you have discovered important and relevant evidence that could make a difference in the court's decision.[132] Be aware that courts rarely grant these motions.

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127. N.Y. Ct. Cl. Act § 10(6) (McKinney 1989 & Supp. 2010).

128. *See* Stephens v. State, 93 Misc. 2d 273, 274, 404 N.Y.S.2d 536, 537 (N.Y. Ct. Cl. 1978) (refusing to assign counsel in prisoner's civil case unless State provides for attorney compensation); *see also* Menin v. Menin, 79 Misc. 2d 285, 293, 359 N.Y.S.2d 721, 729 (Sup. Ct. Westchester County 1974) (refusing to assign counsel in a civil case to represent poor prisoner seeking damages from State for injuries allegedly received during confinement, in absence of any legislative provision of funds for compensation of such counsel), *aff'd mem.*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (2d Dept. 1975).

129. N.Y. C.P.L.R. 3102(a) (McKinney 2005 & Supp. 2010).

130. N.Y. C.P.L.R. 3102(f) (McKinney 2005 & Supp. 2010).

131. N.Y. Ct. Cl. Act § 18 (McKinney 1989 & Supp. 2010).

132. *See* Williams v. State, 90 A.D.2d 882, 884, 456 N.Y.S.2d 528, 530 (3d Dept. 1982) (holding that, where the

(x) Appeal from a Judgment

You can appeal the court's decision about the law, the facts, or both. You can also appeal if the amount awarded was too high or too low. When you make an appeal, the Appellate Division may affirm, reverse, or modify the judgment; dismiss the appeal; grant a new trial; or send the case back to a lower court for further proceedings.[133]

Once the Court of Claims makes a decision in your original case, that decision will be entered with the Clerk of the Court of Claims, and then the Attorney General will serve you with a notice that the judgment has been entered. *You must file a Notice of Appeal within thirty days of the date on which the Attorney General mails you the notice that your judgment has been entered.*[134] Because you may not be receiving mail promptly in prison, be sure to check the date on the envelope when you receive the notice.

You must serve both the Attorney General and the Clerk of the Court of Claims a written Notice of Appeal, briefly stating your reasons for appealing.[135] You will need a transcript of your trial in the Court of Claims. If you were permitted to proceed as a poor person, you may have a right to a free copy of this transcript.[136] If you have not filed for permission to proceed as a poor person, you may wish to apply for status as a poor person at this point. For information on the procedure for applying for status as a poor person, see Part C(2)(b)(iv) above.

(xi) Final Process

If you win at trial, you will be paid the amount of the judgment, unless either you or the State appeals. The Comptroller of the State of New York will mail you a check once you submit the following:

(1) A copy of the judgment certified by the Clerk of the Court of Claims;
(2) A certificate from the Attorney General stating that the State has not and will not take an appeal from the judgment; and
(3) A release signed by your attorney (if you have one) that he has waived any fee for services provided to you.[137]

Note that this is only a waiver of attorney's fees in the eyes of New York State, which makes it essentially a formality. In actuality, the State will make out the check to both you and your attorney and will probably mail it to your attorney's office. You and your attorney will most likely have already decided what percentage of any award the attorney will keep. Typically, attorneys will deduct the expenses of trying your case from the total award, then keep one-third of what remains. Thus, you will receive two-thirds of the damages awarded to you, minus expenses.

D. Checklist for Filing With the Court of Claims

1. Does your claim include violations of your constitutional rights?

(a) If Yes

If yes, you may bring suit in federal district court under 42 U.S.C. § 1983 or in State Supreme Court. See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law." Recall that you may also file New York State constitutional claims with the Court of Claims. New York's state constitution protects many of the same rights as the Bill of Rights.

(b) If No

If no, then you may sue under the state statute that allows for claims such as yours; in New York, you may bring suit against the State in the Court of Claims.

Court of Claims was unable to accurately measure the damages resulting from a partial taking of claimant's property, which then affected the market value of the remaining premises, the court below properly reopened the trial to obtain further and more accurate evidence on the issue).

133. N.Y. Ct. Cl. Act § 24 (McKinney 1989 & Supp. 2010).
134. N.Y. Ct. Cl. Act § 25 (McKinney 1989 & Supp. 2010).
135. N.Y. Ct. Cl. Act § 25 (McKinney 1989 & Supp. 2010). See Appendix A-10 for a sample Notice of Appeal.
136. N.Y. C.P.L.R. 1102(b) (McKinney 1997 & Supp. 2010).
137. N.Y. Ct. Cl. Act § 20(6) (McKinney 1989 & Supp. 2010).

***Note*: You must use the Department of Correctional Services' internal procedure to address issues with loss of or damage to property, which allows for prisoner compensation before bringing your claim to the Court of Claims. See Part C(1) of this Chapter.

***Note*: If you wish to sue the federal government for a tort, and none of your constitutional rights have been violated, you must sue under the Federal Tort Claims Act.[138]

2. If you are bringing a suit in the New York Court of Claims:

(a) File a claim or Notice of Intention

Be sure to serve a claim or Notice of Intention to File a Claim with return receipt requested upon the Attorney General's Office within ninety days of the accident or injury. If you are serving a claim instead of a Notice of Intention, it must be filed within ninety days of the accident or injury at the clerk's office in Albany. You should always err on the side of serving the Notice of Intention, even if you are not certain if you will later proceed forward with the claim. That way, you may still have an opportunity to file a claim later should you decide to do so. Remember: the papers must be *received* within ninety days.

(b) File the original and two copies of each document

File the original and two copies of each document with the clerk's office when you file your claim. Be sure to:

(1) Include all necessary information in your claim;
(2) Serve one copy of each document on the Attorney General;
(3) Keep one copy of every document for your own records;
(4) File proof of service on the Attorney General (the representative of the defendant, the State) at the clerk's office in Albany within ten days of such service; and
(5) Include a notarized verification with your claim.

3. If you are appealing a judgment

Serve both the Attorney General and the Clerk of the Court of Claims with a written Notice of Appeal. The Notice should include the basic reason for your appeal, and must be filed within thirty days of receiving notice that a judgment was entered in your case.

E. Conclusion

You should consider several things before you think about bringing a tort claim. First, you should determine what kind of tort claim you want to bring and whether you can prove that you have suffered an actual injury. If you feel confident that you have a legitimate claim, check to see whether you must exhaust grievance procedures in prison before you think about the court in which you will file a claim and the kind of relief you will seek. Observe all deadlines for filing documents (especially the strict ninety-day time window in which you must file your claim or Notice of Intention with the Court of Claims), make sure you file the right documents in the right places, and pay the proper fees. Consult the checklists provided in this Chapter and the sample documents in the Appendix when filing your tort claims. Last but not least, always retain photocopies of all of the documents you file.

138. Federal Tort Claims Act provisions are found in 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671–80 (2006).

APPENDIX A

SAMPLE TORT CLAIM AND SUPPORTING PAPERS

This Appendix contains the following materials:

A-1. Sample Notice of Intention to File a Tort Claim
A-2. Sample Verification
A-3. Sample Assault and Battery Tort Claim
A-4. Sample Negligence Tort Claim
A-5. Sample Affidavit in Support of Application for a Reduction of Fees
A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim
A-7. Affidavit of Service
A-8. Sample Demand for Bill of Particulars
A-9. Sample Claimant's Bill of Particulars
A-10. Sample Notice of Appeal

Parts A, B, and C of this Chapter tell you how to use each of these papers. Do not use these forms until you have read this entire Chapter.

These papers are examples of the types of documents that you must file in the Court of Claims for various purposes. You should use the basic form of these papers where appropriate, but you must be careful to substitute the information that is applicable to your own case for the general information that is supplied by these samples. The endnotes following the sample documents tell you how to fill in the necessary information. These are only samples. DO NOT TEAR THESE FORMS OUT OF THE *JLM*. Many of the following forms can also be found in the New York Consolidated Laws Service Vol. 43 (1987). In addition, the form for applying for a reduction of filing fees can be obtained from the Chief Clerk's Office in Albany.

A-1. Sample Notice of Intention to File a Tort Claim

State of New York Court of Claims

_____[1]	:	
	:	Notice of Intention
	:	to File Claim
- against -	:	
The State of New York	:	

TO THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:
PLEASE TAKE NOTICE, that the undersigned _____,[2] intends to file a claim against the State of New York, pursuant to Sections 10 and 11 of the Court of Claims Act.
The post office address of the claimant herein is: _____.[3]
For the time being I am representing myself.

The time when and the place where such claim arose and the nature of my claim are as follows:
_____
_____
_____.[4]

_____[5]
Claimant, *pro se*

Dated: _____[6]

A-2. Sample Verification

STATE OF NEW YORK)
)ss:
COUNTY OF _____[7])
_____,[8] being duly sworn, says:

I am the claimant above named; I have read the foregoing claim[9] against the State of New York and know its contents; the same is true to my knowledge, except as to the matter therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

_____[10]
Claimant

Sworn to before me this _____
day of _____, 20____.

_____
Notary Public[11]

A-3. Sample Assault and Battery Tort Claim[12]

State of New York Court of Claims

_____[13]	:	
- against -	:	Claim No. _____[14]
The State of New York.	:	

Claimant, _____,[15] appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The post office address of the claimant herein is _____.[16]
2. This claim is for assault and battery of the State committed by its employee _____[17] for injuring the claimant while acting within the scope of his/her employment and in the discharge of his/her duties, on _____[18] at _____.[19]
3. [*On September 10, 1999, at approximately 6:00pm, Correction Officer Smith at XYZ Correctional Facility told the claimant [name] to leave the day room where claimant was mopping the floor.*
4. *Claimant responded that he had been told to remain there by another officer, whose name he could not remember.*
5. *Correction Officer Smith then told claimant to leave immediately or he would receive an infraction.*
6. *Claimant, pursuant to Correction Officer Smith's order, began to leave when, without just cause or provocation, the defendant Correction Officer Smith willfully and maliciously grabbed the mop from claimant and hit him across the chest and head with the handle, causing the claimant to sustain serious injury.*
7. *The actions of Correction Officer Smith were intentional and unwarranted.*[20]
8. *As a result of this assault and battery, claimant was hospitalized for two weeks and received 26 stitches on his chest and head.*
9. *As a result of this incident, claimant suffered severe physical and mental pain and anguish.*
10. *Claimant's hearing has been permanently impaired as a result of a blow on the head by Correction Officer Smith.*]
11. The particulars of claimant's damages are as follows:[21]
    a) Medical expenses[22]
    _____
    _____.
    b) Lost earnings[23]
    [*Claimant having been a musician prior to his incarceration, claimant having anticipated returning to that profession upon his release, claimant's hearing having been impaired as a result of this incident so as to render him unable to be gainfully employed as a musician, claimant seeks $_____ in damages for lost potential earnings.*]
    c) Pain and suffering[24]
    _____
    _____.
    d) Mental anguish[25]
    _____
    _____.
    e) Permanent disability
    _____
    _____.
12. Attached hereto as part of the claim is a sketch of the place of the above-described incident.[26]

13. Notice of intention to file this claim was served in the Office of the Clerk of the Court of Claims, on the ____ day of _____, 20____, and in the office of the Attorney General on the _____ day of _____ 20_____.[27]

14. This claim is filed within ____ years after the claim accrued, as required by law.[28]

15. This action is filed pursuant to Sections 10 and 11 of the Court of Claims Act.

WHEREFORE, claimant respectfully requests judgment against the defendant in the sum of _____ dollars ($_____).[29]

_____[30]
Claimant, *pro se*

Dated: _____[31]

A-4. Sample Negligence Tort Claim[32]

State of New York Court of Claims

_____[33]	:	
- against -	:	Claim No. _____[34]
The State of New York.	:	

Claimant, _____,[35] appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The post office address of the claimant herein is _____.[36]

2. This claim is for negligence of the State [*for failure to adequately maintain the ceiling of the day room of*][37] _____[38] on the ___ day of _____, 20___, so as to cause serious injury to the claimant, _____.[39]

3. It was the duty of the defendant State of New York [*to maintain in a safe and proper condition the ceilings and walls in the correctional facilities of the State of New York, and more particularly the ceiling in the day room on Tier 3*[40] *at XYZ Correctional Facility.*[41]

4. *On and prior to the 5th day of May, 2000, the defendant disregarded its duty by negligently and carelessly permitting the ceiling at Tier 3 at XYZ Correctional Facility to be improperly and dangerously maintained in an unsafe condition in that the plaster had disintegrated so that large portions had become loosened and not properly held in place.*

5. *On the 5th day of May, 2000, at approximately 1:00pm, claimant [name] was sitting in the day room of Tier 3 at XYZ Correctional Facility reading a newspaper when a large portion of plaster fell from the ceiling striking claimant on the head, shoulder, arm, and leg and causing him to sustain serious injuries.*

6. *On the 5th day of May, 2000, and for three months prior, the defendant had actual knowledge and notice of the defective and dangerous condition of the ceiling of the day room as claimant had filed a grievance requesting the repair of the ceiling with the Superintendent of XYZ Correctional Facility on February 5, 2000.*[42]

7. *As a result of this incident, claimant received a broken arm, a broken leg, and injuries to the shoulder and head, including recurring headaches.*

8. *As a result of this incident, claimant suffered severe physical and mental pain and anguish.*

9. *As a result of this incident, claimant has suffered permanent disabilities including chronic headaches, lameness, and the loss of the full use of his arm.*][43]

10. Attached hereto as part of the claim is a sketch of the place of the above-described incident.[44]

11. The particulars of claimant's damages are as follows:[45]

a) Medical expenses[46]

_____

_____.

b) Lost earnings[47]

[*Claimant was a carpenter prior to his incarceration and anticipated returning to that profession upon his release. As a result of this incident, Claimant lost the full use of his arm and is now unable to be gainfully employed as a carpenter. Consequently, Claimant seeks $_____ in damages for lost potential earnings.*]

c) Pain and suffering[48]

_____

_____.

d) Mental anguish[49]

_____

_____.

e) Permanent disability

_____

_____.

12. Notice of intention to file this claim was served in the Office of the Clerk of the Court of Claims, on the ____ day of _____, 20____, and in the office of the Attorney General on the _____ day of _____ 20_____.[50]

13. This claim is filed within ____ years after the claim accrued, as required by law.[51]

14. This action is filed pursuant to Sections 10 and 11 of the Court of Claims Act.

WHEREFORE, claimant respectfully requests judgment against the defendant in the sum of _____ dollars ($_____).[52]

_____[53]
Claimant, *pro se*

Dated: _____[54]

A-5. Sample Affidavit in Support of Application for a Reduction of Fees

State of New York Court of Claims

_____[55]	:	Application Pursuant to N.Y. C.P.L.R. 1101(f)
DIN No. _____,[56]	:	
- against -	:	Claim No._____[57]
The State of New York,	:	

STATE OF NEW YORK
COUNTY OF _____[58]

I, _____,[59] being duly sworn, hereby declare as follows:

1) I am the claimant in the above-entitled proceeding, I am a prisoner in a [*federal, state, or local*] correctional facility, _____,[60] and I submit this affidavit in support of my application for a reduction of the filing fee pursuant to CPLR 1101(f).

2) During the past six months:[61]

☐ I was not incarcerated at any other correctional facility.

☐ I was incarcerated at the following correctional facilities in addition to the one in which I am currently incarcerated: _____.

3) I currently receive income from the following sources, exclusive of correctional facility wages:

_____

4) I own the following valuable property (other than miscellaneous personal property): [62]

Property:	Value:
_____	_____
_____	_____

5) I have no savings, property, assets, or income other than as set forth herein.

6) I am unable to pay the filing fee necessary to prosecute this proceeding.

7) No other person able to pay the filing fee has a beneficial interest in the result of this proceeding.

8) The facts of my case are described in my claim and other papers filed with the court.

9) I have made no prior request for this relief in this case.

_____[63]

Sworn to before me this _____
day of _____, 20____.

_____
Notary Public[64]

AUTHORIZATION[65]

I, _____,[66] inmate number _____,[67] request and authorize the agency holding me in custody to send to the Clerk of the Court of Claims certified copies of my correctional facility trust fund account statements (or the institutional equivalent) for the past six months.

In the event that my application for poor person status in the above-captioned case is granted by the Court, I further request and authorize the agency holding me in custody to deduct the filing fee (or other outstanding obligation reported by the Court pursuant to N.Y. C.P.L.R. 1101(f)(2)) from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court of Claims. This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT THE FULL AMOUNT OF THE OUTSTANDING OBLIGATION REFERRED TO HEREIN WILL BE PAID BY AUTOMATIC DEDUCTION FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

_____[68]

_____[69]

A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim[70]

State of New York Court of Claims[71]

_____[72]	:	
	:	Motion For Permission To
	:	File A Late Claim
- against -	:	
	:	Claim No. _____[73]
The State of New York	:	

TO THE CLERK OF THE COURT OF CLAIMS:
TO THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:

The undersigned claimant, _____,[74] hereby deposes and swears under penalty of perjury that the following is true.

Claimant requests the permission of the Court to file the attached claim against the State of New York, pursuant to the provisions of Section 10(6) of the Court of Claims Act for filing late claims. In support of my motion for permission to file this claim, I respectfully submit that:

1. The incident underlying this claim occurred on _____.[75] Under the provisions of Article Two of the Civil Practice Law and Rules, I would not be barred from asserting a like claim against a citizen of the State.

2. The delay in filing this claim is excusable because: [*I am not a lawyer and I had no access to professional legal counsel or to the prison law library during the statutory period for filing because of the illness caused by the incident underlying this claim.*[76]

3. *The State had notice of the essential facts constituting the claim in that medical personnel in the prison dispensary were aware of my illness during my stay in the prison dispensary, and the State also had opportunity to investigate the cause of this illness, which is the subject of this claim, by simply questioning the guards and other persons who were present in the machine shop at the time of my injury.*][77]

4. I have no other available remedy for the injury and suffering I sustained because of the State's negligence.

_____[78]
Claimant, *pro se*

Dated:_____, 20____[79]
_____
_____

A-7. Affidavit of Service[80]

State of New York Court of Claims

_____X

_____[81] :

:

- against - :

:

The State of New York :

_____X

Affidavit of Service

Claim No. _____[82]

STATE OF NEW YORK

COUNTY OF_____[83]

_____,[84] being duly sworn, deposes and says:

I am over the age of 18 and reside at _____.[85]

On _____,[86] I served the within _____[87] upon the Attorney General of the State of New York by certified mail No._____ , return receipt requested at the following address:

Department of Law
Capitol Building
Albany, NY 12224,

said address being the address designated by the Attorney General for that purpose, by depositing a true copy of the within in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

_____[88]
Claimant, *pro se*

Sworn to before me this _____
day of _____, 20____.

_____
Notary Public[89]

A-8. Sample Demand for Bill of Particulars[90]

State of New York Court of Claims

_____,[91]	:	
	:	Demand for
	:	Bill of Particulars
- against -	:	
	:	Claim No. _____[92]
The State of New York,	:	

SIR:

PLEASE TAKE NOTICE that you are hereby required to serve upon the defendants within 30 days after service of a copy of this notice, a verified bill of particulars, setting forth in detail:

(a) The date and time of the occurrence.

(b) The exact location of the occurrence.

(c) A general statement of the acts or omissions constituting the negligence claimed.

(d) Whether actual or constructive notice is claimed.[93]

(e) If actual notice is claimed, the name of the person served with notice.

(f) Statement of the injuries and description of any that are claimed to be permanent.

(g) Length of time confined to bed and to house.

(h) Length of time incapacitated from employment, and the nature of such employment.

(i) Total amounts claimed as special damages for (1) physicians' services and medical supplies; (2) loss of earnings, with name and address of the employer; (3) hospital expenses, with names of hospitals; (4) nurses' services.

(j) Address and maiden name of claimant (if applicable).

(k) List of statutes, ordinances, rules, and regulations that were allegedly violated by defendant.

Hon. _____[94]
Attorney General of the State of New York
Department of Law
Albany, NY 12224
By:_____[95]
Assistant Attorney General

A-9. Sample Claimant's Bill of Particulars[96]

State of New York Court of Claims

_____X

_____[97] :

- against - :

The State of New York, :

_____X

Bill of Particulars

Claim No. _____[98]

Claimant, pursuant to the demand of the defendant, submits the following for his/her bill of particulars:

1. The occurrence took place on [*May 5, 2000 at approximately 1:00 p.m.*].
2. The occurrence took place in the [*day room of Tier 3 at XYZ Correctional Facility*].
3. The negligence of the defendants consisted of those acts alleged in paragraphs 4, 5, and 6 of the claim; specifically, [*the failure to maintain in a safe and proper condition the ceilings and walls of the day room of Tier 3 at XYZ Correctional Facility*].
4. Actual notice claimed.
5. Actual notice was given by the filing of a grievance with the Superintendent of [*XYZ Correctional Facility requesting the repair of the ceiling on February 5, 2000*].
6. As a result of this incident claimant received [*a broken arm, a broken leg, injuries to the shoulder and head, including recurring headaches, and severe physical and mental pain and anguish*]. Permanent disabilities include [*chronic headaches, lameness, and the loss of full use of the arm*].
7. *Claimant was confined in the hospital for three weeks, in the prison infirmary for ten weeks and was bedridden for an additional five months.*
8. Claimant lost employment wages [*as law library clerk within the prison of $0.75 an hour for eight months*]. Claimant's injuries also render him unable to be gainfully employed [*as a construction worker*] (his employment prior to incarceration) upon his release from prison, which will be no later than [*May, 2004, the date of release based upon the serving of the maximum sentence*].
9. Special damages for:
   (a) physicians' services and medical supplies—not applicable;[99]
   (b) loss of earnings—not applicable except as set forth in paragraph 8;
   (c) hospital expenses—not applicable;
   (d) nurses' services—not applicable.
10. Claimant's address currently is: _____[100]
11. Claimant claims that defendant violated _____.[101]

_____[102]
Claimant, *pro se*
_____
_____[103]

Hon. _____[104]
Attorney General of the State of New York
Department of Law
Albany, NY 12224

A-10. Sample Notice of Appeal[105]

State of New York Court of Claims

_____[106]	
- against -	Notice of Appeal
	Claim No. _____[107]
The State of New York	

SIRS:

PLEASE TAKE NOTICE, that the undersigned _____,[108] hereby appeals to the Appellate Division of the New York Supreme Court in and for the _____[109] Department, from a judgment entered in the above entitled action in favor of the above named defendant, the State of New York, against the above named claimant _____,[110] entered in the office of the Clerk of the County of _____[111] on the ____ day of _____, 20__,[112] and this appeal is taken from each and every part of said judgment as well as the whole thereof.

Dated: _____[113]

_____[114]
Claimant, *pro se*

To: _____[115]
Clerk of the County of _____[116]

Hon. _____[117]
Attorney General of the State of New York
Department of Law
Albany, New York 12224

Fill in the forms shown in Appendix A as follows:

1. Your name.
2. Your name.
3. Your complete address.
4. Give clear, detailed information about the basis for your complaint: who did what, where, when. Include the date of the incident and the facility in which it occurred.
5. Your signature.
6. The date on which you sign the notice and your address. Attach a Verification. See Appendix A-2 for a sample Verification.
7. The name of the county in which you signed the affidavit.
8. Your name.
9. Your tort claim. See Appendices A-3 and A-4 for sample tort claims.
10. Your signature. Sign this only in the presence of a notary public, as the next footnote explains.
11. This is where the notary public notarizes the Verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature and cross out "Notary Public." (But only do this if it is *impossible* for you to find a notary public.) If another prisoner is your witness, you should add the following paragraph at the bottom of the certification:

> I declare that I have not been able to have this [*insert claim, or notice of intent to file a claim, etc.*] notarized according to law because [*explain here your efforts to get the claim, etc. notarized*]. I therefore declare under penalty of perjury that all of the statements made in this [*claim, or notice of intent, etc.*] are true of my own knowledge, and I pray leave of the Court to allow this [*claim, or notice of intent, etc.*] to be filed without notarization.
>
> _____
> (Your signature)

12. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. Assault and battery are intentional torts, in other words, torts that were committed purposefully and not by accident. In a claim for assault and battery, as in all claims for intentional torts, you must allege the following:
    (1) The facts of the assault and battery (the intentional tort). You should not simply say that assault and battery was committed by the defendant; rather, you should give the basic facts of what happened. However, remember that not only must you be able to prove all of the allegations set forth in your claim at trial, but that any inconsistencies between the allegations set forth in your claim and the proof you present at trial will make it more difficult for you to win at trial.
    (2) Intent. You must state that the defendant's actions were not accidental but rather were intentional.
    (3) Injury. You must indicate that you were injured as a result of the defendant's actions. You also must include a description of the injuries you received.
    (4) That the person who injured you was working for the State of New York and injured you while acting within the scope of his/her employment and in the discharge of his/her duties.
    (5) That you served the claim or the Notice of Intention to File a Claim upon the Attorney General within 90 days of the incident about which you are complaining.
    (6) That your claim is filed pursuant to §§ 10 and 11 of the Court of Claims Act.
13. Your name.
14. Leave this blank. This will be filled in by the clerk of the Court of Claims.
15. Your name.
16. Your prison address, including the name of your prison and the county where it is located.
17. Name of the state official who is responsible for your injury.
18. Insert the date (day, month, and year) when your injury or property damage occurred.
19. Insert the name of the correctional facility where your injury or property damage occurred.
20. Describe in detail how your injury happened, including names and dates. Each point should be in its own paragraph with its own number.
21. You should only include the following factors that apply to your case for determining damages.
22. If applicable, list the medical expenses you have had to pay for or that you can show a high probability of having to pay for in the future. You cannot obtain damages for any money your care cost while in prison because the State pays those bills. However, in seeking damages, you might consider such factors as the long-term effects of your injury after your release, including whether there is a high probability that you may require hospitalization, specialist care, or the

purchase and maintenance of medical or therapeutic equipment such as, in this sample claim, the cost and maintenance of a hearing aid.

23. List below any current or future lost earnings.

24. You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

25. Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

26. This paragraph is optional.

27. Include the day, the month, and the year when you filed the Notice of Intention with the Clerk for the Court of Claims and the Attorney General, respectively. Do not include this paragraph if you did not serve a Notice of Intention.

28. Paragraphs 13 and 14 will depend upon whether you served a Notice of Intention to File Claim. N.Y. Ct. Cl. Act § 10 (McKinney Supp. 2004). If you did not serve a Notice of Intention, do not include paragraph 13. Paragraph 14 should now read: "13. This claim is filed within ninety days after the claim accrued as required by law." If you are filing a late motion, add: "I am filing this motion pursuant to the late motion that the Court of Claims granted on [*date*]."

29. Insert total amount of money you are claiming as damages.

30. Your signature.

31. The date on which you sign the petition. Also write your mailing address in this space and attach at the end of your claim a Verification exactly like the one illustrated at Appendix A-2.

32. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. An action for personal injury due to negligence, unlike assault and battery, does not require that you plead or prove intent. However, you must show that your injuries were foreseeable—that your injuries were a likely result of the defendant's action or failure to act. You must also show that the negligence of the defendant-State's employee's actions or failures to act when under a duty to do so were the major cause of the accident. Also, where appropriate, you should plead that the defendant had actual or constructive knowledge (knew or should have known) of the defective condition causing the accident.

33. Your name.

34. Insert claim number.

35. Your name.

36. Your prison address, including the name of your prison and the county where it is located.

37. Insert the type of the negligence tort you are claiming. For example, you may claim failure to protect, negligent destruction of property, or inadequate medical care. These claims may be stated as follows

> Sample Failure to Protect Claim:
>
> This claim is for negligence of the State for the failure of its employee [*insert name of the state/prison official responsible for not protecting you*] to protect claimant from the reasonably foreseeable assault by [*insert the prisoner's name who attacked you*] while acting within the scope of his/her employment and in the discharge of his/her duties, on [*insert the date when the attack occurred*], at [*insert the name of the facility where the attack occurred*], so as to cause serious injury to the claimant, [*insert your name*].
>
> Sample Destruction of Property Claim:
>
> This claim is for negligence of the State committed by its employee [*insert the name of the state or prison official responsible for the damage to your property, if known*] for the destruction of claimant's property while acting within the scope of his/her employment and in the discharge of his/her duties, on [*insert the date when the destruction of your property occurred, if known*], at [*insert the name of the facility where the destruction of your property occurred*].
>
> Sample Inadequate Medical Care Claim:
>
> This claim is for negligence of the State committed by its employee for failure of its employee [*insert name of the state/prison official responsible for not protecting you*] to

> provide adequate medical care following accepted medical standards on [*insert the date when you requested medical care that you did not receive or the date when you received inappropriate medical care*] while acting within the scope of his/her employment and in the discharge of his/her duties, on [*insert the date when the denial of medical care occurred*], at [*insert the name of the facility where the denial of medical care occurred*], so as to cause serious injury to the claimant, [*insert your name*].

38. Insert the name of the facility where the injury occurred.

39. Insert your name.

40. Insert the state's duty of reasonable care that the State has violated. Examples of duty of care include: medical care following accepted professional standards, protection from reasonably foreseeable attacks by corrections officers or other prisoners, and other dangers that a reasonable official knew or should have known about. If the duty that an official owes you is defined by a statute or regulation, you may be able to make a claim of negligence per se.

41. Insert the name of the facility where your injury occurred.

42. In the preceding paragraphs you should describe in detail how your injury happened, including names and dates. Each point should be in its own paragraph with its own number.

43. In the preceding paragraphs you should describe your injury in detail. Each point should be in its own paragraph with its own number.

44. This paragraph is optional.

45. You should only include the following factors that apply to your case for determining damages.

46. If applicable, list below the medical expenses you have had to pay for or those you can show a high probability of having to pay for in the future. You cannot obtain damages for the money your care cost while you were incarcerated as the State has assumed this cost. However, in seeking damages, you might consider such factors as the long-term effects of your injury after your release, including whether there is a high probability that you may require hospitalization, specialist care, or the purchase and maintenance of therapeutic devices.

47. List below any current or future lost earnings.

48. You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

49. Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

50. Include the day, the month, and the year when you filed the Notice of Intention with the Clerk for the Court of Claims and the Attorney General, respectively. Do not include this paragraph if you did not serve a Notice of Intention.

51. Paragraphs 12 and 13 will depend upon whether you served a Notice of Intention to File Claim. N.Y. Ct. Cl. Act § 10 (McKinney Supp. 2004). If you did not serve a Notice of Intention, do not include paragraph 12. Paragraph 13 should now read: "12. This claim is filed within ninety days after the claim accrued as required by law." If you are filing a late motion, add: "I am filing this motion pursuant to the late motion which the Court of Claims granted on (date)."

52. Insert total amount of money you are claiming as damages.

53. Your signature.

54. The date on which you sign the petition. Also write your mailing address in this space and attach a Verification at the end of your claim, illustrated at Appendix A-2.

55. Your name.

56. Your identification number.

57. Insert claim number.

58. The name of the county in which you signed the affidavit.

59. Your name.

60. Name and address of your correctional facility.

61. Check one of the boxes below.

62. If you do not own any property of value, write "NONE." Otherwise, list each item of property and how much it is worth in the spaces below.

63. Your signature.

64. This is where the notary public notarizes the verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature

and delete "Notary Public." (Use this technique only as a last resort.) If another prisoner is your witness, you should add the following paragraph at the bottom of the certification:

> I declare that I have not been able to have this [*insert claim, or notice of intent to file a claim, etc.*] notarized according to law because [*explain here your efforts to get the claim, etc. notarized*]. I therefore declare under penalty of perjury that all of the statements made in this [*claim, or notice of intent, etc.*] are true of my own knowledge, and I pray leave of the Court to allow this [*claim, or notice of intent, etc.*] to be filed without notarization.
>
> _____
>
> (Your signature)

65. By signing this section, you give permission for your facility to send the Court copies of your trust fund account statement. You also authorize the facility to withdraw the filing fee from your account and to send it to the Court. The entire filing fee will be withdrawn automatically from your account even if your case is dismissed.

66. Your name.

67. Your inmate number.

68. Your signature.

69. Your name.

70. When submitting this form, you will also need to include a Notice of Motion form. *See* N.Y. Ct. Rules § 206.8, which includes a copy of the form.

71. When filing this motion you must attach the proposed claim itself so the court knows what the motion refers to. The court will not consider this copy of your claim as being filed, however. After you receive permission to file a late claim, you must send your claim to the court along with the order granting you permission to file a late claim.

72. Your name.

73. Insert claim number.

74. Your name.

75. The date on which the actions upon which you are basing your claim occurred.

76. These are only *sample* reasons; do not copy them unless they apply to you. The reasons you give here for your failure to file your claim in a timely manner must be persuasive. See Part C(1)(b) of the Chapter for a list of factors that the court considers in ruling on your application for permission to file a late claim.

77. These are *examples* of the types of justification that you must offer to the court to persuade it to grant your application; do not copy them unless they apply to you.

78. Your signature.

79. The date and your address.

80. You must complete this form and submit it to the court within 10 days after serving your Notice of Intention to File a Tort Claim or Claim on the Attorney General. N.Y. Comp. Codes R. & Regs. Tit. 22, § 206.5 (2003). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society.

81. Your name.

82. Insert claim number.

83. Insert the name of the county in which you signed the affidavit.

84. Your name.

85. Insert the name and address of the correctional facility where you are incarcerated.

86. Insert the date on which you mailed the Notice of Intention or Claim to the Attorney General.

87. Insert either "Notice of Intention to file a Claim" if you filed a Notice of Intention, or "Claim" if you filed a Claim.

88. Your signature.

89. This is where the notary public notarizes the verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature and delete "Notary Public." (Use this technique only as a last resort.) If another prisoner is your witness, you should add the following paragraph at the bottom of the certification:

> I declare that I have not been able to have this [*insert claim, or notice of intent to file a claim, etc.*] notarized according to law because [*explain here your efforts to get the*

claim, etc. notarized]. I therefore declare under penalty of perjury that all of the statements made in this [*claim, or notice of intent, etc.*] are true of my own knowledge, and I pray leave of the Court to allow this [*claim, or notice of intent, etc.*] to be filed without notarization.

_____
(Your signature)

90. If you do not answer or object to a demand for a Bill of Particulars within 30 days after receiving it, the Court may stop you (preclude you) from introducing evidence at trial of the facts asked for in the demand. *See* N.Y. C.P.L.R. 3042, 3126 (McKinney Supp. 2004). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. This is a sample of a demand that the State may serve on you. Appendix A-9 is a sample response.

91. Your name.

92. Insert claim number.

93. This means whether you claim the defendant actually knew of the condition that caused your injury ("actual notice") or just that they should have known ("constructive notice").

94. The name of the New York State Attorney General.

95. The name of the New York State Assistant Attorney General.

96. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. This is not a form you will prepare, but is a form that can be served on you by the State. This response to the Request for a Bill of Particulars (see Appendix A-9) is loosely based upon the facts set forth in the Sample Tort Claim in Appendix A-4, personal injury due to negligence. Please refer to this Claim to see how closely the Bill of Particulars follows it.

97. Your name.

98. Insert claim number.

99. This is because DOCS typically pays for medical expenses (unless you request, and pay for, a private doctor).

100. Your address.

101. Insert statutes, ordinances, rules, or regulations the state officials violated.

102. Your signature.

103. Your address.

104. The name of the New York State Attorney General.

105. If you would like to appeal the decision of the Court of Claims to the Appellate Division of the New York Supreme Court, you must file a Notice of Appeal within 30 days after the judgment. *See* N.Y. Ct. Cl. Act § 24 (McKinney 1989). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society.

106. Your name.

107. Insert the claim number.

108. Your name.

109. The Appellate Division is divided into four departments. Each department has a fixed geographic jurisdiction hearing cases from specific counties. You can determine which department your appeal should be taken to by checking the list of counties served by each Appellate Division, which can be found in Appendix II of the *JLM*.

110. Your name.

111. The county in which your case was heard.

112. Insert the date the judgment was filed in the Clerk's office.

113. The date on which you sign the notice.

114. Your signature.

115. Insert the name of the Clerk (if known) in whose office the judgment was filed.

116. The county in which your case was heard.

117. The name of the New York State Attorney General.

A JAILHOUSE LAWYER'S MANUAL

Chapter 18: Your Rights At Prison Disciplinary Proceedings

Columbia Human Rights Law Review

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CHAPTER 18

YOUR RIGHTS AT PRISON DISCIPLINARY PROCEEDINGS*

A. Introduction

This Chapter is a guide for prisoners facing disciplinary action for violating prison rules. It outlines basic requirements for disciplinary proceedings under federal law, with special emphasis on New York State disciplinary proceedings. If you are incarcerated outside New York, you should research the rules and regulations covering disciplinary proceedings in your state before preparing your defense.[1]

This Chapter begins with a broad overview of your constitutional rights during prison disciplinary proceedings. Part B explains the concept of "due process of law," which applies to disciplinary proceedings. Part C details the concept of due process in the prison setting, with a detailed discussion of the U.S. Supreme Court case *Sandin v. Conner*. Part D describes prisoners' basic rights in disciplinary proceedings. Part E explains disciplinary proceedings in the State of New York and includes information on the procedures that prison officials must follow before they put you in disciplinary segregation. Finally, Part F explains the procedures that officials in New York State must follow before they put you in administrative segregation as well as the procedures that federal prisons must follow.

Prison officials have the authority to discipline prisoners who violate the law, or who violate prison rules and regulations. They also have the authority to place prisoners who pose a threat to prison safety and security in administrative segregation. Prison officials generally have wide discretion in disciplinary and administrative matters, and courts will usually defer to (agree with) the officials' conclusions and decisions about how to manage the prison. However, there are limits on this discretion. To protect you from arbitrary or unfair abuses of power by prison officials, federal and state laws require officials to follow procedural requirements (certain guidelines) when they discipline you or place you in administrative segregation. If officials do not comply with these procedural requirements and as a result you are subject to "atypical and significant hardship" (see below for more on what kinds of discipline meet this standard), you may be able to claim that your rights under the Due Process Clause of the U.S. Constitution have been violated.

This Chapter describes those rights that relate to the conditions of your confinement. To protect these rights, you must first go through your institution's administrative grievance procedure. Chapter 15 of the *JLM* contains further information on inmate grievance procedures. If you are unsuccessful or do not receive a favorable result through the prisoner grievance procedure, you can either bring an action under 42 U.S.C. § 1983 (in certain cases) or file a tort action in state court. If you are in New York, you can bring a tort action in the Court of Claims, or file an Article 78 petition in state court. More information on all of these types of cases can be found in *JLM* Chapter 5, "Choosing a Court and Lawsuit," *JLM* Chapter 14, "Prison Litigation Reform Act," *JLM* Chapter 16, "42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," *JLM* Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," and *JLM* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you decide to pursue a claim in federal court, you must read Chapter 14 of the *JLM* on the Prison Litigation Reform Act (PLRA). If you fail to follow the PLRA requirements you could lose your good-time credit and your right to bring future claims in federal court without paying the full filing fee.

B. Definition of "Due Process"

The Constitution's Fifth and Fourteenth Amendments prevent the government from taking your life, liberty, or property without due process. The Fifth Amendment limits the power of the federal government, including federal prison officials. The Fourteenth Amendment similarly limits the power of state prison officials. Both federal and state courts have authority to review the actions of prison officials to make sure they comply with due process requirements.[2] The Due Process Clause of the Fourteenth Amendment

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* This Chapter was written by Miranda Berge based in part on previous versions by Rachel Wilgoren, Marjorie A. Adams, Jennifer L. Hurt, Ivan A. Sacks, and James A. Skarzynski. Special thanks to Kenneth Stephens of The Legal Aid Society, Prisoners' Rights Project for his assistance in the revision of this Chapter.

1. See Chapter 2 of the *JLM*, "Legal Research," for information on how to conduct legal research in prison.

2. Article III of the Constitution grants federal courts jurisdiction to hear cases "arising under this Constitution." State courts have "concurrent jurisdiction," which means that they are as equally able as federal courts to decide cases

protects you from arbitrary and unfair treatment by the government. It refers to two kinds of interests: substantive rights and procedural rights. Substantive rights include the fundamental right to "life, liberty, and property," and the specific guarantees in the Bill of Rights, like the right to free speech and to freedom of religion. Substantive due process requires that the government treat people with "fundamental fairness" and not interfere with these rights unless it is absolutely necessary to achieve a more important public need.

If the government seeks to restrict your substantive rights, procedural due process guarantees that certain procedures be followed. These procedural rights include the right to know about a hearing before it occurs (advance notice) and the opportunity to be heard. The exact procedures that the government must follow are different from case to case. Courts determine what procedures are required in a given case by comparing the degree of your interests to those of the government.

C. Due Process in Prison

Due process means something different in the prison context than it does outside. The Constitution only guarantees you a right to due process in situations where the government attempts to deprive you of your "life, liberty, or property." So, a court must decide whether you have a "liberty interest" at stake before it identifies the required "due process" in your disciplinary hearing.[3] In other words, Fourteenth Amendment due process only applies when prison officials attempt to deprive you of a recognized interest.

It is important to note that the Supreme Court's decision in *Sandin v. Conner*[4] changed the law in this area dramatically. During the 1960s and '70s, the Supreme Court took major steps toward recognizing the constitutional rights of prisoners. Unfortunately, the *Sandin* decision reversed that trend by significantly limiting the circumstances in which prisoners may petition the courts to vindicate their constitutional rights. *Sandin v. Conner* is important because in it the Supreme Court sets the minimum standard all other federal and state courts must follow. States may choose to grant prisoners more rights than those required by the Supreme Court in *Sandin v. Conner*, but they cannot take away rights guaranteed by federal law.

In *Sandin v. Conner*, a prisoner in Hawaii faced a disciplinary proceeding for trying to physically interfere with a strip search being performed on him and for using "abusive or obscene language" toward prison employees.[5] The prison disciplinary committee refused the prisoner's request to present witnesses at the hearing, stating that all of the witnesses were unavailable.[6] The prisoner was sentenced to a thirty-day disciplinary segregation in the Special Holding Unit (SHU) and sought administrative review of the decision. Administrators eventually waived the charge, finding that it was unsupported.[7] In the meantime, however, the prisoner filed a Section 1983 claim, alleging that his civil rights had been violated.

According to the Supreme Court, although a change may have a substantial and adverse impact on the conditions of a prisoner's confinement, it does not necessarily violate a liberty interest protected by due process rights (rights dealing with procedural fairness).[8] As long as the new conditions are "within the normal limits or range of custody which the conviction has authorized the State to impose," the Due Process Clause does not apply.[9] However, even if the conditions of your confinement are not necessarily due process violations, you may still be able to use the Due Process Clause to challenge the procedures by which you were confined. The Supreme Court has held that if a state avoids certain types of confinement, it may create

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involving the U.S. Constitution.

3. This "liberty interest" refers to the liberty described in the 5th and 14th Amendments. Individuals cannot be deprived of liberty (which includes being imprisoned) without due process of law.

4. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life).

5. Sandin v. Conner, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

6. Sandin v. Conner, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

7. Sandin v. Conner, 515 U.S. 472, 476, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 425 (1995).

8. Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (holding that the transfer of a prisoner to a prison, the conditions of which are substantially less favorable to him, does not necessarily violate a liberty interest protected by the Due Process Clause of the 14th Amendment).

9. Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976); *see also* Montanye v. Haymes, 427 U.S. 236, 242–43, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471–72 (1976) (holding that no Due Process Clause liberty interest is infringed when a prisoner is transferred from one prison to another within the State, unless there is some right or expectation that can be derived from state law that a prisoner will not be transferred except for misbehavior or upon the occurrence of other "specified events").

a protected liberty interest. For that to be the case in your state, your state must have made a law or regulation that requires certain procedures to be followed before a particular condition is imposed on you.[10]

Even then, not every law or regulation that requires prison officials to follow procedures before depriving you of liberty creates a protected liberty interest. In *Sandin*, the Supreme Court held that such laws and regulations only implicate the Due Process Clause when the condition in question imposes "atypical [uncommon] and significant [major] hardship on the inmate in relation to the ordinary incidents of prison life."[11] To determine whether this is the case, a court will generally compare the conditions prisoners can ordinarily expect in the course of their incarceration with a fact-based analysis of the length and extent of the deprivation you are claiming. In *Sandin*, the Supreme Court decided that, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the state's actions in placing him there for thirty days did not work a major disruption in his environment."[12] The court concluded that the prisoner's thirty-day disciplinary segregation was not the "atypical, significant deprivation in which a State might conceivably create a liberty interest."[13] Because the prisoner did not have a liberty interest protected by due process, the court concluded that prison officials conducting the disciplinary proceeding were not required to follow the constitutional due process requirements or state regulations regarding disciplinary procedures.

In sum, if you wish to make a claim that your due process rights were violated by a deficiency in the procedures that led to your confinement in the SHU, you must show that:

(1) The confinement constituted an "atypical and significant hardship" compared with the deprivations experienced in the general population; and
(2) The state, through language in a statute, had created a protected liberty interest in avoiding that form of confinement.

Unfortunately, the Court's opinion in *Sandin* sets a very high standard for showing that the prison's procedures actually violated your right to due process, and typically you can allege this violation only after you have already been confined. However, even if you are unable to prove a due process violation using the *Sandin* standard, you may still be entitled to other protections from state actions that impose arbitrary and severe conditions of confinement on you. You may either:

(1) Draw upon internal prison grievance procedures[14] and state judicial review (review by state courts under state laws or state constitutional protections) where available; or
(2) Pursue a claim under the Eighth Amendment of the Constitution, which protects against cruel and unusual punishment.[15]

Since the Supreme Court decided *Sandin*, courts around the country have applied the *Sandin* test differently when determining what constitutes an "atypical and significant hardship" protected by state regulation. This Chapter examines when courts (especially in New York) have interpreted regulations as mandatory (therefore creating a liberty interest) and how they have applied *Sandin* to disciplinary and administrative segregation, transfers, good-time credits, and work release programs.

The rest of this Part will examine whether certain prison practices create "atypical and significant hardship." Remember that it does not matter whether the punishment is "atypical and significant" unless the state has a statute creating a protected liberty interest.

1. Disciplinary and Administrative Segregation

Prison officials in New York may confine a prisoner in a Segregated Housing/Holding Unit (SHU) for a predetermined period of time if the prisoner was found to have committed a rule violation. Pending the disciplinary hearing or during investigation, the prisoner may be placed in administrative segregation. Prison officials may also hold a prisoner in administrative segregation in a SHU if the prisoner poses a threat to the safety or security of the prison.[16] Disciplinary segregation must be based on a finding—after a

10. Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–30 (1995) (citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)).

11. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

12. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).

13. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).

14. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for more information.

15. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more information.

16. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(b) (2007).

formal hearing—that the prisoner violated the New York State Department of Correctional Services (DOCS) Standards of Prisoner Behaviors. However, administrative segregation is based on a determination after an *informal* hearing that a prisoner's presence in the general prison population threatens prison safety and security. Disciplinary confinement takes place for a specific time period, unlike administrative segregation, which is not considered punishment and therefore may continue until the superintendent finds the threat is over.[17] For more on the procedural requirements for disciplinary and administrative segregation in New York prisons, see Parts E and F of this Chapter.

Courts in New York State and the Second Circuit analyze both disciplinary and administrative detention proceedings under the *Sandin* test explained above. Claims arising from both kinds of segregation must be evaluated by the court to determine whether:

(1) There are procedures explicitly required of prison officials; and,
(2) An "atypical and significant hardship" exists.[18]

This Section will help you figure out whether the procedures that took place before you were placed in disciplinary or administrative detention met requirement (1) and then how courts evaluate a prisoner's confinement in the SHU under requirement (2). This Section focuses specifically on the law that governs courts in the Second Circuit (that is, federal courts in New York, Vermont, and Connecticut). Analysis by courts in other jurisdictions may be different. Unfortunately, some courts outside of the Second Circuit have held that no liberty interests may arise in the context of administrative detention.[19] If you live outside the jurisdiction of the Second Circuit, you should research how courts in your jurisdiction have interpreted your prison's rules and whether administrative detention has been found to be a protected liberty interest.

(a) The State-Created Liberty Interest Requirement

Even if your segregation was "atypical and significant," courts will not recognize a due process violation unless you can show you had a constitutional or state-created liberty interest in avoiding the segregation. Some New York district courts rely on cases that came before *Sandin*, and hold that state and federal regulations which govern disciplinary confinement[20] and administrative segregation[21] automatically grant prisoners a liberty interest that protects them from certain prison conditions, and that the Due Process Clause of the U.S. Constitution protects these rights. The Second Circuit, however, does not accept this clear rule. The Second Circuit finds that a prisoner only has a federal due process claim if, upon careful analysis, specific state statutes and regulations create protected liberty interests and these protected interests are regularly upheld within the prison.[22] It is important to remember that courts outside of New York State do

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17. *See* N.Y. Comp. Codes R. & Regs. tit. 7, §§ 301.2(a), 301.4 (2007).

18. *See*, *e.g.*, Sealey v. Giltner, 197 F.3d 578, 584–85 (2d Cir. 1999) (interpreting *Sandin* to require consideration of: whether, first, a prisoner has a protected liberty interest in avoiding administrative confinement, and, second, the confinement imposed an atypical and significant hardship); Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *8 (W.D.N.Y. May 16, 2000) (*unpublished*) ("[C]onfinement implicated due process only if it was an atypical and significant hardship and if DOCS regulations conferred a liberty interest in remaining free from such confinement.").

19. *See* Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996) (holding administrative detention cannot give rise to a protected liberty interest); Moore v. Ham, No. 92-3305, 1993 U.S. App. LEXIS 826, at *5 (10th Cir. Jan. 13, 1993) (*unpublished*) ("If segregation is non-punitive in nature and is done for administrative or supervisory reasons, the inmate has no due process rights prior to administrative confinement unless prison regulations provide him with a liberty interest."); Awalt v. Whalen, 809 F. Supp. 414, 416 (E.D. Va. 1992) (holding regulations providing for staff procedures and time frames, but not mandating release upon a hearing and specific findings, do not create a liberty interest in release from administrative detention). *But see* Muhammad v. Carlson, 845 F.2d 175, 177 (8th Cir. 1988) (holding that a liberty interest may be created by prison regulations if those regulations impose substantive criteria limiting or guiding prison officials' discretion); Maclean v. Secor, 876 F. Supp. 695, 701–02 (E.D. Pa. 1995) (holding regulations limiting prison officials' discretion in administrative detention decisions created a liberty interest).

20. *See*, *e.g.*, Nicholas v. Tucker, No. 95 Civ. 9705, 2000 U.S. Dist. LEXIS 749, at *19 (S.D.N.Y. Jan. 27, 2000) (*unpublished*) (finding New York State regulations grant prisoners a protected liberty interest in freedom from disciplinary confinement); Wright v. Miller, 973 F. Supp. 390, 395 (S.D.N.Y. 1997) (finding a state-created liberty interest in being free from disciplinary confinement); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–58 (S.D.N.Y. 1997) (holding state regulations on disciplinary segregation create a liberty interest in freedom from disciplinary confinement).

21. *See*, *e.g.*, Tellier v. Fields, 280 F.3d 69, 81 (2d Cir. 2000) (holding that 28 C.F.R. § 541.22 creates a liberty interest); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–58 (S.D.N.Y. 1997) (concluding that New York State rules regarding administrative confinement create a liberty interest).

22. *See* Sealey v. Giltner, 197 F.3d 578, 583–84 (2d Cir. 1999) (finding that *Sandin* rejected the idea that "a state's establishment of a specific substantive predicate for restrictive confinement of a prisoner is sufficient to create a

not always find that state statutes and regulations create a liberty interest that protects prisoners from disciplinary and administrative segregation.

(b) The "Atypical and Significant Hardship" Requirement

In determining whether your confinement in the SHU implicates a protected liberty interest, a court will conduct the same analysis for disciplinary segregation as it conducts for administrative segregation. The court assesses whether the specific factual conditions of your confinement in a segregated facility rise to the level of an "atypical and significant hardship … in relation to the ordinary incidents of prison life."[23] A court will look at the particular facts of your confinement in conducting its analysis.[24] There is no clear formula for determining whether a given SHU confinement is an "atypical and significant hardship," but courts will consider two main elements in their analysis:

(1) the length of your confinement; and
(2) the extent of your deprivation.[25]

The court will consider both factors "since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."[26]

(i) Duration of Your Confinement

If you are filing a claim within the jurisdiction of the Second Circuit, the length of your confinement is the actual time that you have been detained in the SHU, and this period of time is the period for which a prison official may be responsible for violating your due process rights. Therefore, when you file your claim, you will state the actual time that you spent in detention and not the potential duration of your confinement.[27] You should count the total number of days that you spent in the SHU before, during, and after the disciplinary or administrative hearing.[28] If you are transferred from one SHU directly to another SHU, in a different prison facility, count the *total* number of days that you were detained. Your transfer to another SHU does not restart the duration of confinement that the court will consider.[29]

There is not a strictly defined period of SHU confinement that qualifies as "atypical and significant," but the Second Circuit has indicated general rules to evaluate such claims. The Second Circuit recently suggested that SHU confinement of approximately 305 days or more probably implicates a protected liberty interest.[30] Periods of confinement that are shorter than 305 days but longer than 101 days may implicate a protected liberty interest, and whether it implicates a protected liberty interest heavily depends on the

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protected liberty interest"); Welch v. Bartlett, 196 F.3d 389, 392 (2d Cir. 1999) (holding that a prisoner who brings a due process claim that is premised upon a state-law liberty interest, has the burden to establish that the law does, in fact, create such a liberty interest). The Second Circuit's method of analysis, is based on the Supreme Court's opinion in Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). The Supreme Court explicitly rejected the *Hewitt* analysis, however, as the primary means of determining the existence of a due process claim. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995). Despite the Supreme Court's ruling in *Sandin*, the Second Circuit held that, in combination with *Sandin's* "atypical and significant hardship" test, the procedure established by the Second Circuit in *Sealey* and *Welch* is still an appropriate way to determine whether a legitimate due process claim is present.

23. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

24. Miller v. Selsky, 111 F.3d 7, 9 (2d Cir. 1997) (holding that *Sandin* did not create a blanket rule, and that "courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest").

25. Sealey v. Giltner, 197 F.3d 578, 582–83 (2d Cir. 1999).

26. Sealey v. Giltner, 197 F.3d 578, 586 (2d Cir. 1999).

27. *See* Scott v. Albury, 156 F.3d 283, 286–87 (2d Cir. 1998) (holding that the measure of liberty derivation under *Sandlin* is the actual confinement that the prisoner endured—in this case 60 days—rather than the potential, maximum penalty that the prisoner faced—indefinite detention).

28. *See* Sealey v. Giltner, 197 F.3d 578, 587–88 (2d Cir. 1999).

29. *See* Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001) (holding that a court must consider the cumulative period of time that a prisoner was held in administrative segregation at two facilities because his detention at the two facilities was continuous, based on the same administrative rationale, and under nearly identical conditions); *see also* Sims v. Artuz, 230 F.3d 14, 23–24 (2d Cir. 2000) (suggesting that "some or all" of a series of separate SHU sentences "should be aggregated for purposes of the *Sandin* inquiry" when they are imposed within a period of days or hours of each other and add up to a sustained period of confinement).

30. *See* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (holding that confinement in a SHU for 305 days under "normal conditions" is a departure from standard prison life, which warrants due process protection under *Sandin*).

extent of the deprivation that you suffered.[31] (This second factor is discussed more below.) Confinement for 101 days or shorter probably does not implicate a liberty interest under *Sandin*, unless you can prove that you endured unusually severe conditions in the SHU.[32] Finally, confinement under typical SHU conditions for thirty days or fewer probably will not give rise to a successful due process claim.

In addition to weighing the length of your confinement and the extent of your deprivation, courts also consider how frequently prisoners endure comparable periods of non-disciplinary SHU confinement to determine whether a particular period of segregation is "atypical." In other words, courts may compare your period of confinement with "periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration" for non-disciplinary reasons.[33]

(ii) Extent of the Deprivation Compared to "Ordinary Incidents of Prison Life"

Courts will compare the extent of the hardship that you suffered in disciplinary or administrative segregation to the hardships that prisoners regularly endure as "ordinary incidents of prison life."[34] The Second Circuit has explained that, under *Sandin*, a prisoner does not have a due process claim if other prisoners typically experience approximately the same hardship as a result of ordinary prison administration.[35] Although there is some dispute about the meaning of "ordinary incidents of prison life,"[36] courts accept comparisons between the conditions that you experienced in the SHU to the conditions that the general population experiences at the prison in which you are housed.[37] Thus, to constitute an "atypical and

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31. *See* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000); *see also* Beckford v. Portuondo, 151 F. Supp. 2d 204, 219 (N.D.N.Y. 2001) (holding plaintiff's confinement, which lasted less than a week, was not sufficiently atypical to implicate a protected liberty interest); Prince v. Edwards, No. 99 Civ. 8650 (DC), 2000 U.S. Dist. LEXIS 6608, at *16 (S.D.N.Y. May 17, 2000) (*unpublished*) (dismissing procedural due process claim because the prisoner did not allege that the conditions of his 66-day confinement constituted an atypical or significant hardship under *Sandin*); Jones v. Kelly, 937 F. Supp. 200, 202–03 (W.D.N.Y. 1996) (concluding that the prisoner's 191 days in segregated confinement did not impose an atypical and significant hardship, but that "[t]he length of SHU confinement is not necessarily dispositive of whether a liberty interest is implicated"); Tulloch v. Coughlin, No. 91-CV-0211E(M), 1995 U.S. Dist. LEXIS 19624, at *9 (W.D.N.Y. Dec. 28, 1995) (*unpublished*) (holding that the prisoner's 180-day disciplinary segregation in SHU did not represent a due process violation, because the conditions of the SHU segregation did not "present an atypical or significant hardship in relation to the normal incidents of prison life"); Carter v. Carriero, 905 F. Supp. 99, 104 (W.D.N.Y. 1995) (finding that the prisoner's 270 days in a SHU did not violate a protected liberty interest, because the nature of the deprivation did not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

32. *See* Sealey v. Giltner, 197 F.3d 578, 589–90 (2d Cir. 1999) (holding that a prisoner's 101 day confinement under standard SHU conditions did not constitute an "atypical and significant" deprivation under *Sandin*). *But see* Colon v. Howard, 215 F.3d 227, 232 n.5 (2d Cir. 2000) (noting that confinement for periods of 101 days or less "could be shown on a record more fully developed than the one in *Sealey* to constitute an atypical and severe hardship under *Sandin*"); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (holding the prisoner's 90-day confinement in a SHU may be "atypical and significant" if the deprivation that the prison suffered "was more serious than typically endured by prisoners as an ordinary incident of prison life").

33. Scott v. Coughlin, 78 F. Supp. 2d 299, 307 (S.D.N.Y. 2000) (noting that "[a]long with duration, the Court must examine the frequency with which inmates are confined to SHU in the ordinary course of the prison administration"); *see also* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (holding that 305 days in SHU confinement is atypical under *Sandin*, because New York could not show that a 305-day confinement was comparable with that "typically endured by other prisoners in the ordinary course of prison administration"); Brooks v. DiFasi, 112 F.3d 46, 49 (2d Cir. 1997) (holding that, while New York prison regulations allow for lengthy administrative confinement, these regulations do not necessarily mean that lengthy disciplinary confinement is compatible with due process, and that after *Sandin* "a court must examine the specific circumstances of the punishment").

34. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

35. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 430 (1995).

36. *See* Sealey v. Giltner, 197 F.3d 578, 588–89 (2d Cir. 1999) (noting unresolved questions about: (1) whether the "ordinary incidents of prison life" requirement asks courts to compare SHU conditions to the conditions within administrative confinement or to the conditions within the general population, and (2) whether the "ordinary incidents of prison life" requirement asks courts to compare SHU conditions to those conditions within the particular prison, to prison conditions across the state, or to prison conditions nationwide).

37. *See*, *e.g.*, Sealey v. Giltner, 197 F.3d 578, 589 (2d Cir. 1999) (finding on appeal, that the prisoner's trial evidence was sufficient, when he only compared the conditions of his SHU confinement to the conditions among the general population within his particular prison); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (comparing the conditions of a prisoner's SHU segregation to the deprivation that other prisoners endure in the ordinary course of prison administration); Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *17 (W.D.N.Y. May 16, 2000) (*unpublished*) (comparing the conditions that the prisoner faced in administrative segregation to the typical conditions

substantial deprivation," your hardships in the SHU must be "substantially more grave" than those hardships that you would ordinarily experience as a member of the general prison population.[38]

Like the duration of you confinement, courts have not determined a strict rule to determine when your deprivations in a SHU are "substantially grave" enough to be "atypical and significant." Rather, the court will consider various factors to determine whether the deprivation that you suffered violates the Due Process Clause. For example, in a case heard in the Southern District of New York, *Giano v. Kelly*, the court noted significant differences between conditions in the SHU and conditions in the general population, including:

(1) Significantly greater isolation;
(2) Absence of organized, meaningful activity, such as job assignments, vocational training, or classroom instruction; and
(3) Lack of social and recreational activity, such as drug and alcohol counseling, religious services, group meals, or group exercise.[39]

The *Giano* court found several additional distinctions between conditions in the SHU and conditions in the general population. SHU prisoners were confined to their cells for twenty-three hours per day, with one hour of daily exercise in a separate, slightly larger cell without any equipment. Additionally, SHU prisoners were only permitted two showers per week, one non-legal visit per week, and no telephone calls (except in the an emergency and with prison officials' permission). Finally, the *Giano* court considered the prisoner's testimony that his cell was ten feet by ten feet in size, often dirty, and usually dark, because the windows were covered to prevent eye contact with the other prisoners when they were outside.[40]

The fact that prisoners in the general population occasionally experience deprivations similar to what you experienced in SHU does not mean that you do not have a due process claim.[41] The *Giano* court reasoned that, while general population prisoners under "lock-down" are subject to conditions similar to those in SHU, the duration and extent of SHU "inactivity or cell confinement, long-term isolation and idleness are far less typical outside of SHU."[42] This type of analysis, which considers the conditions of segregation and the length of time of confinement, appears to be typical of what courts in the Second Circuit have been doing in recent years.[43]

It is important to remember that the length of time you are in administrative or disciplinary segregation is one of two factors the court will consider when comparing your detention to the ordinary incidents of

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that the prison's general population endured).

38. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 430 (1995); *see also* Welch v. Bartlett, 196 F.3d 389, 392 (2d Cir. 1999) (finding that, after *Sandin*, a prisoner who experiences a deprivation under mandatory state regulations does not have a federal due process claim if other prisoners in the prison's general population typically experience approximately the same deprivation in the ordinary administration of the prison); Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) (holding that when a prisoner was confined in the SHU for 12 days while awaiting the disposition of disciplinary proceedings, his due process rights were not violated, despite the fact that the prisoner was denied certain privileges because the conditions of his confinement were not prohibited by law).

39. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–20 (W.D.N.Y. May 16, 2000) (*unpublished*).

40. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–21 (W.D.N.Y. May 16, 2000) (*unpublished*).

41. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *21 (W.D.N.Y. May 16, 2000) (*unpublished*).

42. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *21 (W.D.N.Y. May 16, 2000) (*unpublished*).

43. *See*, *e.g.*, LaBounty v. Kinkhabwala, No. 99-0329, 2001 U.S. App. LEXIS 1696, at *6–7, 2 F. App'x. 197, 201 (2d Cir. Feb. 5, 2001) (*unpublished*) (instructing the district court to compare both the specific conditions of the prisoner's disciplinary segregation and the duration to the conditions of other categories of confinement); Vaughan v. Erno, No. 00-264, 2001 U.S. App. LEXIS 10585, at *3, 8 F.App'x 145, 146 (2d Cir. May 18, 2001) (*unpublished*) (finding no due process violation where the prisoner failed to allege any adverse conditions of the confinement other than its duration); Sealey v. Giltner, 197 F.3d 578, 587–89 (2d Cir. 1999) (finding that plaintiff's 101-day confinement in administrative segregation did not impair a protected liberty interest since the confinement was not of such duration and in such conditions as to meet the *Sandin* atypicality standard); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (holding that the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration); Nicholas v. Tucker, 95 Civ. 9705, 2000 U.S. Dist. LEXIS 749, at *13–14 (S.D.N.Y. Jan. 27, 2000) (*unpublished*) (holding that in determining whether a confinement constitutes an atypical and significant hardship, courts should consider the effect of the segregation on the length of the plaintiff's prison confinement, the extent to which conditions differ from other prison conditions, and the duration of the disciplinary confinement compared to the potential duration of discretionary confinement). All of these cases compared the individual experience of the prisoner in the SHU under the conditions imposed by applicable regulations to experiences of the general prison population.

prison life. Thus, if you wish to bring a claim that your due process rights were violated when you were confined in administrative or disciplinary segregation for a period of less than 305 days, it is recommended that you present any and all available evidence of the conditions of the SHU, any evidence of psychological effects of prolonged confinement in isolated conditions, and the specific amount of times you have been placed in SHU confinements of varying durations.[44] Your own testimony may be considered by the court, but it is recommended that you obtain and submit other, independent evidence about the conditions of your detention as well.

2. Transfers

The due process analysis is often triggered when a prisoner is transferred from one facility to another. Although the Supreme Court has concluded that you do not have a protected liberty interest in remaining at a specific prison,[45] you do have a claim if prison authorities transfer you in retaliation for exercising your constitutional rights.[46]

You also do not have a recognized liberty interest in remaining in a specific prison when you are transferred to a new prison that maintains a different level of security.[47] For example, a discretionary transfer from a minimum security prison to a medium security prison is not a disruption that exceeds the ordinary disruptions of prison life.[48] Likewise, courts may view transfers from the general population to maximum security as "within the normal limits or range of custody which the conviction" has authorized the state to impose, even when the conditions in maximum security are much more burdensome.[49] The frequency of transfers between prisons will not change this analysis.[50]

The courts' reasoning in the context of transfers also applies to deportation. It is settled that you do not have a protected liberty interest in avoiding deportation, despite the fact that you may be subjected to less humane conditions in the United States than you would have faced in your home country's prisons.[51]

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44. *See, e.g.*, Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 1999) (recommending to the district courts that this information would be helpful in evaluating on appeal whether segregation is atypical and significant); *see also* Taylor v. Rodriguez, 238 F.3d 188, 195 (2d Cir. 2001) (reinforcing the finding in *Colon* that a "fully developed record" along with the length of confinement would be helpful in determining atypicality); Sealey v. Giltner, 197 F.3d 578, 589 (2d Cir. 1999) (noting evidence of "conditions of administrative confinement at other New York prisons, as well as the frequency and duration of confinements imposing significant hardships, might well be relevant to a prisoner's liberty claim").

45. *See* Meachum v. Fano, 427 U.S. 215, 224–25, 96 S. Ct. 2532, 2538–39, 49 L. Ed. 2d 451, 459–60 (1976) (holding that the "Due Process Clause [does not] in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system," such that a transfer within a state is within the normal range of custody), *rehearing denied*, Meachum v. Fano, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976); Olim v. Wakinekona, 461 U.S. 238, 247, 103 S. Ct. 1741, 1746, 75 L. Ed. 2d 813, 821 (1983) (transfer for confinement in another state is within the normal range of custody). *But see* Vitek v. Jones, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 555–56 (1980) (transfer to a mental hospital is not within the normal range of custody).

46. *See* Merriweather v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989) (holding that a jury could reasonably conclude that prisoners were transferred solely because they exercised their 1st Amendment rights, and thus had a valid claim, where the prisoners were transferred after critiquing the prison administration).

47. *See* Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) (holding that discretionary transfer of prisoner from minimum to medium security prison, as a result of disciplinary action, was not a disruption exceeding ordinary incidents of prison life and, thus, did not implicate a due process liberty interest); Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) (noting the standard for determining whether a prisoner had a protected liberty interest in prison transfer depends on whether conditions at the facility to which a prisoner was transferred imposed significant and atypical hardship).

48. *See* Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) ("[S]uch assignments are discretionary, so long as they are not done for prohibited or invidious reasons.").

49. Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538–39, 49 L. Ed. 2d 451, 459 (1976) (concluding transfer to prison with more severe rules does not in itself signify a 14th Amendment liberty interest violation).

50. *See* Maguire v. Coughlin, 901 F. Supp. 101, 106 (N.D.N.Y. 1995) (asserting transfer of prisoner between four different correctional facilities in the span of three weeks did not implicate a protected liberty interest).

51. *See* Marshall v. Reno, 915 F. Supp. 426, 431–32 (D.D.C. 1996) (stating that it was beyond the authority of the courts to order where a defendant (in this case, a Canadian) is to be incarcerated, because this is the role of the Bureau of Prisons); *see also* Meachum v. Fano, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) ("The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another.").

3. Good-Time Credits

Good-time credits alone do not create a protected liberty interest.[52] In order to sustain a claim that you have a liberty interest, that interest must be created by the state.[53] For example, in *Reynolds v. Wolff*, a Nevada statute provided for the accumulation of good-time credits "unless the prisoner ha[d] committed serious misbehavior."[54] The court found that this statute, since it offered a "right of 'real substance'" by providing good-time credits, gave rise to a liberty interest falling under the due process analysis.[55] Finding prisoners guilty of "serious misbehavior" will result in the loss of the prisoner's good-time credits. Therefore, before Nevada prisons find prisoners guilty, the prisoners must be given a notice of the charges against them and an opportunity to be heard.[56]

The opportunity to earn good-time credits, however, does not create a protected liberty interest.[57] For example, in *Luken v. Scott*,[58] the prisoner was confined to administrative segregation and was, therefore, unable to receive additional good-time credits which would have accelerated his eligibility for parole. Still, the court found no liberty interest in his custody status because the "loss of opportunity to earn good-time credits ... is an [unsure] consequence of administrative decisions [that] do not create constitutionally protected liberty interests."[59] Similarly, in *Bulger v. U.S. Bureau of Prisons*, the loss of a prison job did not involve the prisoner's liberty interest even though the prisoner lost the ability to automatically accrue good-time credits as a result.[60]

The Supreme Court case of *Edwards v. Balisok* has major implications for prisoner claims involving loss of good-time credits.[61] According to that case, if a prisoner wants to bring a federal Section 1983 claim that questions the actual results of a hearing involving good-time credit issues (and not simply the procedures), he must first have that disciplinary hearing reversed in state court.[62] The application of the *Edwards* standard varies greatly. The Second Circuit, for instance, has interpreted *Edwards* as applying only to good-time credit cases.[63] The Seventh Circuit and some district courts, however, have read the case as broadly requiring an administrative or court reversal in all disciplinary or even administrative segregation cases before a prisoner can bring a damages action.[64] See *JLM* Chapter 35, "Getting Out Early: Conditional & Early Release," for more information about good-time credits.

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52. *See* Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974) (holding actual restoration of good-time credits could not be handled in a civil rights suit—habeas corpus was the proper remedy—but declaratory judgment regarding good-time withdrawal procedures, as a predicate to a damage award, was not barred).

53. *See* Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974); *see also* Leacock v. DuBois, 937 F. Supp. 81, 83–84 (D. Mass. 1996) (holding a prisoner may not be divested of a state-created right to good-time credit without a minimum of due process, including written notice of claimed violations, qualified right to call witnesses and present evidence, and written statement of fact-finders as to evidence relied upon and reasons for action).

54. Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

55. Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996); *see also* Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1106–07 (S.D.N.Y. 1995) (loss of good time constitutes protected liberty interest in New York under *Sandin*).

56. *See* Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

57. *See* Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995).

58. Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995).

59. Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995) (alterations in original).

60. Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995); *see also* Rivera v. Coughlin, No. 92 CIV 3404, 1996 U.S. Dist. LEXIS 560, at *17 (S.D.N.Y. Jan. 22, 1996) (*unpublished*) (holding no protected liberty interest existed where loss of good-time credit under New York regulations was a recommendation and, therefore, only tentative).

61. Edwards v. Balisok, 520 U.S. 641, 117 S. Ct. 1584 (1997); *see also* Rivera v. Coughlin, No. 92 CIV 3404, 1996 U.S. Dist. LEXIS 560, at *9 (S.D.N.Y. Jan. 22, 1996) (*unpublished*) (finding no protected liberty interest existed where loss of good-time credit under New York regulations was a recommendation and, therefore, only tentative).

62. Edwards v. Balisok, 520 U.S. 641, 647–48, 117 S. Ct. 1584, 1588–89, 137 L. Ed. 2d 906, 914–915 (1997); Interview with Kenneth Stephens, Esq., The Legal Aid Society, Prisoners' Rights Project, in N.Y., N.Y. (Oct. 22, 1999).

63. *See* Jackson v. Johnson, 15 F. Supp. 2d 341, 360 (S.D.N.Y. 1998) (holding that where prisoner had not lost good-time credits and was not otherwise challenging the fact or duration of his confinement, he could use a § 1983 suit rather than habeas corpus to make a due process challenge to a disciplinary hearing); *see also* Brown v. Plaut, 131 F.3d 163, 166 (D.C. Cir. 1997) (finding that a former prisoner who brought a § 1983 action seeking damages for being placed in administrative segregation without due process was not required to raise the claim via writ of habeas corpus).

64. *See* Stone-Bey v. Barnes, 120 F.3d 718, 722 (7th Cir. 1997) (holding that prisoner's § 1983 claim that disciplinary segregation violated due process was barred because disciplinary judgment had not been overturned and claim would necessarily imply its invalidity).

4. Work Release Programs

The Supreme Court has been reluctant to find that a liberty interest may arise from the Due Process Clause, even without a state statute creating one, when the prisoner's "release from institutional life altogether" has been revoked.[65] But some lower courts have interpreted this restriction broadly enough to find an inherent liberty interest arising from the Due Process Clause "when a person has substantial, albeit conditional, freedom, such as when he is on probation or parole."[66] The standard used by courts to determine whether "substantial freedom" exists is whether the work release program in question is more similar to release from incarceration or whether it remains more similar to institutional life.[67] In fact, one court has proposed that parole and work release should be viewed on a scale, with a liberty interest existing when the program more closely resembles parole.[68]

The deciding factor for whether you have been "release[d] from institutional life altogether" is where you live on a full-time basis. In *Edwards v. Lockhart*, the court found that a work release program participant had a protected liberty interest because she no longer lived in an institution but lived in the community.[69] In *Roucchio v. Coughlin*, however, the court found no inherent liberty interest in continued placement in a work release program where the participant was on "5" and "2" status (spent five nights a week at home and two at the institution), held a full-time job, lived at home with his mother, and reported twice a week to the institution to sleep over and meet with his counselor.[70] In this case, the court found that "although the [prisoner] 'did enjoy some conditional liberty while participating in the work release program, he had not been released from institutional life altogether.'"[71]

Even if you do not have an inherent (absolute) liberty interest under the Due Process Clause, you may still have a state-created liberty interest in a work release program. Although it is settled that you do not have a state-created liberty interest in the initial determination of whether you may participate in a work release program,[72] in some states removal from a work release program does constitute an "atypical and significant hardship" under the *Sandin* analysis.[73] In New York, for example, it is settled that "the removal

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65. *See* Hewitt v. Helms, 459 U.S. 460, 468, 103 S. Ct. 864, 870, 74 L. Ed. 2d 675, 686 (1983) (finding that neither parole nor good-time are interests that enjoy independent protection under the Due Process Clause). More recently, the Supreme Court has overruled this line of reasoning in *Sandin,* though the Court declined to actually overturn the *Hewitt* holding itself.

66. Callender v. Sioux City Residential Treatment Facility, 88 F.3d 666, 668 (8th Cir. 1996) (asserting that work release program did not give rise to liberty interest inherent in Due Process Clause itself and that there was no state-created liberty interest because revocation of prisoner's work release program was not atypical or significant deprivation in relation to ordinary prison life).

67. *See* Callender v. Sioux City Residential Treatment Facility, 88 F.3d 666, 668 (8th Cir. 1996) (finding the work release program in question "did not provide the sort of substantial freedom that gives rise to a liberty interest" because it "was more analogous to institutional life than it was to probation or parole").

68. *See* Harper v. Young, 64 F.3d 563, 566–67 (10th Cir. 1995) (citing Edwards v. Lockhart, 908 F.2d 299, 302–03 (8th Cir. 1990)) ("[A] prisoner release program which permits a convict to exist, albeit conditionally, in society on a full-time basis more closely resembles parole or probation than even the more permissive forms of institutional confinement.").

69. Edwards v. Lockhart, 908 F.2d 299, 302 (8th Cir. 1990); *see also* U.S. v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (finding inherent liberty interest in continued placement in supervised release program allowing convicts to live in society).

70. Roucchio v. Coughlin, 923 F. Supp. 360, 369 (E.D.N.Y. 1996).

71. Roucchio v. Coughlin, 923 F. Supp. 360, 369 (E.D.N.Y. 1996) (quoting Whitehorn v. Harrelson, 758 F.2d 1416, 1421 (11th Cir. 1985)).

72. *See* Roucchio v. Coughlin, 923 F. Supp. 360, 371 n.3 (E.D.N.Y. 1996) (stating that "a New York prisoner has no state-created liberty interest in the initial determination" about participation in a work release program in a case about revocation of work release privileges); *see also* Greenholtz v. Prisoners of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9, 99 S. Ct. 2100, 2105, 60 L. Ed. 2d 668, 676 (1979) ("There is a crucial distinction between being deprived of a liberty one has ... and being denied a conditional liberty that one desires."); Lee v. Governor of the State of N.Y., 87 F.3d 55, 58 (2d Cir. 1996) (holding that since prisoners had not previously participated in work release program, new rules rendering him ineligible for such programs did not give rise to a liberty interest); Whitehorn v. Harrelson, 758 F.2d 1416, 1422 (11th Cir. 1985) (determination of initial placement in work release program, and removal of prisoner from such program, present different inquiries).

73. *See* Roucchio v. Coughlin, 923 F. Supp. 360, 374–75 (E.D.N.Y. 1996) (where prisoner removed from work release program after 15 months, the "revocation of [his] conditional freedom" gave rise to a liberty interest). *But see* Dominique v. Weld, 73 F.3d 1156, 1160 (1st Cir. 1996) (finding no liberty interest implicated when prisoner was removed from work release program in which he participated for almost four years; although "return from the quasi-freedom of

of a prisoner from a work release program in which he has been gainfully employed imposes an atypical, significant hardship upon the prisoner relative to the ordinary incidents of prison life."[74] The Second Circuit recently set out the process required before a participant may be removed from temporary work release:

(1) Written notice of the alleged violation of the program's rules or conditions;
(2) A statement of the actual reason for consideration of the prisoner's removal from work release;
(3) A report or summary of the evidence against him or her;
(4) An opportunity to be heard and to present evidence;
(5) Advance notice of a temporary release committee hearing;
(6) The right to confront and cross-examine adverse witnesses;
(7) A TRC (temporary release committee) composed of neutral decision makers; and
(8) A post-hearing written account of the actual reason for removal and a summary of the evidence supporting that reason.[75]
(9) Additionally, removal from a temporary work release program does not meet due process requirements "unless the findings of the [temporary release committee] are supported by some evidence in the record."[76]

5. Parole

You do not have an inherent liberty interest in obtaining parole.[77] The Constitution does, however, give rise to a protected liberty interest when your parole has been revoked.[78]

Although a liberty interest in obtaining parole does not arise from the Constitution, you have a protected liberty interest when a parole statute creates an expectation of parole.[79] The existence of an "expectation of parole" varies from state to state and depends on whether the statute contains mandatory language creating such an expectation.[80] For example, if a statute contains language such as "shall" or "unless," such an expectation may exist.[81]

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work release to the regimentation of life within four walls" may have been a significant deprivation, it was not atypical); Hamilton v. Peters, 919 F. Supp. 1168, 1172 (N.D. Ill. 1996) (finding no liberty interest under *Sandin* when prisoner was removed from work release in a disciplinary transfer).

74. Quartararo v. Catterson, 917 F. Supp. 919, 940 (E.D.N.Y. 1996) (affirming the "continued vitality of *Tracy* [*v. Salamack*] in light of *Sandin*"). Tracy v. Salamack, 572 F.2d 393, 396 (2d Cir. 1978) (holding that the State of New York, in establishing the Temporary Release Program, created a liberty interest that may not be terminated without an individualized due process hearing). In *Anderson v. Recore*, 317 F.3d 194 (2d Cir. 2003), the Second Circuit concluded that the Supreme Court in *Sandin*, by affirming the validity of *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and *Meachum v. Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976), implicitly affirmed by *Tracy v. Salamack*, 572 F.2d 393, because *Tracy* explicitly rests upon *Morrissey* and *Meachum*. *But see* Duffy v. Selsky, No. 95 CIV 0474, 1996 WL 407225, at *11 (S.D.N.Y. Jul. 18, 1996) (*unpublished*) (holding no liberty interest in admission to the Temporary Release Program).

75. Tracy v. Salamack, 572 F.2d 393, 396 (2d Cir. 1978) (defining the circumstances under which removal would be proper after a due process hearing).

76. Friedl v. City of N.Y., 210 F.3d 79, 85 (2d Cir. 2000) (quoting Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985)).

77. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 373, 107 S. Ct. 2415, 2418, 96 L. Ed. 2d 303, 309–10 (1987) (citing Greenholtz v. Prisoners of Neb. Penal and Corr. Complex, 442 U.S. 1, 11, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668, 677–78 (1979)) (stating that "the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release"); *see also* Bowser v. Vose, 968 F.2d 105, 106 (1st Cir. 1992) (holding that there is no liberty interest in continuing to participate in furlough).

78. *See* Morrissey v. Brewer, 408 U.S. 471, 485–88, 92 S. Ct. 2593, 2602–04, 33 L. Ed. 2d 484, 496–98 (1972) (holding that minimum due process requirements for parole revocation include preliminary hearing to determine probable cause "as promptly as convenient after arrest," as well as revocation hearing).

79. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 376–78, 107 S. Ct. 2415, 2420–21, 96 L. Ed. 2d 303, 311–13 (1987) (finding the Montana statute, which includes mandatory language, "creates a liberty interest in parole release"). This remains true even under *Sandin*. *See* Wilson v. Kelkhoff, 86 F.3d 1438, 1446 n.9 (7th Cir. 1996) ("It appears that the Court [in *Sandin*] intended to leave undisturbed the cases holding that a protectable liberty interest exists in parole statutes that create an 'expectancy of release.'"); Ellis v. Dist. of Columbia, 84 F.3d 1413, 1417–18, 318 U.S. App. D.C. 39 (D.C. Cir. 1996) (noting that *Sandin* did not overrule *Greenholtz v. Prisoners of Neb. Penal and Correctional Complex* or *Board of Pardons v. Allen*, and holding that liberty interest in parole stems from state parole statutes).

80. *See, e.g.*, Watson v. DiSabato, 933 F. Supp. 390, 394 (D.N.J. 1996) (New Jersey parole statute creates a sufficient expectation of parole eligibility to give rise to liberty interest); Allison v. Kyle, 66 F.3d 71, 73–74 (5th Cir. 1995) (no state-created liberty interest in parole procedures in Texas); Harper v. Young, 64 F.3d 563, 564–65 (10th Cir. 1995), *aff'd*, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997) (declining to address whether state-created liberty

Generally, confinement in either administrative or disciplinary segregation that may also affect your parole opportunities does not give rise to a protected liberty interest under *Sandin*.[82] Therefore, even if your release date has been postponed because you have spent time in segregation, you still do not have a liberty interest at stake when you are initially charged with a violation.

D. Prisoners' Basic Rights in Disciplinary Procedures

In *Wolff v. McDonnell*,[83] the Supreme Court described how prison disciplinary procedures should be conducted in order to comply with constitutional due process requirements. The due process safeguards for disciplinary action described below do not apply to your placement in administrative segregation. The procedural requirements for administrative segregation are described in Part F of this Chapter. If you have suffered a deprivation of a recognized liberty interest, such as a loss of good-time credits or some similarly severe punishment, this Part will provide a detailed explanation of the *Wolff* due process rights you can assert to defend yourself at your disciplinary proceeding or to challenge it on appeal in court. Once you establish that a disciplinary action was an atypical and significant hardship affecting a protected liberty interest, the court then addresses "whether the deprivation of that liberty interest occurred without due process of law."[84] Even if the punishment you face is not severe enough to trigger due process, your prison regulations may state that certain disciplinary procedures must be followed. Prison officials are still required to follow their own rules.[85] Therefore, while you might not be able to appeal the outcome in federal court, you may still be able to file an administrative appeal within the prison system. In any case, you will have a better chance of success if you are familiar with the procedures that your prison provides and if you take advantage of them at your disciplinary hearing.

1. The Prison Must Publish Rules Governing Your Conduct

Although it was not discussed in *Wolff*, one of your most basic due process rights is that you generally cannot be punished for an act not prohibited by prison regulations unless that act violates state criminal laws. For example, in *Richardson v. Coughlin*,[86] prison officials disciplined a prisoner for circulating a petition without their authorization. The court in that case ruled in favor of the prisoner, stating that the punishment violated due process because none of the prison's rules required prisoners to seek official authorization before circulating petitions.[87] Therefore, it was unfair to punish the prisoner for an activity that he reasonably believed the prison allowed. The Supreme Court described this principle of fairness in

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interest remained in Oklahoma parole revocation proceedings after *Sandin*, but holding that "program participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself"); Clarkson v. Coughlin, 898 F. Supp. 1019, 1040 (S.D.N.Y. 1995) (holding that the state-created limited protected liberty interest in New York parole proceedings extends as far as prisoner's right to be heard and right to know reasons for parole denial); Wilson v. Kelkhoff, 86 F.3d 1438, 1446 (7th Cir. 1996) (holding that the Illinois parole statute provides "for protectable liberty interest in release" for most prisoners).

81. *See* Watson v. DiSabato, 933 F. Supp. 390, 392–93 (D.N.J. 1996) (holding that mandatory language created "expectancy of release," and that *Greenholtz* and *Allen* remain good law after *Sandin* on the subject of liberty interest in parole); *see* Clarkson v. Coughlin, 898 F. Supp. 1019, 1040 (S.D.N.Y. 1995) ("Mandatory language in a state parole statute may create such an interest" in parole board proceedings).

82. *See* Meachum v. Fano, 427 U.S. 215, 229 n.8, 96 S. Ct. 2532, 2540 n.8, 49 L. Ed. 2d 451, 462 n.8 (1976) (noting that possible effect on parole decision does not create liberty interest); Haff v. Cooke, 923 F. Supp. 1104, 1119 (E.D. Wis. 1996) (citing Sandin v. Conner, 515 U.S. 472, 487, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418, 431–32 (1995)) (noting that a disciplinary violation that may "later affect a parole decision does not implicate a liberty interest because prisoner's disciplinary record is only one of many criteria used to determine parole").

83. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

84. Sealey v. Giltner, 116 F.3d 47, 51–52 (2d Cir. 1997) (quoting Bedoya v. Coughlin, 91 F.3d 349, 351–52 (2d Cir. 1996)) (finding that plaintiff must be given opportunity to develop facts relevant to establishing a liberty interest because the plaintiff had no notice that the lower court intended to consider dismissal of his complaint based on the absence of a liberty interest).

85. *See* Uzzell v. Scully, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (finding that though a prisoner's treatment did not amount to a deprivation of his right to due process, the prisoner remained free to raise a claim of procedural error on the ground that the State failed to adhere to its own rule requiring a prisoner to be given 24-hour notice of charges filed against him that resulted in his administrative segregation).

86. Richardson v. Coughlin, 763 F. Supp. 1228 (S.D.N.Y. 1991).

87. Richardson v. Coughlin, 763 F. Supp. 1228, 1235 (S.D.N.Y. 1991).

Grayned v. City of Rockford,[88] stating that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[89]

Prison officials may also be violating your right to due process when they punish you for conduct that is prohibited only by vague (unclear) regulations. For example, a federal court in Ohio struck down as unconstitutionally vague a regulation that prohibited "objectionable" conduct between a prisoner and his or her visitor.[90] The word "objectionable" was considered vague because it can mean different things to different people. To meet the standard of due process, the regulation should spell out exactly what type of conduct qualifies as "objectionable." A regulation can also be found vague as applied to your particular case. In *Rios v. Lane*,[91] the court found a regulation that prohibited "engaging or pressuring others to engage in gang activities" unconstitutionally vague when it was applied to a prisoner who allegedly shared information about Spanish-language political radio stations. In other words, a regulation that is not vague when you read it may be considered vague in your particular situation if it is used to punish you for an activity that is typically considered lawful.

Nevertheless, you are presumed to have knowledge of the penal law (criminal statutes). Therefore, you cannot claim that your rights have been violated if prison officials fail to post and distribute copies of your state's penal law.[92] As one court put it, "the law presumes that everyone knows the law, and ignorance of the law is no excuse for its violation."[93] You are also presumed to have knowledge of statewide rules of misbehavior if you have previously served time in another prison in New York and were provided with a copy of the statewide rules.[94]

Although you cannot be punished for violating a prison regulation that is temporarily posted on a bulletin board,[95] you can be punished if the regulation is posted permanently.[96] New York law requires that every prisoner be given a personal copy of the prison rules.[97] If required by the chief administrative officer of the prison, the prisoner must acknowledge in writing his receipt of the prison disciplinary handbook.[98] All

88. Grayned v. City of Rockford, 408 U.S. 104, 121, 92 S. Ct. 2294, 2306, 33 L. Ed. 2d 222, 235 (1972) (holding that anti-noise ordinance was not unconstitutionally vague or overbroad).

89. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298–99, 33 L. Ed. 2d 222, 227 (1972) (concluding that an anti-noise ordinance was not impermissibly vague because it was written specifically for its context, enabling the impact of prohibited disturbances to be easily measured, but an anti-picketing ordinance was found unconstitutional on equal protection grounds).

90. *See* Taylor v. Perini, 413 F. Supp. 189, 233–34 (N.D. Ohio 1976); *see also* Jenkins v. Werger, 564 F. Supp. 806, 807 (D. Wyo. 1983) (invalidating rule against "unruly or disorderly" conduct for vagueness); Laaman v. Helgemoe, 437 F. Supp. 269, 321–22 (D.N.H. 1977) (invalidating prison rule forbidding "poor conduct" for vagueness). *But see* El-Amin v. Tirey, 817 F. Supp. 694, 701 (W.D. Tenn. 1993) (holding that while due process requires certain minimum standards of specificity in prison regulations, it does not require the same degree of specificity that is required in criminal laws or in statutes that apply outside of prison), *aff'd*, 35 F.3d 565 (6th Cir. 1994).

91. Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987); *see also* Adams v. Gunnell, 729 F.2d 362, 369–70 (5th Cir. 1984) (finding a regulation that prohibited "conduct which disrupts the orderly running of the institution" was unconstitutionally vague when used to punish a prisoner for writing and circulating a petition).

92. *See* McRae v. State, 157 S.E.2d 646, 648, 116 Ga. App. 407, 410 (Ga. Ct. App. 1967) (holding that prison is not required to inform every prisoner of consequences of escape or attempt to escape and failure to so inform prisoner did not render sentence for escape void).

93. McRae v. State, 157 S.E.2d 646, 648, 116 Ga. App. 407, 410 (Ga. Ct. App. 1967).

94. *See* Johnson v. Coughlin, 205 A.D.2d 537, 539, 613 N.Y.S.2d 192, 193 (2d Dept 1994) (holding that prisoner's due process rights were not violated by officials' failure to provide him with prisoner rule book in timely manner where prisoner had previously been incarcerated and received various manuals governing prisoner conduct at another facility).

95. *See* Taylor v. Perini, 413 F. Supp. 189, 235 (N.D. Ohio 1976) (finding that a prisoner manual did not adequately inform prisoners of prohibited conduct since the posting of regulations on a bulletin board does not constitute fair notice).

96. *See* Forbes v. Trigg, 976 F.2d 308, 314–15 (7th Cir. 1992) (finding that a prisoner had fair notice of a prison rule requiring urine tests since the posting of the rule was not temporary or transitory).

97. N.Y. Correct. Law § 138(2) (McKinney 2005).

98. N.Y. Comp. Codes R. & Regs. tit. 9, § 7002.9(d) (2005).

regulations must be printed in both English and Spanish,[99] and the range of punishments for each type of violation must be clearly noted.[100]

If you do not have a copy of your prison's regulations, ask prison officials to give you one. If you do not understand English, or if you read Spanish better than English, ask for a copy of the regulations in Spanish.[101] If you are brought before a prison disciplinary board, remember that you generally cannot be punished for violating a rule that is not published in the prison regulations, nor can you be punished if you have not been issued a copy of the regulations.

2. Written Notice Requirement

Under *Wolff v. McDonnell*,[102] you have the right to receive notice of (know about) the charges against you at least twenty-four hours before your disciplinary hearing is scheduled to begin. An oral (spoken) explanation of the charges is not sufficient. The charges must be in writing, and they must be clear enough to allow you to prepare your defense.[103] At least one court has found that a prisoner was denied due process because although he was given notice twenty-four hours in advance, he was only allowed to review the actual written charges five hours in advance of his hearing.[104] With only five hours to study the twelve charges against him, the prisoner had to rely largely on his memory in gathering evidence and preparing his defense, putting him at a great disadvantage.[105] The purpose of the twenty-four hour notice requirement is to give prisoners a fair chance to prepare their defense by informing them of the specific nature of the charges.[106]

New York law also requires that prisoners receive written notice of the formal charges at least twenty-four hours before the hearing begins.[107] Unlike *Wolff v. McDonnell*, which did not require the notice to have a particular content,[108] New York regulations require notice to contain the date, time, place, and nature of the allegation (including particulars of the alleged misbehavior and the applicable rule allegedly violated),

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99. N.Y. Correct. Law § 138(1) (McKinney 1987); *see* Burgos v. Kuhlmann, 137 Misc. 2d 1039, 1040, 523 N.Y.S.2d 367, 368 (Sup. Ct. Sullivan County 1987) (holding that disciplinary charges must be dismissed and the prisoner's record cleared on the ground that the Spanish-speaking prisoner did not have meaningful notice of prison rules where he was only provided with the English version of the rules).

100. N.Y. Correct. Law § 138(3) (McKinney 2005).

101. If you are incarcerated outside New York, the prison may not be required to provide you with a copy of the prison regulations. Copies may also be available in Spanish. Research the rules and regulations of your state to see if this is the case where you are incarcerated. See Chapter 2 of the *JLM* for information on conducting legal research.

102. Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

103. *See* Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 344 (E.D. Tex. 1991) (holding that prison disciplinary board could not, consistent with due process, rely solely on testimony of charging officer regarding hearsay statements of unidentified informer to support revocation of prisoner's good-time credit).

104. *See* Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993) ("Although *Wolff v. McDonnell* did not state expressly that the inmate must be allowed to retain for 24 hours the written notice given him, we think this requirement is fairly inferred from the requirements that there be advance notice, that it be in writing, and that it be given to the inmate at least 24 hours in advance.").

105. Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993).

106. *See* Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 955, 956 (1974) ("Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact."); *see also* McKinnon v. Patterson, 568 F.2d 930, 940 (2d Cir.1977), *cert. denied,* 434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978) (listing "inform[ing] the inmate of what he allegedly has done so that he can prepare a defense, if he chooses, to the specific charges set forth, based on whatever evidence he can muster, given the limited time available and the lack of an opportunity to interview or call witnesses" among the purposes of the notice requirement); Hameed v. Mann, 849 F. Supp. 169, 172 (N.D.N.Y. 1994) (holding that notice received by prisoner prior to disciplinary hearing was sufficient, but acknowledging that "a notice lacking the required specifics which fail to apprise the accused party of the charges brought against him must be found to be unconstitutional because then, the accused party cannot adequately prepare a defense").

107. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2000).

108. Wolff v. McDonnell, 418 U.S. 539, 563–65, 94 S. Ct. 2963, 2978–79, 41 L. Ed. 2d 955, 956 (1974) (holding advance written notice "of the charges against him" is required by due process but not providing details for the content of the notice). Some federal courts have created certain minimum standards. For example, in *Spellmon-Bey v. Lynaugh*, the court held that notice must contain at least a description of the specific acts upon which the charges are based, as well as the times that these acts allegedly occurred, unless it is an exceptional situation where the threat to prison security interests outweighs the prisoner's interests. Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 342–43 (E.D. Tex. 1991).

and, if more than one inmate was involved in the incident, the specific role played by each inmate.[109] The regulations also require that prison officials provide translations of the notice of the charges and statements of evidence to non-English speaking prisoners.[110] In addition, non-English speaking prisoners are entitled to have a translator present at the disciplinary hearing.[111] Similar accommodations must be made for prisoners who are deaf or hard of hearing.[112]

Prison staff should bring you a copy of the written charges or "ticket." Since you may not know exactly when the proceedings will be held, you should immediately begin preparing a defense, as outlined below.

3. "Substitute Counsel" (Employee Assistant)

In *Baxter v. Palmigiano*,[113] the Supreme Court held that prisoners do not have a right to either retained or appointed counsel at disciplinary proceedings. The *Wolff* Court did, however, recognize two circumstances in which you are entitled to a "counsel-substitute" (a phrase referring either to a prison employee or a fellow prisoner who assists you in the preparation of your case). First, the Court made an exception for illiterate prisoners, who must be given assistance in preparing their cases.[114] Second, the Court stated that all prisoners should be provided assistance where "the complexity of the issue makes it unlikely that the prisoner will be able to collect and present the evidence necessary for an adequate comprehension of the case."[115] The Court did not define "complexity." Therefore, it is unclear how complex the facts involved in the alleged violation must be before you can demand the aid of an employee assistant. If you face some clear personal barrier to preparing your defense (for example: illiteracy, language, mental illness, or restrictive confinement), your claim for assistance will be stronger, and you should raise that fact with prison officials.

The New York regulations governing employee assistants are slightly more expansive than the *Wolff* standard. The regulations guarantee an employee assistant for certain prisoners, including

(1) Non-English speaking prisoners;
(2) Illiterate prisoners;
(3) Prisoners who are deaf or hard-of-hearing (who may be provided with sign language interpreters);
(4) Prisoners who are charged with drug use as a result of urinalysis tests; and
(5) Prisoners confined to a special housing unit (SHU) pending a superintendent's hearing.[116]

In the case of non-English speaking prisoners, a court held a prisoner who spoke only Spanish was entitled to meet with a Spanish-speaking assistant at least twenty-four hours before the disciplinary hearing.[117] In the case of segregated prisoners, a court ruled a prisoner who is unable to adequately prepare his or her defense because he is confined in a SHU, or has been transferred to another prison, has a due process right to assistance.[118] In such situations, correction officers have an obligation to perform

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109. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(c)(1992); *see also* Howard v. Coughlin, 190 A.D.2d 1090, 1090, 593 N.Y.S.2d 707, 708–09 (4th Dept 1993) (finding notice insufficient when it provided the wrong date for when the alleged misconduct occurred); McCleary v. LeFevre, 98 A.D.2d 866, 868, 470 N.Y.S.2d 841, 843–44 (3d Dept 1983) (finding notice was insufficient when it failed to inform prisoners of facts upon which charges were based). *But see* Vogelsang v. Coombe, 105 A.D.2d 913, 914, 482 N.Y.S.2d 348, 350 (3d Dept 1984) (referring to the disciplinary problem in question as the "incident" was sufficient notice where notice contained references to a "readily identifiable" event: a four-day riot, rule violations, and prisoner's offensive conduct).

110. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2 (1997); *see also* Reyes v. Henderson, 121 Misc. 2d 970, 971–72, 469 N.Y.S.2d 520, 521 (Sup. Ct. Albany County 1983) (holding that Spanish-speaking prisoner was denied procedural due process where he was given notice of the charges against him in English only).

111. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2 (1997).

112. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2 (1997).

113. Baxter v. Palmigiano, 425 U.S. 308, 315, 96 S. Ct. 1551, 1556–67, 47 L. Ed. 2d 810, 819–20 (1976).

114. Wolff v. McDonnell, 418 U.S. 539, 570, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

115. Wolff v. McDonnell, 418 U.S. 539, 570, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

116. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.1(a) (1997).

117. Rivera v. Smith, 110 A.D.2d 1043, 1043–44, 489 N.Y.S.2d 131, 131 (4th Dept 1985). *But see* Valles v. Smith, 116 A.D.2d 1002, 1002, 498 N.Y.S.2d 623, 624 (4th Dept 1986) rev'd on other grounds Davidson v. Smith, 69 N.Y.2d 677, 504 N.E.2d 380, 512 N.Y.S.2d 13 (N.Y. Dec 18, 1986) (finding Spanish-speaking prisoner not entitled to have employee assistant translate for him at disciplinary proceeding just as English speakers are not entitled to the employee assistants' presence at the proceeding; translation assistance from Spanish-speaking prisoner was enough).

118. *See* Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) ("[A]n assigned assistant who does nothing to assist a disabled prisoner—one who is segregated from the general prison population—has failed to accord the prisoner his limited constitutional due process right of assistance.").

investigatory tasks that the prisoner would perform for himself were he able.[119] However, note that assistants are only required to answer questions you specifically ask, and to perform tasks you specifically request.[120] Finally, if you are entitled to an assistant, New York law requires your hearing take place no less than twenty-four hours after your initial meeting with that assistant.[121]

When you receive notice of the charges against you, you will be given a list of employees who serve as employee assistants.[122] You are entitled to choose an employee assistant from the list, but you might not get your first choice. If you are given someone whom you do not want as an employee assistant, inform that person that you object to the assignment.[123] If at the time of the hearing you are still not satisfied with your employee assistant, be sure to inform the hearing officer of your objection. It is important to realize that your failure to select an employee assistant from the available list may constitute a "waiver" of any right you have to assistance (meaning you would be considered to have given up your right to assistance).[124]

The employee assistant should assist you in preparing for the hearing by explaining the charges, interviewing witnesses, and helping you obtain documentary evidence or written statements.[125] However, do not expect the employee assistant to do anything that you do not specifically ask him or her to do.[126] You *must* ask for assistance. If you fail to make an affirmative request, you waive your right to assistance. For example, in *Newman v. Coughlin*, the prisoner made a general request for assistance from the law library staff, but did not specifically request that the employee assistant help him prepare his case.[127] As a result, the prisoner bore responsibility for his own lack of representation.

On the other hand, neither due process nor New York law requires that the assistant act as your advocate the way a lawyer would, or even that the assistant be present at your hearing.[128] However, due process *does* require that your assigned assistant carry out basic, reasonable, and non-disruptive requests.[129] For example, one court held that an employee assistant's refusal to collect necessary and available evidence violated the prisoner's due process rights.[130] Another court held that an employee assistant, who did not

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119. Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) (describing the role of the employee assistant as corresponding to "those actions that an inmate facing disciplinary charges can undertake himself" when not separated from others).

120. *See* Serrano v. Coughlin, 152 A.D.2d 790, 792–93, 543 N.Y.S.2d 571, 573 (3d Dept 1989) (holding that prisoner was not denied meaningful employee assistance because he did not specify the documents he wanted produced).

121. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2000).

122. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.1(a) (1997); *see also* Jones v. Coughlin, 112 Misc. 2d 232, 234, 446 N.Y.S.2d 849, 850–51 (Sup. Ct. Albany County 1982) (finding that prisoner's due process rights were violated when prison designated employee assistant other than one prisoner had selected, despite prisoner's oral and written objections).

123. You may also write to the superintendent and request your original choice.

124. *See* Walker v. Coughlin, 202 A.D.2d 1034, 1034, 609 N.Y.S.2d 471, 471 (4th Dept 1994) (holding that prisoner waived his right to employee assistant by refusing to sign employee assistant selection form).

125. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.2 (1997).

126. *See* Horne v. Coughlin, 155 F.3d 26, 29, 31 (2d Cir. 1998), *amended by* 191 F.3d 244 (2d Cir. 1999). In the case, a mentally retarded prisoner was sentenced to six months in the SHU and six months recommended loss of good time. The prisoner argued that his employee assistant should not have merely followed his instructions but should also have developed a defense strategy. The court disagreed, saying that the assistant was not required to do anything besides follow the specific instructions of the inmate. The court also found that six months in the SHU did not constitute cruel and unusual punishment of a retarded person.

127. Newman v. Coughlin, 110 A.D.2d 981, 981, 488 N.Y.S.2d 273, 274 (3d Dept 1985).

128. *See* Gunn v. Ward, 71 A.D. 2d 856, 856, 419 N.Y.S. 2d 182, 183 (2d Dept 1981) (holding failure of employee assistant to appear at superintendent's proceeding violates neither New York law nor a prisoner's right to due process).

129. *See* Silva v. Casey, 992 F.2d 20, 22 (2d Cir. 1993) (discussing the duties of employee assistants and holding that (1) prisoner has no constitutional right of assistance per *Wolff v. McDonnell* so that failure of assistant to call other prisoners involved in alleged violation did not violate prisoner's due process rights, and (2) assistant had no obligation to go beyond bounds of prisoner's specific instructions in interviewing prisoners and gathering evidence); *see also* Tumminia v. Coughlin, 100 A.D.2d 732–33, 732, 473 N.Y.S.2d 618, 619 (4th Dept 1984) (finding that assistant's failure to investigate prisoner's reasonable factual claim violates due process); Hilton v. Dalsheim, 81 A.D.2d 887, 888, 439 N.Y.S.2d 157, 158 (2d Dept 1981) (finding that assistant's failure to interview witnesses as requested by prisoner violates the prisoner's rights under New York law).

130. *See* Giano v. Sullivan, 709 F. Supp. 1209, 1215 (S.D.N.Y. 1989) (holding that the prisoner was denied his constitutional right to assistance in a disciplinary hearing when the employee assistant refused to obtain documentary evidence for the prisoner, and then proceeded with the hearing despite the prisoner's protest that he was not prepared).

report back to the prisoner with the results of his investigation and witness interviews, deprived the prisoner of his right to defend himself.[131]

You may or may not want to give the employee assistant "your side of the story." The advantage to telling your story is that the employee assistant might be able to use this information to help you exercise your limited right to find witnesses, as described in the next Section. However, one disadvantage is that if the story you tell your employee assistant differs from the testimony you give at your hearing, prison officials can hold this against you. The discrepancy may damage your credibility and give prison officials an excuse to discredit your testimony.

4. Witnesses

Wolff v. McDonnell recognized your limited constitutional right to call witnesses at disciplinary hearings.[132] In *Wolff*, the Court stated that a prisoner in a disciplinary proceeding "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[133] In other words, you can call witnesses unless prison officials decide that allowing you to do so would negatively impact either the safety of the prison or the prison officials' ability to operate the prison. Furthermore, prison officials are not required to call every witness you request to testify for you. A prison official may exercise his "discretion to keep the hearing within reasonable limits."[134] This has been interpreted to mean that the official may decline to call witnesses whose testimony would be immaterial[135] or unduly redundant.[136]

This qualified constitutional right to call witnesses was initially expanded and clarified in *Powell v. Ward*, also known as *Powell II*.[137] In *Powell II*, the court stated that while prisoners may not be able to call witnesses to testify in the prisoner's presence at a hearing, "witnesses must be allowed to be present at disciplinary proceedings, unless the appropriate officials determine that their presence would jeopardize institutional safety or correctional goals."[138] If it is determined that witnesses may not be present at the disciplinary hearing, the witness may be interviewed and tape-recorded out of your presence. The tape or transcript of the interview must be made available to you before or at the hearing, unless the hearing officer decides that this also "would jeopardize institutional safety or correctional goals."[139] In such a case, you must be given an explanation for the denial.[140]

Under New York regulations, the notice that you receive before the hearing must inform you of your right to call witnesses.[141] You may request a witness either by informing your employee assistant or hearing officer before the hearing, or by informing your hearing officer during the hearing.[142] You have a right to request that your employee assistant interview prisoner witnesses. If your employee assistant interviews witnesses outside of your presence, you also have a right to receive a tape or transcript of the interview or an explanation of their denial.[143]

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131. *See* Brooks v. Scully, 132 Misc. 2d 517, 519, 504 N.Y.S.2d 387, 389 (Sup. Ct. Dutchess County 1986) (holding that the failure of the employee assistant to inform the prisoner of investigation results and interviews with witnesses deprived the prisoner of meaningful and effective assistance in preparation for a disciplinary hearing).

132. Wolff v. McDonnell, 418 U.S. 539, 566–67, 94 S. Ct. 2963, 2979–80, 41 L. Ed. 2d 935, 956–57 (1974).

133. Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

134. Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956–57 (1974).

135. *See* Finney v. Coughlin, 2 F. App'x. 186, 191(2d Cir. 2001) (stating that a prison hearing officer may exercise his "discretion to keep the hearing within reasonable limits" by declining to call immaterial witnesses to testify).

136. *See* Russell v. Selsky, 35 F.3d 55, 59 (2d Cir. 1994) (finding that disciplinary hearing officer did not violate any of the prisoner's rights in excluding certain witness testimony as "cumulative," where the officer had already heard substantially identical testimony from earlier witnesses).

137. Powell v. Ward, 487 F. Supp. 917 (S.D.N.Y. 1980), *aff'd*, 643 F.2d 924 (2d Cir. 1981).

138. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

139. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

140. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980)*; see also* Ponte v. Real, 471 U.S. 491, 492, 105 S. Ct. 2192, 2193–94, 85 L. Ed. 2d 553, 556 (1985) (although due process requires that prison officials state their reasons for refusing to call witnesses, such reasons do not have to be in writing or made part of the administrative record).

141. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(2) (1995).

142. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5(c) (2000); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5(c) (2004).

143. *See* Burke v. Coughlin, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept 1983) (stating that New York State regulations give prisoners the right to have a chosen employee interview any witnesses requested in investigating the prisoner's reasonable factual claims and submit a written report including witness statements).

If permission to call a witness is denied, you must receive a written statement from the hearing officer that specifically states the reasons for the denial, including the specific threat to institutional safety or correctional goals presented.[144] Statements that give a conclusion without an explanation, like "[it] does not meet with Security Procedure or Correctional goals for you to be present during those interviews," have been found by courts to be insufficient.[145] Although the explanation that a witness' testimony is "redundant" (meaning it repeats evidence available from other sources) can be a valid reason to deny you a witness, prison officials do not always have unlimited discretion to decide that fact.[146] On the other hand, courts do not require these explanations to be detailed. Rather, the court "must accord due deference to the decision of the [prison] administrator."[147] The court will uphold the prison official's denial even if the witness could have provided testimony that might have cleared the prisoner.[148] When prison officials base their decision to deny witnesses on security concerns, courts will almost always uphold that determination.[149]

5. Confronting and Cross-Examining Witnesses

Even though you generally have the right to call witnesses on your behalf, the Supreme Court in *Wolff v. McDonnell* held that you do not have a constitutionally guaranteed right to confront and cross-examine the other side's witnesses (ask them questions). The Court found that such a right would create "considerable potential for havoc [problems] inside prison walls."[150] One court interpreting *Wolff* described the security issues posed by confrontation and cross-examination as being concerned with the likelihood of retaliation against adverse witnesses and informants (those testifying unfavorably or against you), which can often result in death or injury, in addition to the "potential for breakdown in authority."[151] Due to the prison's strong interest in preserving safety, the right to confront and cross-examine adverse witnesses is much more limited than the right to present witnesses who testify on your behalf. Whether you will be allowed to confront and cross-examine witnesses is left up to the prison officials.[152] Prison officers are not required

144. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5(a) (2000), N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5(a) (2004); *see also* Moye v. Selsky, 826 F. Supp. 712, 716–17 (S.D.N.Y. 1993) (prison officials may have to give prisoners an explanation for exclusion of witnesses from disciplinary hearing).

145. *See* People *ex rel.* Selcov v. Coughlin, 98 A.D.2d 733, 735, 469 N.Y.S.2d 148, 151 (2d Dept 1983) (holding that without evidence that prisoner's presence would create any threat to prison security or correctional goals, prisoner's due process rights were violated).

146. *See* Fox v. Coughlin, 893 F.2d 475, 477–78 (2d Cir. 1990) (holding that officials did not deprive prisoner of clearly established statutory or constitutional rights where they called only some of the witnesses he requested); Wong v. Coughlin, 137 A.D.2d 272, 274, 529 N.Y.S.2d 45, 46 (3d Dept 1988) (removing disciplinary violation from prisoner's record where hearing officer's basis for refusing to allow officer who had prepared misbehavior report to testify was based only on guessing or predicting that his testimony would be redundant); Fox v. Dalsheim, 112 A.D.2d 368, 369, 491 N.Y.S.2d 820, 821 (2d Dept 1985) (holding that hearing officer abused his discretion where he refused to call two of the witnesses requested by prisoner due to "redundancy of the testimony"). In *Fox v. Dalsheim*, the court said that "[a]lthough the revised superintendent's hearing rules and regulations ... now permit exclusion of a witness' testimony when it is redundant or immaterial, this provision does not afford the hearing officer the unlimited right to exclude testimony relevant to an inmate's defense." Fox v. Dalsheim, 112 A.D.2d 368, 369, 491 N.Y.S.2d 820, 821 (2d Dept 1985).

147. Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995) (holding hearing officer's denial of request for gallery listing so prisoner could identify other possible witnesses did not violate due process).

148. Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995).

149. *See*, *e.g.*, Laureano v. Kuhlmann, 75 N.Y.2d 141, 147–48, 550 N.E.2d 437, 440–41, 551 N.Y.S.2d 184, 187–88 (1990) (denial of right to call witness upheld where hearing officer informed prisoner that victim of assault feared retaliation, and officer showed prisoner form where witness indicated desire not to testify); Cortez v. Coughlin, 67 N.Y.2d 907, 909, 492 N.E.2d 1225, 1225, 501 N.Y.S.2d 809, 809 (1986) (exclusion of prisoner from his disciplinary hearing during prisoner testimony upheld on the basis of institutional safety and disciplinary reports documenting violent behavior; prisoner allowed to listen to taped testimony instead).

150. Wolff v. McDonnell, 418 U.S. 539, 567, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 957 (1974).

151. Smith v. Farley, 858 F. Supp. 806, 817 (N.D. Ind. 1994) (citing Young v. Kann, 926 F.2d 1396, 1400 (3d Cir. 1991)), *aff'd*, Smith v. Parke, 56 F.3d 67 (7th Cir. 1995) (finding violation of prisoner's due process rights where prisoner was denied his request to admit a letter that could potentially clear his name, without valid security concerns being provided for the denial).

152. *See* Sanchez v. Roth, 891 F. Supp. 452, 458 (N.D. Ill. 1995) (holding that where prisoner did not follow proper procedure for requesting witnesses, prison officials' refusal to allow witnesses to testify at disciplinary proceeding did not violate prisoner's due process rights).

under the Due Process Clause to provide you with a written report of the reasons for denying you the right to confront your accusers or to cross-examine witnesses.[153]

In New York, courts have held that prisoners do not have the right to be present when adverse witnesses testify.[154] But, prison officials must provide some objective evidence to support a decision to interview witnesses outside your presence.[155] They may also be required to give you a tape or transcript of the testimony, if doing so does not undermine the prison's interest in safety. For example, in *Martin v. Coughlin*, a disciplinary ruling was dismissed where the state refused to provide the prisoner with a tape or transcript of a witness' testimony without giving any reason for the denial.[156] Also, if a hearing officer intends to consider information that will be kept confidential from the prisoner, he must at least inform the prisoner of that intention and give some reason for keeping the information confidential.[157] Despite these limits, you can always ask the hearing officer to question adverse witnesses for you. However, prison officials are not required to ensure informants are telling the truth; the Due Process Clause does not usually require prison officials to assess the reliability of confidential informants testifying during disciplinary hearings. Prison officials are only required to judge the reliability of confidential informants in situations where the prisoner has an established right to such a judgment. If your version of the event differs from the witness' version, point this difference out to the hearing officer and comment on the evidence presented at the hearing.

6. "Impartial" Hearing Officer

According to *Wolff v. McDonnell*, you have the right to have an impartial (unbiased) hearing officer preside over your disciplinary proceeding.[158] The hearing officer does not have to meet the strict standard of impartiality that applies to judges.[159] But, the officer must not be so biased against you as to create a "hazard of arbitrary decision making ... violative of due process."[160] To prove bias, you must provide "evidence that the decision maker has actually prejudged the case or [had a] direct personal involvement in the underlying charge."[161] For example, one court found a hearing officer's refusal to consider introduced evidence to be proof of possible bias.[162] The court explained, "where a hearing officer indicates on the record

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153. *See* Ponte v. Real, 471 U.S. 491, 492, 105 S. Ct. 2192, 2193–94, 85 L. Ed. 2d 553, 556 (1985) (holding that the superintendent was not constitutionally required to provide reasons in the administrative record for refusing to allow respondent to call requested witnesses). *But see* Scarpa v. Ponte, 638 F. Supp. 1019, 1023 (D. Mass. 1986) (distinguishing *Ponte* because in that case, prison officials failing to provide reasons in the administrative record had an explanation related to safety or correctional goals).

154. *See* Graham v. N.Y. State Dept. of Corr. Servs., 178 A.D.2d 870, 870, 577 N.Y.S.2d 728, 729 (3d Dept 1991) (holding that the prisoner did not have the right to be present during the testimony of a witness called by the Hearing Officer because "the right to be present applies only when an inmate calls a witness"); Honoret v. Coughlin, 160 A.D.2d 1093, 1094, 533 N.Y.S.2d 573, 574–75 (3d Dept 1990) (dismissing the prisoner's claim that his due process rights were violated when he was not allowed to be present at the testimony of a witness called by the Hearing Officer).

155. *See* Burnell v. Smith, 122 Misc. 2d 342, 347, 471 N.Y.S.2d 493, 497 (Sup. Ct. Wyoming County 1984) (removing disciplinary violation from prisoner's record where no substantive reason was given for refusal to allow prisoner to be present during witness's testimony).

156. Martin v. Coughlin, 139 A.D.2d 650, 651, 526 N.Y.S.2d 1018, 1018 (2d Dept 1988).

157. *See* Boyd v. Coughlin, 105 A.D.2d 532, 533, 481 N.Y.S.2d 769, 770 (3d Dept 1984) (holding that "it is fundamental that the hearing officer must, at the time of the hearing, inform the inmate that he will consider certain information which will remain confidential and articulate some reason for keeping the information confidential"); Freeman v. Coughlin, 138 A.D.2d 824, 826 (3d Dept 1988) (applying the *Boyd* rule to find the hearing officer's decision to keep information confidential without informing the prisoner was not a harmless error, resulting in a new hearing for the prisoner). *But see* Laureano v. Kuhlman, 75 N.Y.2d 141, 147, 550 N.E.2d 437, 440, 551 N.Y.S.2d 184, 187 (N.Y. 1990) ("[A] disciplinary determination cannot stand when a denial of the inmate's request to call a witness, or to be present when his witness testifies, is wholly unexplained, but will not be set aside if the record discloses the basis for denial.").

158. Wolff v. McDonnell, 418 U.S. 539, 592, 94 S. Ct. 2963, 2992, 41 L. Ed. 2d 935, 972 (1974).

159. Moore v. Selsky, 900 F. Supp. 670, 676 (S.D.N.Y. 1995) (finding that a hearing officer may be allowed to have a predetermined view that a scientific test for evidence is reliable, so long as the hearing officer would be willing to consider impartially that he may be mistaken in his view).

160. Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959–60 (1974).

161. Wade v. Farley, 869 F. Supp. 1365, 1376 (N.D. Ind. 1994) (citing Underwood v. Chrans, 1992 U.S. Dist. LEXIS 12616, at *10 (N.D. Ill. Aug. 20, 1992) (*unpublished*)) (holding that although hearing officer had been involved in prisoner's previous disciplinary proceeding, he was impartial with respect to present proceeding); *see, e.g.*, Francis v. Coughlin, 891 F.2d 43, 46 (2d Cir. 1989) (noting that a prison disciplinary hearing in which the result is arbitrarily and adversely predetermined violates a prisoner's right to due process).

162. *See* Colon v. Coughlin, 58 F.3d 865, 871 (2d Cir. 1995) (holding that where a hearing officer "indicates on the

that, without considering the evidence, he finds a prisoner's factual defense inconceivable, we cannot conclude that the prisoner had a full and fair opportunity to litigate the issue."[163] In another case, the court dismissed a disciplinary determination where a hearing officer's remarks and attitude (especially the remark, "Okay now. You have to convince me that you're not guilty") suggested bias against the prisoner.[164]

The New York regulations touch on the issue of impartiality, but they do not in any way guarantee you an impartial hearing officer. There are different rules for disciplinary hearings and for superintendent hearings. An officer of the rank of lieutenant or above may preside over a disciplinary hearing.[165] In a disciplinary hearing, the regulations prohibit the appointment of a hearing officer who has (1) participated in the investigation; or (2) prepared or ordered the preparation of the misbehavior report.[166] Generally, a superintendent's hearing will be conducted by the superintendent, deputy superintendent, captain, or commissioner's hearing officer. In superintendent hearings, the regulations prohibit the use of a hearing officer who: (1) actually witnessed the event; (2) was directly involved in the incident; (3) is a review officer who reviewed the misbehavior report; or (4) has investigated the incident.[167] Note that the superintendent may in his discretion permit other correctional facility employees to act as hearing officers in a superintendent's or disciplinary hearing.[168]

If you feel your hearing officer is biased, you should think about making an objection. You should also consider objecting if your hearing officer is closely connected to prison security or known to have a strong dislike for prisoners. Remember that it is usually to your advantage to make any possible objections at your hearing so that you create a strong "record" for future appeals.

7. "Use" Immunity

Most violations of prison regulations are punished solely through disciplinary proceedings within the prison. Sometimes a violation of a prison rule will also be a violation of a criminal statute. To take an extreme example, stabbing a guard is certainly a severe violation of prison regulations. More importantly, it is also a criminal offense for which a prisoner can be tried and convicted in court.

A situation like the one described above raises special problems. You might feel compelled to testify at the proceeding in order to avoid a potentially severe punishment. On the other hand, you may worry that something you say at your hearing could incriminate you in a later criminal trial.

To avoid this problem, prisoners often seek "use" immunity in disciplinary hearings. "Use" immunity does not immunize you from prosecution, but it prevents any statements you make at your disciplinary hearing from being used against you in such prosecution. Immunity in criminal proceedings comes from the U.S. Constitution's Fifth Amendment privilege against self-incrimination. An individual accused of a crime has the right to remain silent. Nonetheless, when the state demands that you testify, the state must grant "use" immunity. If you choose not to testify in your disciplinary hearing and your silence is used as evidence of your guilt, you must also be granted "use immunity." If that was not the case, the state would be punishing you for exercising your Fifth Amendment right.

The Supreme Court faced this dilemma in *Baxter v. Palmigiano*,[169] which involved a prisoner facing disciplinary action for violations that were also crimes under state law. The *Baxter* Court held that while a prisoner's silence can be considered evidence of guilt in a disciplinary proceeding,[170] silence alone is not enough. Other evidence must be produced in order to establish guilt.[171]

If a prisoner chooses to testify in cases where he is not required or compelled to testify, according to *Baxter*, any statements he makes at disciplinary hearings can be used against him in subsequent criminal

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record that, without considering the evidence, he finds a prisoner's factual defense inconceivable," the prisoner did not have "a full and fair opportunity to litigate the issue").

163. Colon v. Coughlin, 58 F.3d 865, 871 (2d Cir. 1995).

164. Tumminia v. Kuhlmann, 139 Misc. 2d 394, 397, 527 N.Y.S.2d 673, 675 (Sup. Ct. Sullivan County 1988).

165. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(a) (2000).

166. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(b) (2000).

167. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1 (2004). See Part E of this Chapter for an explanation of "superintendent's," "disciplinary," and "violation" hearings, which are the three types of hearings in New York State.

168. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(a) (2000); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1 (2004).

169. Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

170. Baxter v. Palmigiano, 425 U.S. 308, 317–18, 96 S. Ct. 1551, 1557–58, 47 L. Ed. 2d 810, 821 (1976).

171. Baxter v. Palmigiano, 425 U.S. 308, 317–18, 96 S. Ct. 1551, 1557–58, 47 L. Ed. 2d 810, 821 (1976).

proceedings.[172] Therefore, a prisoner does not have a constitutional right to immunity in those cases. Where the prisoner must testify, however, "use" immunity must be granted to protect his Fifth Amendment right to remain silent.[173] In reality, it is unlikely that after *Baxter* prison officials will compel a prisoner to testify since: (1) adverse inferences may be drawn from a prisoner's silence; and (2) the problem of whether to grant immunity can be avoided if the official does not compel testimony.

New York currently grants prisoners "use" immunity at all disciplinary proceedings.[174] You have the right to "use" immunity even if criminal charges have not been filed against you. You must be notified of your right in the following language: "You are hereby advised that no statement made by you in response to the charge, or information derived therefrom may be used against you in a criminal proceeding."[175] This warning will appear in the notice of charges, which must be given to you at least twenty-four hours before the proceeding. Because there are grave dangers associated with disciplinary proceedings that could be followed by a criminal trial, you should consult with your criminal attorney, if you have one, before you make any formal or informal statements in regard to the events in question.

8. The Ruling and the Requirement of a Written Record

At the close of the proceeding, the hearing officer may, at his discretion, do one of several things. He may affirm or dismiss charges, or he may affirm some charges and dismiss others.[176] The only requirement is that some evidence support the hearing officer's final decision. This standard is very low. It does not require the hearing officer to produce substantial evidence or a preponderance of evidence against you. Generally, if any evidence exists at all, the court will uphold the hearing officer's conclusion. Also, the fact finder (here, the hearing officer) is not required to make a decision solely upon the evidence presented at the hearing. In *Baxter v. Palmigiano*,[177] the Supreme Court explained that, in the unique prison environment, facts that may not come to light until after the formal hearing should not be excluded in determining what happened, since they may help officials understand the incident and tailor penalties to further penal goals. The Court also clarified that the fact finder must provide a written statement of the evidence that he relied on and the reasons for the disciplinary action taken.[178]

Often, the only or primary evidence against a prisoner is the misbehavior report itself. New York's regulations require that misbehavior reports present a detailed written account of the alleged incident, so the report alone may provide enough evidence to support a disciplinary ruling.[179] In one case where reports merely restated that all of the prisoners in the mess hall were part of a disturbance, without describing their specific misbehavior, the evidence was found insufficient to support a disciplinary finding against them.[180]

With certain exceptions, *Wolff v. McDonnell* also guarantees your constitutional right to receive, from the hearing officer, a written statement of the evidence relied upon, and a statement of the reasons for the

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172. Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976). Please note that you can be compelled to testify at your prison disciplinary proceeding.

173. Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976). "Use" immunity must be granted where a defendant is forced to give up his right to remain silent, but immunity need not be granted where no right to remain silent exists. If you are incarcerated outside of New York, you should research your state's rules and regulations governing disciplinary proceedings to find out whether you can get some form of immunity at your disciplinary proceeding. See Chapter 2 of the *JLM* on how to conduct legal research.

174. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (1995). New York City, on the other hand, differs from New York state, such that prisoners in city jails are ordinarily not granted "use" immunity. Interview with Kenneth Stephens, Esq., The Legal Aid Society, Prisoners' Rights Project (Dec. 1, 1999).

175. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (1995).

176. Superintendent, Mass. Correctional Inst., Walpole v. Hill, 472 U.S. 445, 455–56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985) (stating that the due process standard that determines whether the decision of a prison disciplinary board is justified, is whether there is any evidence in the record that could support the board's conclusion).

177. Baxter v. Palmigiano, 425 U.S. 308, 322 n.5, 96 S. Ct. 1551, 1560 n.5, 47 L. Ed. 2d 810, 824 n.5 (1976).

178. Baxter v. Palmigiano, 425 U.S. 308, 322 n.5, 96 S. Ct. 1551, 1560 n.5, 47 L. Ed. 2d 810, 824 n.5 (1976).

179. *See* James v. Strack, 214 A.D.2d 674, 675, 625 N.Y.S.2d 265, 266 (2d Dept 1995) (holding that the misbehavior report was "sufficiently detailed, relevant and probative to constitute substantial evidence supporting the Hearing Officer's finding of guilt"); Nelson v. Coughlin, 209 A.D.2d 621, 621, 619 N.Y.S.2d 298, 299 (2d Dept 1994) (holding misbehavior report provided substantial evidence that prisoner violated rule prohibiting prisoners from making or possessing alcoholic beverages and that officials were not required to chemically test beverage for presence of alcohol).

180. *See* Bryant v. Coughlin, 77 N.Y.2d 642, 649–50, 572 N.E.2d 23, 26–27, 569 N.Y.S.2d 582, 585–86 (1991) (concluding that misbehavior reports, which did not specify the particulars of prisoner misconduct and only alleged a mass incident, were insufficient).

decision.[181] This requirement prevents the hearing officer from merely stating that you were found guilty of a particular offense based on certain interviews and reports without providing enough detail. The hearing record must include reasons for the decision, copies of any reports relied on, and summaries of any interviews conducted.[182] In addition, New York regulations provide that you must receive the written statement as soon as possible, and no later than twenty-four hours after the end of the hearing.[183]

Constitutional and New York standards allow the hearing officer to exclude (keep out) items of evidence from the written statement that, if presented, would threaten "personal or institutional safety." For example, in *Laureano v. Kuhlmann*, New York's highest court ruled a hearing officer did not have to disclose to the prisoner the details of a confidential informant's testimony or circumstances that might reveal his identity, where the officer provided a revised summary of essential points of the testimony.[184] If evidence has been excluded, the written statement you receive informing you of the decision must explain this.[185]

The written statement and the tape recording of the hearing will be central parts of your disciplinary hearing "record." This record is very important; the court will examine it if you seek judicial review of an unfavorable disciplinary hearing decision in state or federal court.

E. New York Disciplinary Proceedings and Appeal Procedures

1. Types of Disciplinary Proceedings

New York regulations create a three-tier disciplinary system. Violation hearings, which are used for minor offenses, make up the first tier. Disciplinary hearings, which are used for serious offenses, make up the second tier. Finally, superintendent's hearings, which are for the most serious offenses, make up the third tier. The nature of the wrongdoing of which you are accused determines both the type of hearing that you face and the type of punishment you can receive. *Sandin v. Conner* drastically affects New York's three-tier system. Under that case, prisoners are entitled to due process only when the punishment they receive constitutes an "atypical and significant hardship ... in relation to the ordinary incidents of prison life."[186] In other words, if the court does not regard the punishment you are given as especially severe, there is no requirement to hold a hearing beforehand. Whether a punishment is severe is based on the specific facts of your case.[187] The punishments imposed after violation and disciplinary hearings, such as loss of privileges and placement in disciplinary segregation, do not satisfy *Sandin*'s "atypical and significant hardship" test. Only the more severe punishments imposed after superintendent's hearings—loss of good-time credits or segregated confinement for lengthy periods—can trigger due process protection under *Sandin*.

Accordingly, New York is not constitutionally required to conduct violation and disciplinary hearings at all. However, the regulations still provide for all three types of hearings, and prison officials are required to follow their own rules.[188] For example, if a prison official decided to revoke your visiting privileges or to place you in a SHU for no reason at all without giving you a hearing, you could file an appeal within the prison system. In a case like the one above, however, you could not seek relief in federal court because according to *Sandin*, you no longer have a constitutional right to be free from all arbitrary and unfair punishment, only from "atypical and significant" punishment.[189] It is still unclear whether you could appeal your case

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181. Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

182. *See* McQueen v. Vincent, 53 A.D.2d 630, 631, 384 N.Y.S.2d 475, 476–77 (2d Dept 1976) (remanding case to determine whether due process requirements were met in light of incomplete hearing record); *see also* People *ex rel.* Lloyd v. Smith, 115 A.D.2d 254, 255, 496 N.Y.S.2d 716, 717 (4th Dept 1985) (holding failure to include superintendent's proceeding minutes in the record made adequate review impossible, resulting in remand for review of minutes).

183. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(5) (2007); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(5) (2007).

184. Laureano v. Kuhlmann, 550 N.E.2d 437, 441, 75 N.Y.2d 141,148, 551 N.Y.S.2d 184, 188 (1990).

185. Wolff v. McDonnell, 418 U.S. 539, 565, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

186. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

187. Miller v. Selsky, 111 F.3d 7, 8 (2d Cir. 1997) ("*Sandin* did not create a per se blanket rule that disciplinary confinement may never implicate a liberty interest."); Lee v. Coughlin, 26 F. Supp. 2d 615, 635 (S.D.N.Y. 1998) (arguing *Sandin* "did not say that segregated confinement could never constitute an atypical and significant hardship").

188. *See* Uzzell v. Scully, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (stating that, because prison officials must adhere to their own rules, prisoners may administratively challenge their keeplock confinement by raising procedural error claims).

189. *See* Cliff v. De Celle, 260 A.D.2d 812, 814, 687 N.Y.S.2d 834, 835 (3d Dept 1999), *app. denied*, 93 N.Y.2d 814, 719 N.E.2d 922, 697 N.Y.S.2d 561 (1999) (holding that because the maximum penalty that could be imposed would be

successfully in a New York state court. New York must follow the minimum due process rules set out in *Sandin*, which means it has to comply with due process of law before it can subject a prisoner to an "atypical and significant hardship."[190] New York can choose to give prisoners more rights than federal law requires, but it cannot provide fewer rights. Therefore, when reviewing the rest of this Section, bear in mind that if prison officials violate these rules, the federal courts will not be able to remedy the situation unless your case involves revocation of good-time credits or some similarly severe punishment.

Under New York's regulations, both disciplinary and superintendent's hearings may result in loss of one or more specified privileges for a specific period.[191] Where the prisoner has been involved in improper conduct related to correspondence or visiting privileges with a particular person, a superintendent's hearing may result in loss of those privileges with that person.[192] Disciplinary hearings may not result in loss of correspondence privileges and cannot lead to the loss of visiting privileges for more than thirty days.[193] Both types of hearings may result in confinement in your cell (keeplock) or in a SHU, but disciplinary hearings may only result in such confinement for up to thirty days.[194] Restitution (the payment of money) may be required for loss or intentional damage to property at both hearings.[195] A superintendent's hearing may result in a restricted diet[196] and loss of a specific period of good time.[197] Both types of hearings may allow for a delay before any penalty is imposed.[198]

The punishments that violation officers may impose after violation hearings are less severe than the punishments listed above. If the violation officer finds you guilty of committing an offense, he or she can order any two of the following penalties to be served within a thirteen-day period:[199]

(1) Loss of all or part of recreation (for example, game room, day room, television, movies, yard, gym, special events) for up to thirteen days;[200]

(2) Loss of at most two of the following privileges: one commissary buy (excluding items related to your health and sanitary needs), withholding of radio for up to thirteen days, withholding of packages for up to thirteen days (excluding perishables that cannot be returned);[201]

(3) The imposition of one work task per day, other than a regular work assignment, for a maximum of seven days (excluding Sundays and public holidays), to be performed on the prisoner's housing unit or other designated area (must be not more than eight hours per day); and[202]

(4) Counsel and/or reprimand.[203]

The violation officer has discretion to suspend these punishments for thirteen days.[204]

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loss of privileges and/or confinement of no longer than 30 days, the punishment is not "atypical or significant").

190. Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

191. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(ii) (2000) (period specified for loss of privileges as a result of disciplinary hearings is "up to 30 days"); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1) (2007).

192. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(ii) (2004).

193. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(ii) (2000). New York procedures for the suspension of visitation rights are contained within a consent decree issued in *Kozlowski v. Coughlin*, 539 F. Supp. 852 (S.D.N.Y. 1982), *den. of modif. aff'd*, 871 F.2d 241 (2d Cir. 1989).

194. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(iii) (2000); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(iii) (2004).

195. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(v) (2004); N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(iv) (1996). At disciplinary hearings, restitution is limited to $100.

196. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(iv) (2004). The diet must at all times contain a "sufficient quantity of wholesome and nutritious food." N.Y. Comp. Codes R. & Regs. tit. 7, § 304.2(e) (2007). While there has not been litigation about this, it is possible that at some point, the diet provided may be so unhealthy as to amount to "cruel and unusual punishment" in violation of the 8th Amendment. For a discussion of the 8th Amendment, see *JLM*, Chapter 16, "42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

197. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(vii) (2004).

198. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(4) (2004); N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(4) (1996). The specified time period for suspensions is up to 180 days from a superintendent's hearing and up to 90 days from a disciplinary hearing.

199. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a) (1997).

200. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(1) (1997).

201. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(2) (1997).

202. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(3) (1997).

203. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(4) (1997).

204. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a) (1997).

A review officer can order any one of the three types of hearings to be held (violation, disciplinary, or superintendent's hearings). The choice will depend on the seriousness of the reported offense.[205] Reports of prisoner misbehavior may come to the attention of the review officer in the following way: if a guard, or any other prison employee, believes that you have committed a violation that creates a "danger to life, health, security, or property," a formal report of your conduct (referred to by prisoners as a "ticket") must be filed "as soon as practicable" with the review officer.[206] The staff person who observed the alleged violation (or who got the facts) must report in writing the nature, date, time, and place of its occurrence.[207] An employee is not required to be absolutely certain or even have a reasonable suspicion that a prisoner broke the rules before formal charges may be filed. Minor infractions or other violations of rules and policies governing prisoner behavior "that do not involve danger to life, health, security, or property" need not be reported.[208] The misbehavior report becomes the basis for the review of an officer's choice of the type of hearing to be held.

An officer will place you in solitary confinement if he or she believes you present an "immediate threat to the safety, security or order of the facility, or an immediate danger to other persons or to property."[209] The regulations state that you may not be confined to your cell or elsewhere for more than seven days without a hearing.[210] Such a hearing must be completed within fourteen days, unless a delay is authorized.[211] If you are placed in keeplock or a Special Housing Unit (SHU) solely because of the charges against you, your hearing must begin within seven days of being confined, unless special circumstances exist.[212] An officer may also confine you to your cell or room for your own protection, but you can only be confined for seventy-two hours and, within that time period, you must be transferred to another housing unit, scheduled for transfer to another facility, released from confinement, or placed in protective custody.[213]

The validity of the rules stated above is questionable in light of *Sandin v. Conner*. A federal court in New York has suggested that *Sandin v. Conner* undermines the validity of New York regulations that afford prisoners liberty interests in remaining free from administrative and disciplinary segregation.[214] You may be able to assert rights under these regulations within the prison system or possibly in state court, but you will not be able to assert constitutional rights in federal court.

2. Important Exceptions at Violation Hearings

At violation hearings, you will not be entitled to all of the rights you have at disciplinary or superintendent's hearings. For example, before disciplinary and superintendent's hearings, you must receive written notice about the hearing, but violation hearings do not require written notice. Therefore, you may not have enough time to prepare your defense. However, once the misbehavior report is written against you, the violation hearing must be held within seven days.[215]

The regulations grant you the right to be present at your violation hearing.[216] This right gives you a chance to defend yourself by orally explaining your version of the events to the violation officer, presenting documentary evidence (for example, a time card showing your presence at your work-station rather than at the scene of the alleged incident), or submitting a written statement on your own behalf.[217] You do not,

205. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-2.2(b) (2004).
206. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(a) (1995).
207. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(b), (c) (1995).
208. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.5 (1995).
209. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.6(a) (1995).
210. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(a)–(c) (1995).
211. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(b) (1995).
212. *See* Gittens v. LeFevre, 891 F.2d 38, 42–43 (2d Cir. 1989) (holding that failure of New York regulations to provide prisoners an adequate opportunity to be heard within a reasonable time of their administrative confinement (more than a seven days wait was unreasonable) violates due process requirements, but that officials had acted reasonably in reliance on New York regulations which were unclear at that time). *But see* Scott v. Coughlin, 727 F. Supp. 806, 809–10 (W.D.N.Y. 1990) (holding that prisoner's due process rights were violated where he was confined to keeplock for 14 days without a misbehavior report being issued or a disciplinary hearing being conducted).
213. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.6(b) (1995).
214. *See* Rodriguez v. Phillips, 66 F.3d 470, 479–80 (2d Cir. 1995) (holding that prison officials' belief that prisoner's three-day administrative confinement, without opportunity to be heard, did not violate prisoner's 14th Amendment due process rights was reasonable).
215. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(c) (1995).
216. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(2) (1997).
217. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(3) (1997).

however, have the right to call witnesses at violation hearings,[218] which might make it difficult for you to prove your version of the events. If you believe you have been accused of an offense you did not commit, request the violation officer to investigate further before issuing a decision.

The differences among the three types of disciplinary proceedings can be confusing. To simplify matters, the differences among the rights you have are illustrated in Figure I:

Disciplinary/Superintendent's Hearing	Violation Hearing
Written notice that a proceeding will be held at least twenty-four hours before the hearing.[219]	Written notice of charges at the hearing.[220]
Hearing must be completed within fourteen days after report, unless authorized by the commissioner.[221]	Hearing must be completed within 7 days after report.[222]
Limited right to substitute counsel.[223]	No right to substitute counsel.
Right to appear before the hearing officer.[224]	Right to appear before the violation officer.[225]
Limited right to call witnesses.[226]	No right to call witnesses.[227]
Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.)[228]	Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.)[229]
Right to an impartial hearing officer.[230]	No declared right to an impartial violation officer.
Right to receive a copy of a written record of the disposition.[231]	Right to receive a copy of a written record of the disposition.[232]

218. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(3) (1997).

219. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2000) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6(a)(1) (2004) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974) (holding that notice is only required for hearings where more rights are at stake such as a disciplinary or superintendent hearing but not a violation hearing).

220. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(1) (1997).

221. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(b) (1995).

222. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(c) (1995).

223. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.4 (2000) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.4 (2004) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 566–70, 94 S. Ct. 2963, 2979–82, 41 L. Ed. 2d 935, 956-59 (1974) (holding that prisoners do not have a right to an attorney but can collect documents and have a fellow prisoner assist them when they are illiterate or unlikely to understand the charges against them so long as these rights will not create a "risk of reprisal or undermine authority").

224. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(b) (2000) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6(a)(2) (2004) (rule governing superintendent hearings).

225. N.Y. Comp. Codes R. & Regs. tit. 7 § 252.3(a)(2) (1997).

226. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5 (2000) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5 (2004) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979–80, 41 L. Ed. 2d 935, 957 (1974) (holding that an inmate should be permitted to call witnesses "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals").

227. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(3) (1997).

228. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (1995).

229. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (1995).

230. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(b) (2000) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1 (2004) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

231. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(5) (1996) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(5) (2004) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

232. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(b) (1997).

Disciplinary/Superintendent's Hearing	Violation Hearing
Disposition of hearing may be made part of prisoner's institutional records.	Disposition of violation hearing not made part of prisoner's institutional records.[233]

Figure I: Comparison of the Rights of Prisoners at Disciplinary or Superintendent's Hearings and Violation Hearings in New York[234]

Once you receive written charges, you know that a disciplinary proceeding will take place in the near future. If you are in solitary confinement as a result of the charges, the regulations require that the disciplinary or superintendent's hearing begin within seven days from the time you were first confined.[235] If you are not confined, the hearing must be completed within fourteen days from the time the written charges were made against you.[236] The Commissioner of Correctional Services or a person designated to act for the Commissioner can, however, authorize a delay beyond these time limits.[237] Such delays are often authorized.

3. Appeal Procedures

In New York, prisoners have an absolute right to make an administrative appeal to another prison official.[238] You must pursue this administrative appeal process in order to preserve your right to pursue further appeals in the courts (your right to judicial review).[239] This means that in order to have a court hear your case at a later stage, you must make an administrative appeal. Most other states also provide appeal procedures. If you are incarcerated elsewhere, you should research the rules and regulations governing disciplinary proceedings in your state. The appeal procedures differ for disciplinary hearings, superintendent's hearings, and violation hearings. For this reason, they are discussed separately below.

(a) Disciplinary Hearings

You can begin the review process by writing to the superintendent of your facility and requesting that he or she review the decision made at your disciplinary hearing. You must submit your request no later than seventy-two hours (three days) after you receive your hearing disposition (the decision).[240] If your written request is submitted after the seventy-two hour deadline, you may lose your right to have your hearing reviewed.[241] After receiving your appeal, the superintendent or a person designated to act for the superintendent must review your case and issue a decision within fifteen days.[242]

When appealing a disciplinary hearing, you should also consider writing the superintendent. A superintendent has the power to reduce your penalty at any time an imposed penalty is in effect.[243]

It is important to note if you appeal a disciplinary hearing, you could possibly face a harsher penalty.[244]

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233. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(d) (1997).

234. See Part E(1) of this Chapter for more information on the different levels of disciplinary proceedings.

235. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(a) (1995).

236. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(b) (1995).

237. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(a), 251-5.1(b) (1995).

238. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (1996) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2004) (rule governing superintendent hearings).

239. To institute a New York Article 78 proceeding or a federal § 1983 claim, you must first exhaust your administrative appeal possibilities. For more information, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," *JLM*, Chapter 16, "42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," and *JLM*, Chapter 14 on the Prison Litigation Reform Act.

240. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (1996).

241. *See* Lane v. Hanberry, 593 F.2d 648, 649 (5th Cir. 1979) (holding that constitutional due process does not require that prisoner, when advised of his right to administrative appeal, also be advised that if he chooses not to make an administrative appeal, he will not be allowed to challenge the disciplinary hearing in a court of law).

242. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (1996).

243. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.9 (1996).

244. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (1996).

(b) Superintendent's Hearings

The process by which you may appeal a superintendent's decision is similar to the appeal procedure for disciplinary hearings discussed above. The major differences are (1) the person you write to, (2) the number of days you have to submit your written appeal, and (3) an appeal can never result in a harsher penalty.

After a superintendent's hearing, you should submit your appeal in writing to the Commissioner of Correctional Services, not to the superintendent.[245] You have thirty days after you receive the superintendent's decision to submit your written request to have your superintendent's hearing reviewed.[246] Address your appeal to:

Commissioner _____
New York State Department of Correctional Services
State Office Campus, Building 2
1220 Washington Avenue
Albany, New York 12226

The Commissioner or person designated to act for him or her must issue a decision within sixty days.[247]

Another important consideration when appealing a superintendent hearing is that under no circumstances can the appeal result in a harsher penalty.[248]

When appealing a superintendent's hearing to the Commissioner, you should also consider writing to the superintendent. A superintendent has the authority to reduce your penalty imposed at the superintendant's hearing at any time during which an imposed penalty is in effect.[249] Even if the Commissioner decides not to reverse or modify the decision made at your superintendent's hearing, the superintendent can reduce your penalty. It may be particularly worthwhile to write to your superintendent if he or she did not preside over your hearing.

(c) Violation Hearings

To appeal the decision in your violation hearing, you must write to your superintendent and request that he or she review your case no later than twenty-four hours after you receive notification of the decision.[250] The superintendent or the person designated to act for the superintendent must then issue a decision within seven days.[251] The superintendent may reduce the penalty imposed at your hearing.[252]

After a superintendent's hearing, you may want to appeal an unfavorable decision to a court of law.[253] However, after *Sandin v. Conner*,[254] it is not likely that you would be able to successfully appeal an unfavorable decision from a violation or disciplinary hearing. Furthermore, if the penalty imposed at your violation hearing is relatively minor, filing an appeal may not be worth the trouble. Since an appeal creates more work for prison officials, submitting an appeal may only annoy them. Moreover, violation hearings cannot be made part of a prisoner's institutional records.[255] In any event, the minor infraction cannot be held against you at a later date.

F. Administrative Segregation Proceedings

As with disciplinary confinement, for you to receive procedural protection in the context of administrative segregation a court must find the laws or regulations applicable to your prison create a protected liberty interest.[256] In other words, unless your state has a law or regulation that entitles you to

245. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2004).
246. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2004).
247. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2004).
248. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2004).
249. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.9 (2004).
250. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.6 (1997).
251. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.6 (1997).
252. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.7 (1997).
253. Remember that you must exhaust your administrative remedies before petitioning the courts. You should review Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on Article 78 appeals in New York State court.
254. Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 123 L. Ed. 2d 418 (1995).
255. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(d) (1997).
256. *See* Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that a

avoid segregation from the general prison population, you do not have due process rights to a formal hearing before being confined in administrative or protective custody. Not all jurisdictions have found a protected liberty interest in the context of administrative segregation. But, courts in the Second Circuit have found some state and federal regulations regarding administrative segregation create a protected liberty interest.[257] This Part will first discuss the procedures officials in New York must follow and then those that federal prisons within the Second Circuit must follow before and during your administrative detention.

The due process safeguards outlined above for disciplinary action do not apply to your placement in administrative segregation. This means that the requirements of *Wolff v. McDonnell*[258] do not apply to administrative segregation. The guiding case for basic procedural requirements in the administrative segregation context is *Hewitt v. Helms*.[259] *Hewitt* concerned a prisoner who was placed in administrative segregation after a riot occurred in a state prison. The following day, he was given notice of a misconduct charge against him. After five days of confinement, a hearing committee reviewed the evidence against him, including a report of his version of the events at issue. Although the committee did not reach a decision about the prisoner's guilt, the hearing committee decided that he posed a threat to the safety of other prisoners and prison officials and that his confinement in administrative segregation should be continued. The Supreme Court examined these events and found that state law created a protected liberty interest in staying out of administrative segregation. Even so, the Supreme Court concluded that the review process conducted by prison officials did not violate the prisoner's due process rights.

The Supreme Court established a standard for hearings to determine whether a prisoner represents a security threat, or whether he should be confined to administrative segregation pending an investigation into misconduct charges. The Court stated that an informal, non-adversarial (not focused on the dispute or conflict) review of the evidence will satisfy the due process requirements of the Fourteenth Amendment. Thus, for administrative segregation hearings, the procedural safeguards you are entitled to are:

(1) Some notice of the charges against you;
(2) An opportunity to present your views orally or in writing to the prison officer who will decide whether or not to transfer you to administrative segregation;
(3) An informal proceeding held within a reasonable time after your transfer to administrative segregation; and
(4) Periodic review of the charges and available evidence by the decision-maker.[260]

These are the minimum procedural requirements prison officials must follow. State or federal regulations applicable to your prison may set out additional, specific guidelines.

New York State prisons may place you in administrative segregation only if prison officials find that your presence in the general prison population poses a threat to the general safety and security of the facility.[261] You are entitled to submit a written statement responding to the charges against you. Prison officials may, in their discretion, let you make your case in person. Although you are not entitled to be present at each review hearing, you may be entitled to a report of the results of the review hearings and an opportunity to respond to those findings.[262] You are also entitled to have a committee review your status of confinement in administrative segregation every sixty days.[263] A three-member committee consisting of a

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prisoner has a liberty interest protected by the Constitution's Due Process Clause only when his administrative segregation reaches levels of atypical and significant hardship); Hewitt v. Helms, 459 U.S. 460, 472, 103 S. Ct. 864, 871–72, 74 L. Ed. 2d 675, 688–89 (1983) (holding that the proceeding involving an informal non-adversarial review of evidence provided to a prisoner who was placed in administrative segregation satisfied the due process requirements for continued confinement).

257. *See* Tellier v. Fields, 280 F.3d 69, 83 (2d Cir. 2000) (holding that federal rule 28 C.F.R. § 541.22 "contains mandatory language that gives rise to" a liberty interest); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–58 (S.D.N.Y. 1997) (concluding that New York rules regarding administrative confinement create a protected liberty interest).

258. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

259. Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

260. *See* Hewitt v. Helms, 459 U.S. 460, 476–77, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691–92 (1983).

261. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(b) (2002).

262. *See* Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *50–51 (W.D.N.Y. May 16, 2000) (*unpublished*) (suggesting that to constitute sufficient notice and opportunity to respond to charges, a prisoner should be informed of the dates and results of his reviews, how long he can expect to be confined and what he might do to change his status, and should have a real opportunity to present information in his defense that he was no longer a threat to the facility).

263. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d) (2002).

representative of the facility executive staff, a security supervisor, and a member of the guidance and counseling staff will examine your institutional record and prepare and submit a report to the superintendent.[264] The report must state

(1) Reasons why you were initially determined to be appropriate for administrative segregation;
(2) Information on your subsequent behavior and attitude; and
(3) Any other factors that favor keeping you in or releasing you from administrative segregation.[265]

The law that applies to prisoners in federal prison is slightly different. Under federal law, if you are placed in administrative detention in a federal prison, unless you were placed in detention as a direct result of your holdover status, you are entitled to a copy of the "Administrative Detention Order" prepared by the warden detailing the reasons for administrative detention within twenty-four hours of placement in a Special Housing Unit (SHU).[266] Officials must conduct an initial record review to evaluate the merits of the segregation within three days of your placement in a SHU and then conduct a formal review after the first seven continuous days that you spend in the SHU. After that, there must be periodic informal hearings every seven days before a Segregation Review Official (SRO). If the administrative detention lasts longer than thirty days, formal hearings are required every thirty days and your record should be reviewed on a weekly basis.

Unlike in New York State, some formal hearings are required by federal laws for federal prisons, meaning that you have the right to appear and present your opinion at those hearings about your detention status. After the first thirty days, and every thirty days afterwards, staff must interview you and do a psychiatric or psychological assessment for the purpose of preparing written reports on how you are adjusting to the SHU and whether you pose a threat to the facility. So long as the security of the prison is not compromised, you are entitled to a copy of the written reports.[267] This section of federal law also states that if the reasons for your confinement no longer exist, you must be released from administrative detention.[268] However, courts have held that the warden's original decision to place you in administrative detention is discretionary, and courts will generally respect and uphold the warden's decision as long as certain procedural requirements are met.[269] Long-term administrative detention may only be allowed where there are "exceptional circumstances, ordinarily tied to security or complex investigative concerns."[270] The need for longer detention must be documented by the Segregation Review Official.[271]

For both federal and state prisons in the Second Circuit, the reasons for placing you in confinement, and, upon periodic review, continuing your confinement in administrative segregation, must be compelling.[272] The reason given at a later review hearing may be the same as the original reason, but it must be deemed compelling, and it must take into account all the evidence available at the time of each review.[273] Thus, if new, relevant information arises after your initial hearing, the committee must consider that new evidence in determining whether you still pose a threat to the safety or security of the prison. If a review of all the then-available evidence does not support a finding that you pose such a threat, prison officials may not keep you in administrative segregation.[274] If the reason for your confinement in administrative segregation changes, you have the right to know the new reason and to respond to it.[275]

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264. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d)(1) (2002).
265. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d) (2002).
266. 28 C.F.R. § 541.22(b) (2006).
267. 28 C.F.R. § 541.22(c)(1) (2006).
268. 28 C.F.R. § 541.22(c)(1) (2006).
269. *See* Tellier v. Fields, 280 F.3d 69, 82 (2d Cir. 2000) (stating that although a warden's decision to place a prisoner in administrative detention is discretionary, this discretion is not "boundless and continuing").
270. 28 C.F.R. § 541.22(c)(1) (2006).
271. 28 C.F.R. § 541.22(c)(1) (2006).
272. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *48 (W.D.N.Y. May 16, 2000) (*unpublished*) (holding that confinement in administrative segregation must be based on a compelling reason, and upon review the decision-maker must determine if that reason is still valid).
273. Giano v. Kelly, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *48–49 (W.D.N.Y. May 16, 2000) (*unpublished*); *see* Hewitt v. Helms, 459 U.S. 460, 477, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 692 (1983).
274. *See* Giano v. Kelly, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, 2000) (*unpublished*) (noting periodic review hearings must consider all evidence available at the time of the review hearing).
275. *See* Young Ah Kim v. Hurston, 182 F.3d 113, 119 (2d Cir. 1999) (holding that liability exists for failure to inform a prisoner of the correct reason for removal from a temporary release program).

There must be a record of those meetings showing the weekly review was not just a *pro forma* exercise (only going through the motions), and there was actually "meaningful consideration" of the reasons for the segregation status.[276] In the case *Giano v. Kelly*, one district court in New York found that the committee did not in fact conduct "meaningful" reviews of a New York State prisoner's segregation status and this violated the prisoner's due process rights. There were two main reasons for this finding. First, records of the committee meetings did not show that there was deliberation on evidence available after he was first confined. Second, the records of the reviews contained no conclusions reached by the committee on the specific question of whether the prisoner continued to pose a threat to the safety or security of the prison.[277]

Reviewing courts in general will not scrutinize the prison officials' reasons but rather will give great deference to those decisions. But, the court in *Giano v. Kelly* did conclude the reason for the plaintiff's initial confinement was no longer an adequate reason for his continued confinement.[278] The decision as to what constitutes a threat to the security of the prison does not need to be based on any single determining factor, and there does not need to be a finding that the prisoner committed some sort of misconduct. In making the decision, the committee may consider the character of prisoners confined in the particular facility, as well as recent and long-standing relations among prisoners and between prisoners and guards.[279]

In *Taylor v. Rodriguez*, the Second Circuit addressed what constitutes meaningful review for administrative segregation in the context of gang affiliation.[280] In that case, a prisoner confined to a Connecticut prison was placed in administrative segregation because of "recent tension in B-Unit involving gang activity" and "statements by independent confidential informants."[281] The prisoner's request for specific factual allegations was denied. The Second Circuit concluded that this notice was not enough to allow the prisoner to adequately prepare his defense. This means that if there are allegations that you are currently involved in a gang, prison officials have to tell you the specific facts supporting those allegations.[282] Unclear statements or definitive statements of fact without evidence are not enough. The court made clear in *Taylor* that prison officials do not have to reveal the identity of confidential informants, or have those informants testify at the hearing, in order to give sufficient notice of the charges. However, the prison officials are required to make an independent assessment of a confidential informant's credibility.[283]

In *Taylor*, the Second Circuit also found that the review of evidence at the prisoner's hearing did not meet due process requirements. To satisfy due process, "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board."[284] The report of the hearing provided no details to support the decision to segregate the prisoner in administrative housing. The report referred to attached statements of confidential informants, but no such statements were actually attached for review by the court. Furthermore, prison officials have to make an individual assessment about

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276. *See* Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001) (stating that a hearing for placement in administrative segregation "is not 'meaningful' if a prisoner is given inadequate information about the basis of the charges against him"); Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *49–55 (W.D.N.Y. May 16, 2000) (*unpublished*) (holding that an administrative segregation committee did not give meaningful consideration to a prisoner's confinement in part because the prisoner was neither permitted to appear before nor submit information to the committee, and did not regularly receive information regarding the committee's recommendations); *see also* Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32, 96 S. Ct. 893, 902 (1976) (establishing that the kind of meaningful consideration that satisfies due process is not satisfied by a standard set of procedures, but depends on the context in which the hearing is held).

277. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, 2000) (*unpublished*).

278. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *54 (W.D.N.Y. May 16, 2000) (*unpublished*) (concluding that since his attacker was now at a different facility, the prisoner could no longer pose a security risk).

279. *See* Giano v. Kelly, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, 2000) (*unpublished*).

280. Taylor v. Rodriguez, 238 F.3d 188, 193–94 (2d Cir. 2001) (holding notice given to a prisoner was too vague to allow him to prepare a defense, and a decision-maker must assess the reliability of a confidential informant if relying on the informant's testimony). See *JLM*, Chapter 31, "Security Classification and Gang Validation," for more information.

281. Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001).

282. Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001).

283. Taylor v. Rodriguez, 238 F.3d 188, 193–94 (2d Cir. 2001) (citing Giakoumelos v. Coughlin, 88 F.3d 56, 61–62 (2d Cir. 1996)) (reasoning that confidential informant's identity in prison disciplinary hearing need not be disclosed because the "requirements of prison security are unique").

284. Superintendent v. Hill, 472 U.S. 445, 455–56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985) (holding due process is satisfied if some evidence supports a prison disciplinary board's decision to reverse good-time credits).

an informant's credibility,[285] and the record did not show any findings on that issue made around the time of the hearing. The only thing on record about reliability of the informant was an official statement by a prison officer, and this was submitted two years after the hearing. The court found that this official statement was not enough. The court held that, without findings on the reliability of the informant, a decision to place a prisoner in administrative detention cannot be based on "some evidence"[286] if the prisoner does not have adequate information about the basis of the charges against him. If the prisoner's due process right to a meaningful hearing is violated, his detention in administrative housing is unlawful.

G. Conclusion

If prison officials have changed the conditions of your confinement for the worse, and you believe they acted unfairly (for example, by not allowing you to present evidence on your behalf), you may be able to bring a due process challenge in federal court. This will depend on whether your state has made a law or regulation creating a protected liberty interest, and whether the change in your confinement taking away that liberty is "atypical and significant." Even if the change in your confinement does not meet this standard, you still may be able to challenge it through the prison administrative process or in state court. Prison officials must follow their own rules, and you can challenge the change in your confinement if these rules have been violated. In all cases, your first step is to go through your prison's administrative process. You should learn what steps you need to take to do so. Sometimes, your prison must provide you help in bringing your case, but you must ask for this help.

285. Giakoumelos v. Coughlin, 88 F.3d 56, 61 (2d Cir. 1996) (stating that a confidential informant's testimony is sufficient to support a prison disciplinary finding as long as there has been some examination of the informant's credibility); Russell v. Scully, 15 F.3d 219, 223 (2d Cir. 1993) (holding that the prisoner had not been deprived of a protected liberty interest because he was only subject to administrative confinement pending his hearing and appeal; as a result the question of whether or not the prisoner had a clearly established right to an independent examination of the credibility of confidential informants did not need to be decided).

286. Taylor v. Rodriguez, 238 F.3d 188, 194 (2d Cir. 2001).

A JAILHOUSE LAWYER'S MANUAL

Chapter 19: Your Right to Communicate with the Outside World

Columbia Human Rights Law Review

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CHAPTER 19

YOUR RIGHT TO COMMUNICATE WITH THE OUTSIDE WORLD*

A. Introduction

Prison administrators often restrict your right to communicate with courts, attorneys, family, friends, and the news media. They may also limit the types and sources of materials that you may read. Prison authorities do not, however, have absolute power to limit your right to communicate. The U.S. Constitution, state constitutions, and federal, state, and city regulations limit prison authorities' power to restrict your access to the outside world. Upon imprisonment, you keep some constitutional rights, including some of your First Amendment protections of speech, press, and association.[1] Within prisons, however, these rights can be limited under certain circumstances to accommodate the prison's "legitimate penological interests."[2]

Part B of this Chapter discusses your rights to correspond with the general public (friends, relatives, etc.). This Part first addresses the constitutional protections that apply to all prisoners in the United States. It then outlines the protections that state and federal regulations add to your right to correspond with the general public. This Chapter mainly focuses on New York State and federal law. Although federal law is a minimum applied everywhere within the United States, your own state's law may be different than the New York laws discussed here and might provide additional protections. See Chapter 2 of the *JLM* for information on how to conduct thorough legal research.

Part C addresses your right to correspond with courts, public officials, and attorneys. This kind of legal correspondence is often privileged, which means it receives greater protection than correspondence with the general public. Part D discusses your right to communicate over the Internet, both directly and indirectly (through third parties). Part E provides a general outline of your right to receive publications such as magazines and books and includes a discussion of your right to receive sexually explicit materials. Part F examines your right to communicate with the news media, and Part G discusses your right to receive visitors. Finally, Part H discusses telephone access.

The validity of a prison's restrictions on all of these rights, with the exception of legal mail and outgoing general correspondence, is determined by a four-part test: courts consider whether (1) the regulation is rationally related to a legitimate goal of the prison, (2) there is an alternative way for the prisoner or outside communicator to exercise the right even with the restriction in place, (3) the burden on or cost to the prison if the right is accommodated is too great, (4) there are available alternative procedures the prison could put in place.[3] For instance, prison officials may not arbitrarily restrict your right to communicate, but they may legally do so in circumstances where exercising that right might endanger the security or order of the prison, or the rehabilitation of prisoners. This Chapter refers to this test as the *Turner* reasonableness standard.

Another important term that this Chapter will use is *discretion*. As you will learn, although the courts will independently examine all four of the *Turner* factors, they often give a great deal of weight to the prison officials' own reasoning for the decision of whether or not to restrict your right to communicate. Black's Law Dictionary contains this definition for discretion: "A public official's power or right to act in certain circumstances according to personal judgment and conscience, often in an official or representative capacity."[4] This means that the courts will allow the prison officials to decide whether or not to restrict your

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1. U.S. Const. amend. I; Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979). Courts generally avoid deciding to what extent rights survive incarceration and instead determine whether the restriction is reasonable regardless of whether the right survives. *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 131–32, 123 S. Ct. 2162, 2167–68, 156 L. Ed. 2d 162, 169–70 (2003).

2. Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)) (noting that the warden may only reject communication if it is determined to be detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity).

3. Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987). *See also* Thornburgh v. Abbott, 490 U.S. 401, 414–16, 109 S. Ct. 1874, 1882–83, 104 L. Ed. 2d 459, 473–77 (1989) (applying *Turner* test to incoming mail); Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003) (applying *Turner* test to visitation restrictions); Beard v. Banks, 548 U.S. 521, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697, 705 (2006) (applying *Turner* test to denial of publications and photographs).

4. Black's Law Dictionary 499 (8th ed. 2004).

right to communicate based on their understanding of the effect that the exercise of the particular right would have on penological interests, as long as their decision does not violate the Constitution. The reasoning is that prison officials understand the prison conditions better than judges and are, therefore, can better determine how certain acts will affect the prison.

The rights this Chapter describes are about the conditions of your confinement, and are subject to the Prison Litigation Reform Act. Because of this, if you believe your right to communicate has been improperly denied, you must first raise the problem through your institution's administrative grievance procedure, if there is one, before you can file a federal claim. So, you must first try to protect your rights through your institution's administrative grievance procedure. See Chapter 15 of the *JLM* for further information on inmate grievance procedures. If you are unsuccessful or do not receive a satisfactory result through the inmate grievance procedure, you can bring a case under a federal law, 42 U.S.C. § 1983, in federal or state court. You could choose instead to file a tort action in state court (in the Court of Claims if you are in New York), or to file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5 (on choosing a court and a lawsuit), Chapter 14 (on the Prison Litigation Reform Act), Chapter 16 (42 U.S.C. § 1983 and *Bivens* Actions), Chapter 17 (Tort Actions), and Chapter 22 (New York's Article 78) of the *JLM*.

If you decide to pursue a claim in federal court, you need to read *JLM*, Chapter 14, on the Prison Litigation Reform Act ("PLRA"). Failure to follow the PLRA's requirements can lead, among other things, to the loss of good time credits and the right to bring future claims in federal court without paying the full filing fee.

B. The Right to General (Non-Legal) Correspondence

If you are a state prisoner, your right to communicate with the outside world is protected by the U.S. Constitution, and the constitution, statutes, and regulations of the state in which you are imprisoned. If you are a federal prisoner, the U.S. Constitution, and federal statutes and regulations protect your rights.

1. Federal Constitutional Protections

The First Amendment to the U.S. Constitution creates a minimum level of protection of your right to communicate with the outside world. No government body may pass laws or regulations falling below this level of protection. Some states may also provide *more* protection of your right to communicate with the outside world, through state constitutions and statutes. The following is a discussion of the U.S. Constitution's minimum guarantees of your right to communicate. While reading the information below, it is important to keep in mind that courts distinguish between incoming and outgoing mail. Restrictions on incoming mail are greater than on outgoing mail because incoming mail can pose a greater security threat.

In *Procunier v. Martinez*,[5] later partially overruled, the U.S. Supreme Court held that arbitrary censorship of both incoming and outgoing general prison correspondence (regulations preventing you from sending or receiving all or part of your mail) violated the First Amendment right to free speech of both prisoners and their correspondents.[6] The Court held that censorship of prison mail was allowed only to further certain substantial government interests such as prison order, security, and rehabilitation.[7] The Court also held that when some censorship was justified, the censorship could not be greater than necessary to serve valid government interests.[8] This case applied to both incoming and outgoing mail.

Martinez was applied by lower state and federal courts when they reviewed acts of prison censorship, and courts often, but not always, found such acts unconstitutional.[9] In 1989, however, the Supreme Court in

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5. Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

6. Procunier v. Martinez, 416 U.S. 396, 411–12, 94 S. Ct. 1800, 1810, 40 L. Ed. 2d 224, 239 (1974).

7. Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974).

8. Procunier v. Martinez, 416 U.S. 396, 412–13, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974). Note that the Supreme Court has severely limited the force of this requirement by refusing to interpret it as imposing a "least restrictive means" test. This means that lower courts will not invalidate a regulation simply because a less restrictive alternative is proposed. Thornburgh v. Abbott, 490 U.S. 401, 410–11, 109 S. Ct. 1874, 1880, 104 L. Ed. 2d 459, 471 (1989).

9. *See* McNamara v. Moody, 606 F.2d 621, 624 (5th Cir. 1979). In *McNamara*, the court held that prison officials violated a prisoner's constitutional rights by refusing to mail a letter from the prisoner to his girlfriend in which the prisoner charged that the mail censoring officer, while reading mail, engaged in masturbation and "had sex" with a cat. The court further noted that prison officials could not justify their conduct on the grounds that to allow such letters

Thornburgh v. Abbott[10] partially overruled *Martinez*. This means that you must be very careful in relying on cases decided before 1989 as they may no longer be good law.

In *Abbott*, the Court partially overruled *Martinez* by specifying that the *Martinez* standard applies only to outgoing correspondence—correspondence sent by a prisoner to someone outside the prison. For incoming correspondence (correspondence received by a prisoner from the outside), a different standard applies. This standard comes from *Turner v. Safley,*[11] and states that restrictions on incoming mail are valid if they are reasonably related to a legitimate penological interest.[12] Four factors must be considered in determining whether a limitation on your incoming mail meets this standard: (1) the rational connection between the mail restriction and the prison's penological interest; (2) alternatives available to prisoners to exercise their rights; (3) the burden of accommodating rights; and (4) the lack of alternatives available to prisons in satisfying their interests.[13] The reason the *Abbott* Court gave for treating incoming and outgoing mail differently was that mail containing contraband that comes into the prison is more of a security threat than mail that leaves the prison.[14]

Although the *Turner* standard may appear to be similar to the *Martinez* standard, there is a significant difference between the two. To satisfy the *Turner* standard (for incoming correspondence), prison officials must simply show the regulation could potentially achieve a legitimate goal. To meet the *Martinez* standard (for outgoing correspondence), officials must demonstrate that the restriction actually achieves an important goal. Thus, there are two main differences between the two standards: (1) the purposes that restrictions on outgoing mail are meant to serve must be important and not just legitimate; and (2) restrictions on outgoing mail must be shown to be more effective than restrictions on incoming mail need to be. As a result, it is easier to convince a judge that restrictions on outgoing mail are unconstitutional than it is to show restrictions on incoming mail are unconstitutional. The standards for incoming and outgoing correspondence are explained further below with the help of examples to indicate how courts have interpreted them.

(a) Outgoing Correspondence

Restrictions on outgoing, non-legal mail must further an important governmental objective, and the restriction must be no greater than necessary.[15] Courts have generally upheld four important types of regulations on outgoing mail under this standard: (1) regulations banning letter kiting (including mail to a third party in your letter to someone else),[16] (2) setting postage limits,[17] (3) banning inmate-to-inmate correspondence,[18] and (4) requiring approved correspondence lists.[19]

Under New York State regulations, when the prison authorities have a reason to suspect that a prisoner is kiting mail (sending third party messages through sealed general correspondence), they may open a prisoner's outgoing mail.[20] However, they must have proof that the officials reasonably believed the prisoner

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would result in a breakdown in prison security and discipline, or on the grounds that the letter was obscene or libelous.

10. Thornburgh v. Abbott, 490 U.S. 401, 412–14, 109 S. Ct. 1874, 1881–82, 104 L. Ed. 2d 459, 473 (1989).

11. Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

12. Thornburgh v. Abbott, 490 U.S. 401, 412–14, 109 S. Ct. 1874, 1881–82, 104 L. Ed. 2d 459, 473 (1989) (finding that outgoing materials are less likely to cause disorder than incoming materials and determining that incoming materials should be held to a higher standard of inspection than outgoing mail).

13. Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987).

14. Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881–82, 104 L. Ed. 2d 459, 473 (1989).

15. Procunier v. Martinez, 416 U.S. 396, 413–14, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974) (holding that restrictions on mail must satisfy this test); Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (limiting the *Martinez* test to outgoing mail).

16. *See*, *e.g.*, United States v. Felipe, 148 F.3d 101, 110 (2d Cir. 1998).

17. *See*, *e.g.*, Davidson v. Mann, 129 F.3d 700, 702 (2d Cir. 1997).

18. *See*, *e.g.*, Purnell v. Lord, 952 F.2d 679, 683 (2d Cir. 1992).

19. *See*, *e.g.*, Palmigiano v. Travisono, 317 F. Supp. 776, 791 (D.R.I. 1970).

20. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.3(p) (2007); *see* United States v. Felipe, 148 F.3d 101, 110 (2d Cir. 1998) (upholding restrictions on kiting).

was kiting mail.[21] Receiving incoming kited mail is also prohibited, though it is permissible for someone to send you the writing of a minor child within an adult's correspondence.[22]

Courts have also held that prison authorities are permitted to restrict the amount of postage you can spend on outgoing mail.[23] Similarly, courts have generally upheld prison policies that restrict receiving postage in the mail and providing free postage.[24] These restrictions relate to the legitimate penological interest of security because postage stamps can be used as currency (and thus lead to increased theft and unregulated transactions) and because drugs can be smuggled on stamps.[25]

Many prisons completely ban inmate-to-inmate correspondence, and these restrictions have generally been upheld as reasonably relating to prison security.[26] As this situation involves both outgoing and incoming correspondence, it presents a slightly different case from purely outgoing mail. But, because only the rights of prisoners and not those of the general public are involved, the courts are generally not as concerned about the restriction of rights. Inmate-to-inmate correspondence was at issue in *Turner v. Safley*, in which the Supreme Court announced the reasonable relation standard that is applied in all incoming correspondence cases and even in many outgoing correspondence cases.[27] In addition, courts have also found restrictions barring correspondence between current and former inmates to be constitutional because they are rationally related to security interests such as preventing escapes and violent acts.[28]

Whether "approved correspondence lists" for outgoing non-legal mail are constitutional is unclear. In *Milburn v. McNiff*,[29] a New York court found unconstitutional a policy requiring prisoners who wanted to communicate with people not on their "approved correspondence lists" to submit a "request to correspond form" to the addressee. On the other hand, various federal district courts have found such a regulation to be "a reasonable method of maintaining prison security without undue restriction on the First Amendment rights of prisoners."[30] Such lists, of course, must pass *Martinez* and have only been upheld when a substantial penological (prison-related) interest in security or rehabilitation is involved.[31] In New York, state courts might follow *McNiff* and prohibit the use of this type of list all together. But, in other states or in federal court, the lists may be upheld, provided they are legitimately used to further prison security or rehabilitation.[32]

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21. *See* Ode v. Kelly, 159 A.D.2d 1000, 1000, 552 N.Y.S.2d 475, 476 (4th Dept. 1990) (finding inspection of prisoner's outgoing mail violated his rights where the superintendent had no reason to suspect prisoner was kiting mail). *But see* Minigan v. Irvin, 977 F. Supp. 607, 609–10 (W.D.N.Y. 1997) (permitting screening of prisoner's outgoing mail provided there is "good cause pursuant to legitimate prison regulations and directives.").

22. State of New York, Department of Correctional Services, Handbook for Families and Friends of New York State DOCS Inmates 5 (2007).

23. *See* Gittens v. Sullivan, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (finding $1.10 per week for stamps and an additional advance of $36 for legal mailings satisfied the constitutional minimum for access to the courts); *see also* Davidson v. Mann, 129 F.3d 700, 702 (2d Cir. 1997) (upholding limits on prisoner's access to stamps for non-legal mail).

24. *See* Johnson v. Goord, 445 F.3d 532, 534–35 (2d Cir. 2006).

25. Johnson v. Goord, 445 F.3d 532, 535 (2d Cir. 2006).

26. *See*, *e.g.*, Purnell v. Lord, 952 F.2d 679, 683 (2d Cir. 1992) (finding restriction on correspondence between inmates at different facilities reasonably related to security interests); Farrell v. Peters, 951 F.2d 862, 863 (7th Cir. 1992) (finding preventing correspondence between inmates reasonably related to security).

27. *See generally* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

28. Nasir v. Morgan, 350 F.3d 366, 371–72 (3d Cir. 2003).

29. Milburn v. McNiff, 81 A.D.2d 587, 589, 437 N.Y.S.2d 445, 448 (2d Dept. 1981).

30. Palmigiano v. Travisono, 317 F. Supp. 776, 791 (D.R.I. 1970); *see also* George v. Smith, No. 05-C-403-C, 2005 U.S. Dist. LEXIS 16139, at *20 (D. Wis. Aug. 2, 2005) (*unpublished*) ("In the interest of maintaining prison security, prison officials may lawfully limit an inmate to corresponding with individuals on a pre-approved list."). *But see* Collins v. Schoonfield, 344 F. Supp. 257, 276 (D. Md. 1972) (criticizing the broad prohibition on reading inmate mail in Palmigiano v. Travisono); Guajardo v. Estelle, 580 F.2d 748, 755 (5th Cir. 1978) (finding unconstitutional a policy limiting letters sent by prisoners to family and an approved list of 10 individuals because it is not essential to further legitimate security interests and is often abused as applied); Finney v. Arkansas Bd. of Corr., 505 F.2d 194, 211–12 (8th Cir. 1974) (rejecting an approved correspondence list procedure because the justifications of prospectively investigating potential visitors, universally prohibiting correspondence with former inmates, and assuring that no unwanted mail was received by unapproved recipients were not enough).

31. *See* Finney v. Arkansas Bd. of Corr., 505 F.2d 194, 211 (8th Cir. 1974) (finding an approved correspondence list unconstitutional where the prison justified it as pre-screening potential visitors and protecting those who might not want to receive mail from prisoners).

32. *Cf.* United States v. Felipe, 148 F.3d 101, 110–11 (2d Cir. 1998) (upholding as serving security interests the

In addition to the above, you generally must provide a return address on all outgoing mail.[33]

Finally, courts do not allow prison officials to censor and discipline prisoners based on statements in mail that are intended to insult prison personnel, even if such statements would be prohibited if expressed verbally.[34] Courts have also upheld regulations that call for the routine inspection of all non-legal outgoing mail.[35] They have distinguished between censorship and inspection for security reasons.[36] One court has even upheld the censorship of outgoing mail under the *Martinez* standard.[37]

When the regulation at issue involves both incoming and outgoing correspondence, courts have applied the *Turner* standard.[38] A few courts have even departed entirely from the *Martinez* standard, instead applying the *Turner* reasonableness standard to outgoing mail as well. In general, courts are increasingly deferring to prison officials' reasons for placing restrictions on outgoing correspondence.[39]

(b) Incoming Correspondence

Regarding the restriction of incoming correspondence (mail and publications sent to you), the Court in *Thornburgh v. Abbott* held that the proper standard of review was the one stated in *Turner v. Safley*.[40] In *Turner* the Court held that "[w]here the regulations at issue concern the entry of materials into the prison, ... a regulation that gives prison authorities broad discretion is appropriate."[41] Under the *Turner* standard, restrictions are valid if they are reasonably related to a legitimate penological interest (for example, security, order, or rehabilitation). This "reasonably related" standard is more general than the *Martinez* standard and less protective of your right to communicate.

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unique, severe restrictions on mail and visitation to a court-approved list for gang member convicted of racketeering).

33. *See*, *e.g.*, 28 C.F.R. § 540.14(c)(1)(iv) (2007) (staff at a minimum- or low-security federal prison may open the prisoner's outgoing mail if the prisoner has not filled out the return address properly); N.Y. Comp. Codes R. & Regs. tit. 7, § 720.3(i) (2005) (requiring New York State prisoners to include their return addresses on outgoing mail).

34. Cases where prisoners are not certain if their defamatory (insulting) comments will be read should be treated differently than cases involving defamatory comments directed at prison officials. *See* Loggins v. Delo, 999 F.2d 364, 367 (8th Cir. 1993) (finding that prison official violated prisoner's 1st Amendment rights by disciplining a prisoner after reading a prisoner's letter to his brother that commented about prison guards where the letter did not raise a security risk and was not directed towards staff); Brooks v. Andolina, 826 F.2d 1266, 1268 (3d Cir. 1987) (finding no government interest in censorship); Hall v. Curran, 818 F.2d 1040, 1044–45 (2d Cir. 1987) (finding the district court should not have granted summary judgment to prison administrator against a prisoner's 1st Amendment claim for censorship of his statements critical of prison administration). *But see* Leonard v. Nix, 55 F.3d 370, 376 (8th Cir. 1995) (finding that prisoners cannot send letters as personal communication that are extremely offensive to prison personnel if their purpose is only to defame (insult) prison personnel and not to communicate).

35. Bell-Bey v. Williams, 87 F.3d 832, 838 (6th Cir. 1996) (holding that a mail inspection procedure did not violate a prisoner's 1st Amendment rights because the procedure was limited to protecting the legitimate government interest of managing scarce prison resources); Stow v. Grimaldi, 993 F.2d 1002, 1004 (1st Cir. 1993) (finding that inspection procedures served the legitimate government interest of safety).

36. Altizer v. Deeds, 191 F.3d 540, 549 (4th Cir. 1999) (holding that inspection of prisoner's mail was not a constitutional violation since there is a substantial government interest in censoring materials harmful to security).

37. Martyr v. Mazur-Hart, 789 F. Supp. 1081, 1085–86 (D. Or. 1992) (allowing a mental institution's refusal to send letters written by a prisoner because the censorship furthered the important governmental interest of rehabilitation; the writing hindered the prisoner's progress).

38. *See* Duamutef v. Hollins, 297 F.3d 108, 113 (2d Cir. 2002) (upholding mail watch on all incoming and outgoing mail based on *Turner* standard as furthering the government interest of security where inflammatory material had previously circulated through the mail); Sisneros v. Nix, 884 F. Supp. 1313, 1331–33 (S.D. Iowa 1995) (upholding under the *Turner* standard a regulation that prohibited the delivery to or from a prisoner of letters written in a language other than English unless that language was the only one a prisoner spoke); Martin v. Rison, 741 F. Supp. 1406, 1413, 1417 (N.D. Cal. 1990) (upholding a regulation that prohibited prisoners from acting as reporters for newspapers published outside the prison; the court based its decision in part on the fact that the article, although published outside the prison, was read within the prison and caused agitation amongst prisoners resulting in a need for security adjustment and meriting application of the *Turner* standard to the regulation).

39. Altizer v. Deeds, 191 F.3d 540, 549 (4th Cir. 1999) (holding that the inspection of outgoing mail was not a 1st Amendment violation under the *Turner* standard); Butti v. Unger, No. 04-5381, 2005 U.S. Dist. LEXIS 14408, at *9 (S.D.N.Y. Jan. 15, 2005) (*unpublished*) (citing *Turner* standard as basis for surveillance of prisoner's outgoing mail when officials were suspicious of prisoner's creating fake names to send mail to recipients other than those the letters addressed).

40. Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79 (1987)).

41. Thornburgh v. Abbott, 490 U.S. 401, 416, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 475 (1989).

The Court has identified four factors for determining whether a restriction meets the reasonably related standard. The first and most important factor is whether the regulation is both neutral and rationally related to the alleged legitimate government interest.[42] This factor can be broken down into three subparts:

(1) Whether the government interest or goal is legitimate;
(2) Whether the regulation is rationally related to that interest or goal; and
(3) Whether the regulation is neutral.

Regarding subpart (1), the government interest used to justify restrictions on mail is usually either maintenance of prison security or screening for contraband. Courts almost always hold these two interests to be legitimate.[43] Under the *Turner* standard, the relationship between a mail restriction and the stated government interest does not need to be very close. Prisons do not need to prove the restrictions will *actually* promote security or screen contraband in all cases; they only need to convince the court that the restriction *might* achieve these goals. Courts usually find the government's argument to be valid.[44] Nevertheless, when courts invalidate restrictions on mail, they usually do so because no rational relation exists between the regulation and the government interest.[45] Finally, regulations are considered neutral under subpart (3) as long as the government interest is unrelated to suppressing expression. In other words, as long as the purpose of the restriction is something other than stopping you from expressing yourself, the restriction will be considered neutral.[46]

The second factor of the reasonably related standard is whether the regulation leaves open an alternate way for the prisoner to exercise the right asserted.[47] Courts usually define the right in question broadly, making it easier to show how a prisoner can still exercise that right. For example, in *Thornburgh v. Abbott,* where the regulation at issue prohibited publications containing sexually explicit material, the court defined the right in question not as the right to receive sexually explicit materials but simply as the right to expression, which it held could be exercised through the many other publications that were not prohibited.[48]

The third and fourth factors are usually interrelated. The third factor is the impact that accommodating the right will have on other prisoners, guards, and prison resources. The fourth factor is whether there are any ready alternatives to the proposed regulation.[49] Because the accommodation of a right will usually require alternatives to the regulation, these two factors are often combined. For example, accommodating a prisoner's right to receive blank greeting cards from non-vendors would require extensive searches of an increased volume of incoming mail. Such searches may be considered both an unacceptable impact of the accommodation of the right and an unacceptable alternative to the regulation at issue.[50]

(c) "As Applied" versus "Facial" Challenges

Most cases discussed in this Chapter so far involve *facial* challenges—challenges to the regulation as written. But, because many prison regulations are vague, it is often hard for judges to object to them. In such cases, prisoners may instead bring an *as applied* challenge. As applied challenges are brought when a prisoner objects to the way prison officials apply a regulation to him, rather than to the regulation itself.

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42. Thornburgh v. Abbott, 490 U.S. 401, 414, 109 S. Ct. 1874, 1882, 104 L. Ed. 2d 459, 473 (1989).

43. *See*, *e.g.*, Pell v. Procunier, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.").

44. *E.g.*, Waterman v. Farmer, 183 F.3d 208, 214–15 (3d Cir. 1999) (finding a regulation that prohibited sex offenders from receiving sexually explicit publications to be rationally connected to the interest of rehabilitation where a psychologist testified that such materials could hinder rehabilitation); Avery v. Powell, 806 F. Supp. 7, 7–8 (D.N.H. 1992) (finding a regulation that prohibited prisoners from receiving blank greeting cards from anyone other than the vendor to be rationally connected to the interests of promoting security and screening for contraband; the court noted that cards are often multipart, contained within envelopes, or decorated with metals or flammable substances, so cards received from non-vendors would necessitate time-consuming searches).

45. *See*, *e.g.*, Crofton v. Roe, 170 F.3d 957, 960–61 (9th Cir. 1999) (invalidating a regulation that limited the publications prisoners can receive to those ordered and paid for directly by the prisoner because the court found no rational relation between the regulation and the asserted interests of screening for contraband, minimizing fire hazards, or preventing overcrowding).

46. *See* Thornburgh v. Abbott, 490 U.S. 401, 415–16, 109 S. Ct. 1874, 1882–83, 104 L. Ed. 2d 459, 474 (1989).

47. Thornburgh v. Abbott, 490 U.S. 401, 417, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 476 (1989).

48. Thornburgh v. Abbott, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989).

49. Thornburgh v. Abbott, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989).

50. Avery v. Powell, 806 F. Supp. 7, 10–11 (D.N.H. 1992).

Nichols v. Nix[51] and *Lyon v. Grossheim*[52] are good examples of as applied challenges to prison policies.[53] In both cases, the regulation at issue simply gave the superintendent the power to deny a prisoner any publication likely to be disruptive or to produce violence. Because preventing disruptions and violence is always a legitimate goal, and because the regulation only applies to publications that are likely to hinder these goals, the regulation facially passed the *Turner* standard. Therefore, the court upheld both regulations as they were written. However, the court held that prison officials applied the regulations in an unconstitutional manner. In both cases, the court held that there was no evidence that the publications at issue were likely to threaten prison security because other prisoners had possessed similar publications without incident.[54]

If you think a prison policy is being applied in an unconstitutional way, you can challenge it even though it may look, as written, like policies that courts have upheld in the past.

(d) Procedural Safeguards

Note that several important procedural safeguards established by *Procunier v. Martinez*[55] must still be respected by prison officials. First, a prisoner should be notified if prison officials return a letter addressed to him or if a letter by a prisoner is returned to the prison. Second, the author of the returned letter should be given a reasonable opportunity to protest the decision to restrict.[56]

2. State and Federal Protections of the Right to General (Non-Legal) Correspondence

State and federal regulations may give you more rights than those the U.S. Constitution provides—they cannot take away any rights guaranteed by the Constitution, but they can provide more than the Constitution does. The following is a discussion of New York State and City regulations, as well as federal regulations governing your right to communicate in writing with the general public. Prisoners in other states must consult their state and local regulations.[57]

(a) New York State and City Regulations

In New York, the specific regulations governing your right to communicate with the outside world depend on the type of institution in which you are imprisoned. There are three different sets of regulations. One set applies only to prisons run by the New York State Department of Correctional Services (for example, Attica). The second applies to all city and county prisons and jails (for example, Nassau County Jail), and the third applies only to New York City prisons and jails (for example, Rikers Island). The Department of Correctional Services issued the first set of regulations, the New York State Commission of Correction the second, and the New York City Department of Correction and/or the Board of Correction the third. If you are in a New York City jail, both the second and third sets of regulations apply to you. If more than one set of regulations applies to you, courts will use the ones that give you more protection.

New York State regulations, which apply to prisons run by the Department of Correctional Services, provide additional protections to your right to communicate beyond the minimum the Constitution requires. These regulations allow prisoners, with some restrictions, to correspond with any person.[58] State regulations only prohibit prisoners from corresponding with people who have indicated they do not wish to receive mail from the prisoner or with persons listed on a court order of protection.[59] Furthermore, prisoners must receive

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51. Nichols v. Nix, 810 F. Supp. 1448, 1467 (S.D. Iowa 1993) (striking down a regulation as it was used to restrict publications that promoted racial segregation).

52. Lyon v. Grossheim, 803 F. Supp. 1538, 1555 (S.D. Iowa 1992) (invalidating an official action denying prisoners access to "anti-Catholic" comic books which also contained negative references to homosexuality and the Soviet Union).

53. The cases were both decided in the Southern District of Iowa. Though they are only binding on prisons in that district, they provide good examples of as-applied challenges that you can bring elsewhere.

54. Nichols v. Nix, 810 F. Supp. 1448, 1463 (S.D. Iowa 1993) ("[T]he record is ... devoid of evidence of past inmate confrontations as a result of other inmates possessing or reading [such] publications."); Lyon v. Grossheim, 803 F. Supp. 1538, 1552–53 (S.D. Iowa 1992).

55. Procunier v. Martinez, 416 U.S. 396, 418–19, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974). *See* Sheldon Krantz, The Law of Corrections and Prisoners' Rights in a Nutshell § 17, at 142 (3d ed. 1988).

56. Procunier v. Martinez, 416 U.S. 396, 418–19, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974).

57. *JLM*, Chapter 2, "Introduction to Legal Research," will be helpful in conducting this research.

58. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.3 (2007).

59. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.3(a) (2007).

advance approval in order to correspond with unrelated minors, persons on parole or probation, other New York prisoners, employees or former employees of the Department of Correctional Services, and victims of the prisoner's crime(s).[60] State regulations also prohibit prison officials from opening, inspecting, or reading outgoing correspondence (except for oversized envelopes, parcels, and prisoner-to-prisoner correspondence) without written authorization from the facility superintendent.[61] The superintendent cannot provide such authorization unless there is a reason to believe that the correspondence violates the department's regulations or that it threatens the safety, security, or good order of the prison. If authorization is given, the superintendent must set forth, in writing, the specific facts justifying it.[62] With respect to incoming mail, New York State regulations require the inspection of all such mail,[63] but prohibit the reading of incoming correspondence (except for prisoner-to-prisoner letters and prisoner business mail) unless there is evidence that the mail contains plans for sending contraband in or out of the prison, plans for criminal activity, or information that would create a danger to others or to the prison's security and good order.[64] The facility superintendent must provide written authorization to read incoming correspondence and must specify why reading the mail is necessary.[65] It is also important to be aware of your facility's specific restrictions on what can be sent through the mail; failing to follow these rules can result in your mail not reaching you.[66]

The local county jail regulations also provide protections.[67] These regulations provide that you may correspond, with a few restrictions, with anyone you wish. Prison officials may not impose restrictions based on the amount of mail sent or received, or based on the language in which the correspondence is written.[68] Outgoing correspondence may not be opened or read unless the chief administrative officer gives written approval based on a "reasonable suspicion" that the correspondence threatens the security of the prison or of another person.[69] Incoming correspondence may be opened outside the presence of the prisoner-recipient to ensure the absence of contraband, but it may not be read without the written approval of the chief administrative officer.[70] Any information prison officials obtain by opening your incoming correspondence without the superintendent's authorization may not be used in a disciplinary hearing against you.[71]

New York City has additional standards set out in the "Minimum Standards for New York City Correctional Facilities."[72] New York City prisoners are urged to familiarize themselves with these standards. Find out if your prison library has a copy; if it does not, ask the librarian to get one. Copies of "Minimum Standards" can be obtained by writing to:

City of New York
Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

60. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.3(b) (2007).
61. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 720.3(c)–(e) (2007).
62. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.3(e) (2007).
63. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.4(a)(2) (2007).
64. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.4(e) (2007).
65. N.Y. Comp. Codes R. & Regs. tit. 7, § 720.4(f) (2007).
66. Items prohibited in incoming correspondence include obscene, threatening, or fraudulent materials, nude photographs, Polaroid pictures, postage stamps, and letters from others (kiting) except minor children. There is also a five-page limit on incoming correspondence. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 720.4(c)–(d) (2008). See http://www.docs.state.ny.us/directives/4911.pdf for additional restrictions on packages brought or sent to you in prison.
67. N.Y. Comp. Codes R. & Regs. tit. 9, § 7004 (2008).
68. N.Y. Comp. Codes R. & Regs. tit. 9, § 7004.1(b) (2008).
69. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 7004.2 (f)–(g) (2008).
70. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 7004.3 (a)–(b) (2008).
71. *See* Chavis. v. Goord, 265 A.D.2d 798, 798, 697 N.Y.S.2d 409, 410 (4th Dept. 1999) (reversing a disciplinary decision because prison investigation relied on information obtained through unauthorized review of prisoner's mail).
72. Codified at Chapter 1 of Title 40 of the Rules of the City of New York, *available at* http://24.97.137.100/nyc/rcny/entered.htm (last visited Sept. 19, 2010).

The Board of Correction approved changes to these standards in early 2008; these revisions are the first since the Minimum Standards were enacted in 1978.[73] These changes, which have implications for mail and telephone surveillance in New York City facilities,[74] went into effect on June 16, 2008.[75]

(b) Federal Regulations

If you are a federal prisoner (in a prison run by the Bureau of Prisons), you are subject to mail regulations the Federal Bureau of Prisons has issued. Some rules concerning general correspondence follow.

The warden of each prison has the authority to establish your rules of correspondence.[76] The specific rules the warden develops must be communicated to you in writing upon his arrival at the prison.[77] Prison authorities may open and read your mail if they determine doing so is necessary to maintain security or monitor a specific problem.[78] They may not read mail that is "special" or "privileged," although they may open it (in your presence only) to ensure that there is no contraband in the envelope.[79] "Special" or "privileged" mail includes mail from attorneys, law enforcement officers, courts, and public officials. Regulations governing privileged mail are discussed further in Part C of this Chapter.

Prison officials may not open and read mail you are sending from a minimum- or low-security prison unless they have "reason to believe [the mail] would interfere with the orderly running [of the prison], that it would be threatening to the recipient, or that it would facilitate criminal activity."[80] In medium- and high-security institutions, prison officials may read all mail other than "special mail."[81]

Federal prisons must supply you with paper and envelopes at no cost, but you must pay for stamps. If you cannot afford postage, the warden must provide stamps for a reasonable number of letters per month.[82]

For more information and details about the federal regulations, you should consult the relevant regulations themselves. They can be found in the Code of Federal Regulations, 28 C.F.R. § 540.

3. A Note on Foreign-Language Materials

The ability of prisons to restrict correspondence in foreign languages remains unclear. Some courts have found that regulations prohibiting prisoners from writing and receiving letters in languages that cannot be understood by prison officials are permissible as reasonably related to the legitimate prison interest of security.[83] On the other hand, some courts have held that a complete ban on all foreign-language

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73. *See* City of N.Y. Bd. of Corr., *Notice of Adoption of Amendments to the Minimum Standards*, Coalition to Raise the Minimum Standards, *available at* http://www.nycjailreform.org/documents/MINIMUM%20STANDARDS%20FINAL%20APPROVED%20AMENDMENTS%20051908.pdf (last visited Sept. 19, 2010).

74. For instance, an amendment to § 1-10(h) allows correctional facilities to monitor prisoner phone calls with prior notice but without a warrant (with the exception of calls to attorneys, physicians, and like parties). An amendment to § 1-11(c)(6) and (e)(1) allows prison officials to read general correspondence with a warden's written order instead of only with a court order. An amendment to § 1-11(a) allows curtailment of general correspondence privileges where reasonably necessary to protect public safety or maintain prison security. *See* http://www.nycjailreform.org/newrules.html (last visited Sept. 19, 2010).

75. *See* Coalition to Raise the Minimum Standards, http://www.nycjailreform.org/newrules.html (last visited Sept. 19, 2010).

76. 28 C.F.R. § 540.10 (2007).

77. 28 C.F.R. § 540.12(b) (2007).

78. 28 C.F.R. §§ 540.12, 540.14(a) (2007).

79. 28 C.F.R. § 540.12 (2007).

80. 28 C.F.R. § 540.14 (c)(1)(i) (2007). Prison authorities can also read this mail if you are on a restricted correspondence list, if the mail is being sent to another prisoner, or if the return address on the envelope is incomplete. 28 C.F.R. §§ 540.14 (c)(1)(ii)–(iv) (2007).

81. 28 C.F.R. § 540.14(c)(2) (2007).

82. 28 C.F.R. §§ 540.21(a), (b), (d), (e) (2007). *See also* Gittens v. Sullivan, 670 F. Supp. 119, 121, 123 (S.D.N.Y. 1987) (finding reasonable the provision of an amount equal to five free stamps per week for all correspondence, in addition to a $20 advance for legal mail, where the superintendent may advance additional funds for postage on legal mail if the inmate exceeds the twenty dollar limit), *aff'd*, 848 F.2d 389 (2nd Cir. 1988).

83. *See*, *e.g.*, Ortiz v. Fort Dodge Corr. Facility, 368 F.3d 1024, 1026–27 (8th Cir. 2004) (finding acceptable a regulation that prohibited inmates from writing letters in Spanish absent a ready alternative interpreter option). *See also* Sisneros v. Nix, 884 F. Supp. 1313, 1331–33 (S.D. Iowa 1995) (upholding a regulation that prohibited the delivery of letters to or from a prisoner written in a language other than English unless that language was the only one spoken by a prisoner), *aff'd in part and rev'd in part on other grounds*, 95 F.3d 749, 750 (8th Cir. 1996); Nelson v. Woodford, No. C 04-03684 CRB (PR), 2006 U.S. Dist. LEXIS 11120, at *25–30 (N.D. Cal. Mar. 2, 2006) (stating that a ban on foreign-language publications was rationally related to the security goal of preventing coded communication by gangs), *aff'd*, 249

correspondence is not rational.[84] Additionally, some courts have found the exclusion of foreign-language publications unreasonable under this standard.[85] By statute in New York State, prison officials may not impose restrictions based on the language in which the mail is written.[86] Make sure to check statutes, regulations, and court decisions in your state to find out what the law is.

C. Legal Correspondence with Courts, Public Officials, and Attorneys: Privileged Correspondence

Procunier v. Martinez[87] and *Thornburgh v. Abbott*,[88] two important cases discussed in Part B(1) of this Chapter, do not distinguish between legal and non-legal correspondence. As a result, both kinds of mail generally receive the same level of First Amendment protection under those cases. However, legal mail—correspondence with courts, public officials, and attorneys—receives heightened protection because censorship of this mail implicates two other important concerns: your right of meaningful access to the courts and the attorney-client privilege. This Section discusses each of these sources of protection separately. Mail to and from attorneys, courts, paralegals, and legal organizations is treated as privileged and receives heightened protection (for instance, this mail cannot usually be censored). Mail to and from other public officials and agencies is also usually treated as privileged and given more protection than regular mail.

1. First Amendment Protections of *Martinez* and *Abbott*

Some courts have held that legal mail is entitled to a higher degree of First Amendment protection than other mail and that "prison policies or practices which interfere with legal mail on a regular basis ... must be supported by a legitimate penological interest other than mere general security concerns which permit interference with regular mail."[89] Even when this analysis is not applied, courts generally give legal mail more consideration than non-legal mail in evaluating restrictions.[90]

(a) Incoming Legal Correspondence

Correspondence from your attorney is incoming mail, and so restrictions on it are evaluated under the *Turner* standard.[91] Restrictions on privileged incoming mail do not violate the First Amendment if the restrictions are reasonably related to a legitimate need to manage the prison or carry out your penalty. In *Wolff v. McDonnell*,[92] the U.S. Supreme Court held a state can require your lawyer to clearly mark her letters as coming from an attorney, and can require that her address be written on the envelope if the letters are to receive special treatment,[93] and finally, can require your lawyer to identify herself to prison officials before correspondence with the prisoner begins.[94] For example, in 2009, the Ninth Circuit of the U.S. Court of Appeals denied a prisoner's constitutional claims because the return address on his legal mail did not indicate that it came from an attorney, a valid prerequisite under California law for legal mail to receive

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Fed. Appx. 529, 530 (9th Cir. 2007).

84. Thongvanh v. Thalacker, 17 F.3d 256, 259 (8th Cir. 1994) (holding that since the prison could have secured free translation services, the ban on a Lao prisoner's correspondence was not rational).

85. *See*, *e.g.*, Kikimura v. Turner, 28 F.3d 592, 598–600 (7th Cir. 1994) (invalidating a complete ban on foreign-language materials).

86. N.Y. Comp. Codes R. & Regs. tit. 9, § 7004.1(b)(2) (2007).

87. Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

88. Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

89. Cancel v. Goord, No. 00 CIV 2042 LMM, 2001 U.S. Dist. LEXIS 3440, at *17 (S.D.N.Y. Mar. 29, 2001) (*unpublished*).

90. Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) ("In balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail...."); Sallier v. Brooks, 343 F.3d 868, 874 (6th Cir. 2003) ("[W]hen the incoming mail is "legal mail," we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts.").

91. Thornburgh v. Abbott, 490 U.S. 401, 414–19, 109 S. Ct. 1874, 1882–85, 104 L. Ed. 2d 459, 473–77 (1989).

92. Wolff v. McDonnell, 418 U.S. 539, 576, 94 S. Ct. 2963, 2984–85, 41 L. Ed. 2d 935, 963 (1974).

93. Wolff v. McDonnell, 418 U.S. 539, 576, 94 S. Ct. 2963, 2984–85, 41 L. Ed. 2d 935, 963 (1974).

94. Wolff v. McDonnell, 418 U.S. 539, 576–77, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974).

special treatment.[95] *Wolff* seems to imply that prison officials cannot read or censor correspondence with your attorney if there is no suspicion that the correspondence is illegal, but this is not entirely clear.[96] According to *Wolff*, a requirement that letters from an attorney to a prisoner be opened by prison officials only in the presence of the prisoner may be more than what the Constitution demands.[97] Many courts, however, have since ruled that the prisoner must be present if the prison is opening his letters, or that the prisoner at least be given the opportunity to request such a safeguard.[98]

(b) Outgoing Legal Correspondence

Prisons cannot restrict correspondence sent *to* attorneys unless the restriction furthers an important or substantial governmental interest.[99] Some courts have found that outgoing legal correspondence does not present the same security threat as non-legal correspondence, and so there is minimal government interest in restricting it.[100] Letters to some government agencies, elected officials, and legal assistance and civil liberties groups enjoy the same protection as mail addressed to your attorney.[101] Also, the government has a duty to provide indigent prisoners with stationery and a reasonable amount of postage for legal mail.[102]

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95. *See* Paulino v. Todd, No. 08-16081, 2009 U.S. App. LEXIS 16789, at *1 (9th Cir. July 28, 2009) (*unpublished*).

96. *See* Wolff v. McDonnell, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 925, 963 (1974) ("As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence ensures that prison officials will not read the mail.").

97. Wolff v. McDonnell, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974); *see also* Brewer v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993) (holding "that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights.").

98. *See* Sallier v. Brooks, 343 F.3d 868, 874 (6th Cir. 2003) (reaffirming that an opt-in policy, where a prisoner had to request being present when legal mail was opened, is constitutional so long as the prisoner is given written notice of it); Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir. 1974) (*per curiam*) (holding that because "prison officials in inspecting incoming mail outside the presence of an inmate are provided with an opportunity to obtain advanced warning of potential litigation which might involve the prison and, more significantly, could become privy to stratagems being formulated between attorney and client with regard to pending litigation," the prisoner is entitled to be present during the opening of legal mail addressed to him). Later cases with similar holdings to *Bach* include Powells v. Minnehaha County Sheriff Dept., 198 F.3d 711, 712 (8th Cir. 1999); Fontroy v. Beard, 485 F. Supp. 2d 592, 593, 601 (E.D. Pa. 2007) (finding that a Pennsylvania policy allowing prison staff to open incoming legal mail outside prisoners' presence is unconstitutional); and Kensu v. Haigh, 87 F.3d 172, 174 (6th Cir. 1996) (holding that a prisoner's right to be present during opening of his legal mail extends to hand-delivered correspondence as well as correspondence received through the U.S. Postal Service). *But see* John v. New York City Dept. of Corr., 183 F. Supp. 2d 619, 627–29 (S.D.N.Y. 2002) (dismissing prisoner's claim for denial of access to courts when prison officials opened mail outside his presence because he failed to prove either that the officials acted "deliberately and maliciously" in doing so or that he suffered any injury).

99. Procunier v. Martinez, 416 U.S. 396, 412–15, 94 S. Ct. 1800, 1811–12, 40 L. Ed. 2d 224, 239–42 (1974).

100. *See* Cancel v. Goord, No. 00 Civ. 2042 (LMM), 2001 U.S. Dist. LEXIS 3440, at *17 (S.D.N.Y. Mar. 21, 2001) (*unpublished*) (finding that without more than general security interests, interference with outgoing legal mail is unconstitutional) (citing Davidson v. Scully, 694 F.2d 50, 53 (2d Cir. 1982)); Taylor v. Sterrett, 532 F.2d 462, 473–475, 480 (5th Cir. 1976) (finding that censoring outgoing mail to attorneys, the courts or to government agencies is not significantly related to the advancement of jail security and thus unconstitutional).; Palmigiano v. Travisono, 317 F. Supp. 776, 792 (D.R.I. 1970)) (holding that the reading of any outgoing mail violates the 1st Amendment unless pursuant to a duly obtained search warrant).

101. *See* Davidson v. Scully, 694 F.2d 50, 53–54 (2d Cir. 1982) (striking down regulation restricting outgoing mail to government agencies because "[i]f prison officials are able to deny inmates free access to public officials and agencies, the fundamental right [of access to the courts] is restricted just as surely as if the government denied prisoners access to traditional legal materials. In many cases an inmate's claim might be substantially furthered by information or aid available through government agencies."). *But see* O'Keefe v. Van Boening, 82 F.3d 322, 323 (9th Cir. 1996) (upholding regulation treating grievance mail to state agencies as non-legal); Jackson v. Mowery, 743 F. Supp. 600, 606 (D. Ind. 1990) ("[T]he legal mail protected by the Constitution extends only to safeguard communications between an inmate and his attorney, and [defendant] has no basis for his claim of interference with 'legal mail' to and from his family and friends.").

102. *See* Bounds v. Smith, 430 U.S. 817, 824–25, 97 S. Ct. 1491, 1496, 52 L. Ed. 2d 72, 81 (1977) (stating that it is "indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notary services to authenticate them, and with stamps to mail them"). *But see* Gaines v. Lane, 790 F.2d 1299, 1308 (7th Cir. 1986) (citing Bach v. Coughlin, 508 F.2d 303, 307 (7th Cir. 1974)) (explaining that while prisoners have a right to access the courts, they are not entitled to unlimited free postage, and prison officials can balance prisoners' rights to use the mails against budgetary concerns); Chandler v. Coughlin, 763 F.2d 110, 114 (2d Cir. 1985) (finding that state is not required to provide indigent prisoners unlimited free postage, but only a "reasonably adequate" amount of postage for

However, one federal district court case found that a ten-day delay in sending a prisoner's legal mail did not violate his limited constitutional right to freedom of association.[103] The mail was initially delayed because of insufficient funds on two occasions.[104]

2. Your Right to Meaningful Access to the Courts and Assistance of Counsel

You have a constitutional right to meaningful court access and assistance of counsel.[105] In *Davidson v. Scully*, the Second Circuit held that restrictions on a prisoner's legal mail can violate this right.[106] For example, courts have stated that allowing prison officials to read mail to courts or between attorneys and prisoners can prevent prisoners from bringing abuses to the attention of courts because they fear retaliation.[107] Thus, even if your First Amendment claim fails because the restriction at issue is related to an important government objective, you can still challenge the restriction if it prevents you from having meaningful court access.

However, these claims will not likely succeed unless you also prove that there was some actual harm to your ability to assert a legal claim.[108] In one recent New York case, the district court reiterated that to state a claim for denial of access to the courts, the plaintiff must show that the defendant's actions actually hindered his pursuit of legal claims and caused actual injury.[109] The court determined that the prisoner in this case experienced only inconvenience and a delay in sending outgoing mail, neither of which reach the threshold.[110] Some courts have also required that the interference be "deliberate and malicious."[111] In other

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access to the courts); Gittens v. Sullivan, 670 F.Supp. 119, 123 (S.D.N.Y. 1987) (finding that "$1.10 per week for stamps and an additional advance of $36.00 for legal mailings satisfies the constitutional minimum for access to the courts"), *aff'd*, 848 F.2d 389, 390 (2d Cir. 1988). Even though this right has been cut back somewhat, the Court has clearly held that a state violates prisoners' fundamental constitutional rights of access to the courts by failing to provide them with adequate legal library facilities. The right of access to the courts requires that prison officials assist prisoners in the preparation and filing of meaningful legal papers by providing law libraries and adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72, 83 (1977).

103. *See* Branham v. Mansfield, No. 2:04-CV-286, 2009 U.S. Dist. LEXIS 87195 at *15 (W.D. Mich. 2009).

104. *See* Branham v. Mansfield, No. 2:04-CV-286, 2009 U.S. Dist. LEXIS 87195 at *15 (W.D. Mich. 2009).

105. *See* Bounds v. Smith, 430 U.S. 817, 821–23, 97 S. Ct. 1491, 1494–95, 52 L. Ed. 2d 72, 78–80 (1977) (reviewing the history of Supreme Court decisions that have established a right of access to the courts and the assistance of counsel). *But see* Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (holding that a prisoner must prove that lack of necessary legal assistance or library actually hindered case). See Chapter 12 and Chapter 9, Part H of the *JLM* for a full discussion of the right to effective assistance of counsel.

106. Davidson v. Scully, 694 F.2d 50, 53 (2d Cir. 1982) (holding that prison officials who did not allow a prisoner to mail sealed letters to the Army Board for Corrections of Military Records, the Commanding Officer, United States Army Reserve Components Personnel Center, the Judge Advocate General, and the American Civil Liberties Union violated prisoner's right to meaningful access to the courts).

107. *See* Taylor v. Sterrett, 532 F.2d 462, 476 (5th Cir. 1976); Martin v. Brewer, 830 F.2d 76, 78–79 (7th Cir. 1987) (distinguishing incoming from outgoing mail to the courts on this ground).

108. *See* Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (holding the prisoner must prove his prison's law library or legal assistance program was lacking in a way actually hindering his efforts to pursue a legal claim); Bourdon v. Loughren, 386 F.3d 88, 98–99 (2d Cir. 2004) (holding appointment of counsel to a prisoner was sufficient to satisfy the prisoner's right of access to the courts; the attorney's performance did not have to be "effective" as long as it did not prevent the prisoner from pursuing a particular legal claim); DeLeon v. Doe, 361 F.3d 93, 94 (2d Cir. 2004) (dismissing prisoner's claim for denial of court access when prison officials caused delays to his legal mail); Oliver v. Fauver, 118 F.3d 175, 178 (3d Cir. 1997) (holding interference with mail, if it reaches its intended destination, is insufficient to show actual injury); Taylor v. Coughlin, 29 F.3d 39, 40 (2d. Cir. 1994) (*per curiam*) (holding prison's failure to supply prisoners with adequate typewriters did not cause any injury; prisoners were able to access the courts through handwritten documents); Jones v. Smith, 784 F.2d 149, 152 (2d Cir. 1986) (holding 30-day deprivation of access to prison law library during confinement in Special Housing Unit was insufficient to claim lack of meaningful access to courts); Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988) (holding that the loss of outgoing court documents was not a sufficient injury because the error was noted in time to allow the plaintiff to re-file the documents); Jermosen v. Coughlin, 877 F. Supp. 864, 871 (S.D.N.Y. 1995) (holding that the confiscation of a tape mailed to a prisoner did not qualify as a sufficient injury because the prisoner had access to the tape when preparing his civil action, and at the time the tape was taken, the prisoner's case had already been settled). *But see* Key v. Artuz, No. 95 CV 0392 (HB), 1995 U.S. Dist. LEXIS 13201, at *5–6 (S.D.N.Y. Sept. 13, 1995) (*unpublished*) (holding that a prison's mishandling of legal mail that resulted in the prisoner missing a court-imposed deadline was a sufficient showing of injury).

109. *See* Wesolowski v. Washburn, 615 F.Supp.2d 126, 129 (W.D.N.Y. 2009).

110. *See* Wesolowski v. Washburn, 615 F.Supp.2d 126, 129 (W.D.N.Y. 2009).

111. Smith v. O'Connor, 901 F. Supp. 644, 649 (S.D.N.Y. 1995) (holding that although corrections officials destroyed a prisoner's personal property, including his legal papers, the prisoner failed to show prejudice and thus failed

words, they require that the prison authorities have intentionally interfered with a prisoner's legal mail with the purpose of denying him access to the courts. Many courts, however, do not mention this additional requirement.[112]

3. Attorney-Client Privilege

For communications with your attorney, you have the additional shield of the *attorney-client privilege*.[113] This privilege allows you to refuse to disclose, and to prevent any other person from disclosing, confidential communications between you and your attorney. The protection that it provides is limited in two ways. First, because the privilege only protects you against disclosure of your legal correspondence, it may only be used to challenge the reading of your legal mail, not the inspection of it.[114] However, even though prisons may declare temporary emergencies requiring them to open your mail, they may not continue to justify mail opening by stating that the emergency is indefinite.[115] Second, there are exceptions to the kinds of communication that are protected by the privilege. For the attorney-client privilege to apply, you must intend for the communication to remain confidential.[116] In other words, if you disclose information to someone other than your attorney, this information will no longer be considered privileged. Disclosure to representatives of the attorney, such as his or her secretary or student clerk, however, is considered the same as communication with the attorney and is covered under the privilege.[117] An exception is that you cannot claim the attorney-client privilege if the communication furthers future wrongdoing.[118] It does not matter if your communications with your lawyer are written or oral; both are equally privileged.[119]

4. Legal Correspondence and New York State and City Regulations

The following is a discussion of additional New York rules governing legal mail restrictions. Prisoners in other states must consult their state and local regulations. The New York Department of Correctional Services regulations state incoming legal mail should be opened and examined only in the presence of the

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to state a claim that he was denied access to the courts); Herrera v. Scully, 815 F. Supp. 713, 723–24 (S.D.N.Y. 1993) (holding that prison officials did not act in an "intentional and deliberate manner to deprive [the prisoner] of his constitutional rights by preventing his legal mail from arriving at court in a timely manner.").

112. *See, e.g.*, Key v. Artuz, No. 95 CV 0392 (HB), 1995 U.S. Dist. LEXIS 13201, at *7 (S.D.N.Y. Sept. 13, 1995) (*unpublished*) (denying defendant motion to dismiss where interference caused prisoner to miss court-imposed deadline, the Court stated that the plaintiff's failure to allege invidious intent did not fall short of the pleading standards due to the Court's liberal reading of the complaint as if alleging this element).

113. Statute generally sets forth this privilege. In New York, the relevant statute can be found at N.Y. C.P.L.R. 4503.1 (McKinney 2007).

114. Frye v. Henderson, 474 F.2d 1263, 1264 (5th Cir. 1973) (*per curiam*) (stating opening mail to check for contraband is legitimate); People v. Poe, 193 Cal. Rptr. 2d 479, 481, 145 Cal. App. 3d 574, 578 (Cal. Ct. App. 1983) (citing Wolff v. McDonnell, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974)). Some courts have even held prison officials can open mail from a court outside your presence, since court documents are public records and therefore not subject to the same protections. *See* Martin v. Brewer, 830 F.2d 76, 78–79 (7th Cir. 1987) (incoming court mail is not privileged and does not involve the same concerns about retaliation for filing a lawsuit as outgoing mail from a prisoner to a judge); Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996) (finding incoming mail from a court not "legal mail").

115. *See* Jones v. Brown, 461 F.3d 353, 362–63 (3d Cir. 2006) (finding that though a risk of anthrax terrorism might have justified temporarily opening prisoner mail after September 11, 2001, there was no rational basis for continuing this policy more than three years later).

116. United States v. Robinson, 121 F.3d 971, 976 (5th Cir. 1997) (holding that the fact that a meeting between a prisoner and his attorney "take[s] place away from public view" is not enough to prove that the prisoner intended the communication between them to be confidential); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962) (holding that in the case of an attorney preparing a tax return, no privilege could be expected since the form is not intended to be confidential but "is given for transmittal by the attorney to others"); Priest v. Hennessy, 51 N.Y.2d 62, 68–69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 514 (1980)("[N]ot all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services.") (citing Matter of Jacqueline F., 47 N.Y.2d 215, 219, 391 N.E.2d 967, 969; 417 N.Y.S.2d 884, 886, (1979); People ex rel. Vogelstein v Warden of County Jail of County of N.Y., 150 Misc 417, 717–18, 270 N.Y.S. 362, 366 (1934); 8 Wigmore § 2292).

117. *See* N.Y. C.P.L.R. 4503(a)(1) (2007).

118. *In re* Associated Homeowners & Businessmen's Org., Inc., 87 Misc. 2d 67, 68, 385 N.Y.S.2d 449, 450 (Sup. Ct. N.Y. County 1976) (pointing towards the exception for communications "in furtherance of fraudulent or other unlawful acts" as reason for a denial of an application to quash subpoena of an attorney).

119. LeLong v. Siebrecht, 196 A.D. 74, 76, 187 N.Y.S. 150, 150 (2d Dept. 1921).

prisoner and will not be read by prison authorities without written superintendent authorization.[120] Outgoing privileged mail may not be opened, inspected, or read without written superintendent authorization. The regulations applying to city and county jails in New York have essentially the same provisions, except they additionally state that mailed communications with attorneys may not be read without a search warrant.[121]

The standards applicable to jails in New York City have recently been changed and now distinguish between privileged and non-privileged mail. Your privileged incoming mail cannot be opened except in your presence or pursuant to a search warrant, and your privileged outgoing correspondence can only be opened or read pursuant to a search warrant.[122]

5. Legal Correspondence and Federal Regulations

Privileged mail is referred to as "special mail" in the federal regulations governing the Federal Bureau of Prisons.[123] This includes mail from state and federal courts, attorneys, the President and Vice-President, governors, members of the U.S. Congress, embassies and consulates, federal law enforcement officers, and the Department of Justice (excluding the Bureau of Prisons, but including U.S. Attorneys).[124] Mail from any of these sources should be marked as follows on the envelope: "Special Mail—Open only in the presence of the inmate."[125] Prison authorities may still open these letters to ensure there is no contraband and to confirm the enclosed letter does in fact qualify as special mail. But, they may not read the letter. If the envelope is not marked as special mail, the correspondence will be treated as general correspondence.[126] Mail from attorneys must be marked as described above and must indicate the attorney's name and the fact that he or she is an attorney. While the word "Attorney" does not need to appear on the envelope, the court states that there must be some indication that the person sending the letter is an attorney. This indication does not have to be placed on any particular place on the envelope.[127] For more information, see the relevant federal regulations.[128]

As a practical matter, whether you are a state or federal prisoner, you should clearly label envelopes of privileged correspondence: "*Privileged Correspondence (Special Mail)—Do Not Open Except in the Presence of Intended Inmate-Recipient.*" You may also want to suggest your lawyer tape shut all mail sent to you. This will let you know whether your mail had been opened and read when you were not present, since you would be able to see where the tape was removed from the envelope.

D. Internet Communication

The right of a prisoner to access the Internet, whether directly or indirectly, is a relatively new subject, since the Internet has only recently become common in day-to-day life. Therefore, there are not many cases testing to what extent a prisoner has a right to communicate through the Internet. However, the *Turner* standard clearly applies to cases involving Internet communication.[129]

Most, if not all, states ban prisoners from direct, unsupervised access to the Internet.[130] Federal legislation prevents prisoners from access without official supervision.[131] Though this statute has not yet been tested in court, it will likely be upheld because it is narrowly tailored (does not ban access, just requires

120. N.Y. Comp. Codes R. & Regs. tit. 7, § 721 (2007).

121. N.Y. Comp. Codes R. & Regs. tit. 9, § 7004.4 (2007). Note that this section of the regulations distinguishes legal privileged correspondence from general privileged correspondence.

122. Minimum Standards for New York City Correctional Facilities 1-11(c)–(e), *available at* http://www.nyc.gov/html/boc/downloads/pdf/minimum_standards.pdf. The amendments became effective June 16, 2008.

123. 28 C.F.R. § 540.2(c) (2007).

124. 28 C.F.R. § 540.12(b) (2007).

125. 28 C.F.R. § 540.12(b) (2007).

126. 28 C.F.R. § 540.18(b) (2007).

127. Merriweather v. Zamora, 569 F.3d 307, 313–14 (6th Cir. 2009).

128. 28 C.F.R. § 540 (2007).

129. See Part A of this Chapter for an explanation of the *Turner* standard.

130. *See* Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 Brook. L. Rev. 855, 859 (2002).

131. Protection of Children from Sexual Predators Act of 1998, Title VIII, sec. 801, Pub. L. No. 105-314, 112 Stat. 2974, 2990 (1998) (withholding federal funding from any federal program that allows prisoners unsupervised access to the Internet). This statue was enacted in response to a specific case in which a prisoner who had been granted access to participate in online classes instead used his unsupervised time to download child pornography.

supervision) to a valid prison interest (security). Some states allow certain prisoners to access the Internet under supervision for educational and vocational courses. Similarly, the Federal Bureau of Prisons is piloting a program called The Trust Fund Limited Inmate Computer System (TRULINCS), through which prisoners can send electronic messages to families and attorneys without actually accessing the Internet.[132] You should look into the regulations of your own state to find out its specific restrictions and allowances.

Prisoners commonly access the Internet indirectly, using third parties for assistance. For instance, a prisoner might write a regular letter to a third party describing the information he wants posted on the Internet or that he wants sent in an e-mail. The third party would then post the information or send the e-mail, and afterwards would print any Internet response and mail it to the prisoner.[133] Though it would seem this access should be governed by the same rules that regulate mail, some states have begun to regulate this type of indirect Internet communication in a much stricter way. For instance, Ohio prevents any access, direct or indirect, except for that related to educational programs.[134] Arizona has a similar statute that eliminates inmates' direct and indirect access to the internet and e-mail.[135] Other statutes of this kind have also been enacted in Minnesota, California, Kansas, and Wisconsin.[136] These statutes have only begun to be tested in the courts, and most of the recent litigation in this area has centered on these state legislative schemes. The reaction in various courts has been mixed.

In an unpublished opinion in 2002, the Seventh Circuit decided that a prison's ban on all internet-generated material sent in the mail did not violate the inmate's First Amendment rights.[137] The prison's justification for this policy was that allowing such items increased the chance that sensitive material would enter the prison.[138] More recently, the Ninth Circuit invalidated a California policy prohibiting prisoners from receiving by mail any material downloaded from the Internet.[139] The court, applying the *Turner* standard, found no logical relationship between the regulation and the legitimate concerns of security and of increased workload for the mailroom.[140] A 2008 California case, while acknowledging this Ninth Circuit precedent, reaffirmed that prisoners may be denied direct internet access, stating that there is no free-standing First Amendment right to computer and internet access.[141]

The response at the district court level has been similarly mixed. A judge in Arizona found the state law to be unconstitutional,[142] while a judge in Kansas upheld a similar law.[143] Much seems to turn on the courts' interpretation of the *Turner* factors in this context.[144] The Ninth circuit case and the Arizona district court case indicate that the policies prohibiting indirect access to the internet through the receipt of internet-generated materials in the mail might be more vulnerable to constitutional First Amendment challenges than policies dealing with direct internet access. However, it is important to note there have not yet been enough cases on this matter to determine exactly how various courts will handle the issue of Internet communication.

E. Receipt and Possession of Publications

The same standards that govern censorship of incoming mail apply to your right to receive and possess books, magazines, and other reading material. Prior to 1989, *Procunier v. Martinez*[145] held that a publication

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132. BOP: TRULINCS Frequently Asked Questions, Federal Bureau of Prisons, http://www.bop.gov/inmate_programs/trulincs_faq.jsp (last visited July 26, 2008) (discussing the Bureau of Prisons' e-mail program).

133. At least one court has held prisoners cannot be punished if third parties post information on the Internet for them. *See* Canadian Coalition against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199, 1201, 1203 (D. Ariz. 2003).

134. Ohio Rev. Code Ann. § 5145.31C(1) (a).

135. Ariz. Rev. Stat. Ann. §§ 31-235(c), 31-242, 41-1604.

136. *See* Valerie Alter, *Jailhouse Informants: A Lesson in E-Snitching*, 10 J. Tech. L. & Pol'y 223, 232 (2005).

137. Rogers v. Morris, No. 01-3903, 2002 WL 453706 (7th Cir. 2002).

138. Rogers v. Morris, No. 01-3903, 2002 WL 453706 (7th Cir. 2002).

139. Clement v. Cal. Dept. of Corr., 364 F.3d 1148, 1152 (9th Cir. 2004).

140. Clement v. Cal. Dept. of Corr., 364 F.3d 1148, 1152 (9th Cir. 2004).

141. Carmony v. County of Sacramento, 2008 WL 435343, 17–18 (E.D. Cal. 2008).

142. Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199, 1203 (D. Ariz. 2003).

143. Waterman v. Commandant, 337 F. Supp. 2d 1237, 1243 (D. Kan. 2004).

144. Valerie Alter, *Jailhouse Informants: A Lesson in E-Snitching*, 10 J. Tech. L. & Pol'y 223, 233–34 (2005).

145. Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

could not be prohibited unless officials could show that the particular publication constituted a threat to prison security or order or would negatively affect a prisoner's rehabilitation.[146]

But, in 1989, in *Thornburgh v. Abbott*, the U.S. Supreme Court replaced the *Martinez* standard with a standard easier for prison officials to meet: the *Turner* standard.[147] Lower federal and state court decisions that invalidated restrictions under the *Martinez* standard almost surely do not reflect current law, so you probably cannot cite to them in any court papers. *This means that you cannot rely on cases decided before 1989*. See the discussion of *Martinez* and *Abbott* in Part B of this Chapter.

1. General Standards for Receiving Publications

You have a First Amendment right to receive publications, and a publisher has a First Amendment right to send you publications. But, restrictions of this right are valid if reasonably related to a legitimate prison interest (the *Turner* standard).[148] The Supreme Court has noted deference should be paid to the "informed discretion of correction officials."[149] This means it will be relatively easy for officials to restrict access to publications, but censorship is not allowed just because the publication's content is unpopular or offensive.[150]

Most courts, applying the *Turner* standard, have upheld restrictions on receiving incoming publications. Generally, they have held such restrictions are rationally related to the legitimate governmental interests of security,[151] screening contraband,[152] preventing fire,[153] and promoting rehabilitation.[154] In *Frost v. Symington*, a federal appeals court upheld regulations withholding sexually explicit magazines from prisoners.[155] In *Malik v. Coughlin*,[156] a New York state court, citing *Abbott*, allowed censorship of an incoming article in which the author made critical and exaggerated allegations concerning prison medical personnel. The censored article alleged correctional facilities used prisoners as guinea pigs for drug testing.[157] The court held the censorship did not violate the prisoner's right to free speech, despite the fact that the article was read at two other prisons without any disruptions.[158] The withholding of publications that contain racist statements has also been upheld by federal courts relying on *Abbott*.[159] Prison officials can probably ban the distribution of an internal prisoners' newsletter as contrary to prison security if it contains similar forbidden content. However, as one court held in *Epps v. Smith*,[160] a prison cannot ban distribution of an outside newsletter that does not contain prohibited content (in this case, a self-described "revolutionary prisoners' newspaper" published in California and distributed in a New York penitentiary). The court there relied heavily on the rights of those outside the prison to air their political views.[161]

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146. Procunier v. Martinez, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974).

147. Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

148. Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989).

149. Thornburgh v. Abbott, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989) (quoting Turner v. Safley, 482 U.S. 78, 90, 107 S. Ct. 2254, 2263, 96 L. Ed. 2d 64, 80 (1982)).

150. Thornburgh v. Abbott, 490 U.S. 401, 415–16, 109 S. Ct. 1874, 1882–83, 104 L. Ed. 2d 459, 474 (1989).

151. *See, e.g.*, Malik v. Coughlin, 154 A.D.2d 135, 137–38, 552 N.Y.S.2d 182, 184 (3d Dept. 1990) (holding that the inflammatory accusations contained in the publication would have incited disobedience).

152. *See, e.g.*, Skelton v. Pri-Cor, 963 F.2d 100, 103 (6th Cir. 1991) (holding because hardback books can be used to smuggle contraband, a ban on such books was valid). *But see* Prison Legal News v. Lehman, 397 F.3d 692, 700 (9th Cir. 2005) (finding no rational relation between preventing contraband and banning bulk mailings and catalogs).

153. *See, e.g.*, Morrison v. Hall, 261 F.3d 896, 902 (9th Cir. 2001) (holding that reducing fire hazards is a legitimate government interest but banning bulk mailings does not rationally serve that interest). *Cf.* Prison Legal News v. Lehman, 397 F.3d 692, 700 (9th Cir. 2005) (finding that banning catalogs and bulk mailings is not rationally related to decreasing the risk of fire, since limitations already exist on the number of possessions in prisoners' cells).

154. *See, e.g.*, Waterman v. Farmer, 183 F.3d 208, 217–18 (3d Cir. 1999) (holding that a state statute prohibiting pornographic materials for prisoners had a rational relationship to rehabilitation); Dawson v. Scurr, 986 F.2d 257, 260 (8th Cir. 1993) (holding that exposing psychologically unfit prisoners to sexually explicit materials would interfere with their rehabilitation).

155. Frost v. Symington, 197 F.3d 348, 357–58 (9th Cir. 1999) (finding that regulation of pornographic materials promotes security interests).

156. Malik v. Coughlin, 154 A.D.2d 135, 552 N.Y.S.2d 182 (3d Dept. 1990).

157. Malik v. Coughlin, 154 A.D.2d 135, 136, 552 N.Y.S.2d 182, 183 (3d Dept. 1990).

158. Malik v. Coughlin, 154 A.D.2d 135, 138–39, 552 N.Y.S.2d 182, 184 (3d Dept. 1990).

159. *See, e.g.*, Thomas v. U.S. Sec'y of Def., 730 F. Supp. 362, 364–65 (D. Kan. 1990); Chriceol v. Phillips, 169 F.3d 313, 315–17 (5th Cir. 1999); Winburn v. Bologna, 979 F. Supp. 531, 534–35 (W.D. Mich. 1997).

160. Epps v. Smith, 112 Misc. 2d 724, 447 N.Y.S.2d 577 (Sup. Ct. Wyoming County 1981).

161. *See* Epps v. Smith, 112 Misc. 2d 724, 728–29, 447 N.Y.S.2d 577, 580–81 (Sup. Ct. Wyoming County 1981).

Occasionally, courts will invalidate restrictions on publications because they bear no rational relationship to the asserted government interest. In *Crofton v. Roe*,[162] the court found a regulation limiting the publications that a prisoner can receive to those he ordered and paid for directly bore no relationship to the interest of screening for contraband. In *Spellman v. Hopper*,[163] the court found no rational relationship between the government interests of security and fire prevention, and a restriction that prohibited prisoners in administrative segregation (as opposed to in disciplinary segregation) from receiving any subscriptions. Similarly, in *Aiello v. Litscher*,[164] the court held a restriction on publications that contained any nudity could be invalidated as too broad because the restriction included scientific texts and works of art.[165]

A common restriction imposed by prisons is the "publishers-only" rule, which permits "inmates to receive newspapers, magazines, and books from publishers or book clubs only."[166] The Supreme Court in *Bell v. Wolfish*[167] held that if your prison adopts a publishers-only rule for hardcover books, you have no right to receive publications directly from friends or family, as the rule might be necessary to ensure prison security by preventing contraband smuggling. *Bell* only dealt with hardcover books, so it is unclear how far its reasoning can extend. Lower courts have extended the publishers-only rule to other publications like magazines and soft-cover books because courts accept the argument by prison officials that requiring prisoners to receive such materials directly from the publisher is a minor inconvenience, compared to the greater inconvenience of searching all materials not sent in factory-sealed packages.[168] But, courts have found that some restrictions on your ability to receive publications are not rational and have struck them down. For example, one circuit court has stated that prisons may not require books ordered from approved vendors to have special shipping labels.[169] Also, some courts have held that prisons cannot place certain restrictions on bulk mail.[170] In a recent California case, a federal court held that a policy of prohibiting a vendor from sending free, softbound, religious materials to prisoners was not rational.[171] Finally, banning gift subscriptions may not be rational.[172]

In addition, bans on certain publications, beyond sexually explicit ones, can be found reasonably related to rehabilitation interests. In *Beard v. Banks*, the Supreme Court upheld a Pennsylvania regulation denying all newspapers and magazines to prisoners held in segregation and temporarily classified as particularly dangerous or unmanageable.[173] Applying the *Turner* test, the Court found that such a restriction was reasonably related to the prison's interest in promoting good behavior.[174] It was important in this case that the prisoners' placement in segregation was not permanent, and that they could earn back their privilege to

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But see Nasir v. Morgan, 350 F.3d 366, 375–76 (3d Cir. 2003) (upholding ban on correspondence between prisoners and former prisoners under *Turner* balancing test, despite the 1st Amendment interests of the non-prisoner).

162. Crofton v. Roe, 170 F.3d 957, 961 (9th Cir. 1999).

163. Spellman v. Hopper, 95 F. Supp. 2d 1267, 1282 (M.D. Ala. 1999) (distinguishing from cases upholding subscription bans for prisoners in disciplinary segregation, since their lack of access to publications could provide a disincentive to commit infractions).

164. Aiello v. Litscher, 104 F. Supp. 2d 1068, 1082 (W.D. Wis. 2000).

165. *But see* Mauro v. Arpaio, 188 F.3d 1054, 1060 n.4 (9th Cir. 1999) (upholding restriction on sexually explicit materials, even if it includes art and science texts, as not unconstitutionally overbroad).

166. *See*, *e.g.*, Ward v. Washtenaw Cnty. Sheriff's Dept., 881 F.2d 325, 326–27. (6th Cir. 1989).

167. Bell v. Wolfish, 441 U.S. 520, 550–52, 99 S. Ct. 1861, 1880–81, 60 L. Ed. 2d 447, 475–77 (1979).

168. *See* Avery v. Powell, 806 F. Supp. 7, 8–11 (D.N.H. 1992) (finding a prison regulation prohibiting prisoners from receiving blank greeting cards, unless sent from a vendor, was reasonably related to a legitimate interest in maintaining prison security, as greeting cards received from non-vendors would necessitate time-consuming searches for contraband).

169. Ashker v. Cal. Dept. of Corr., 350 F.3d 917, 924 (9th Cir. 2003).

170. Morrison v. Hall, 261 F.3d 896, 900 (9th Cir. 2001) (holding prison cannot ban prisoners from receiving subscriptions sent by bulk, third, or fourth class mail); Prison Legal News v. Lehman, 397 F.3d 692,700–01 (9th Cir. 2005) (finding prison may not prohibit prisoners from receiving non-subscription bulk mail and catalogs).

171. Jesus Christ Prison Ministry v. Cal. Dept. of Corr., 456 F. Supp. 2d 1188, 1201–02 (E.D. Cal. 2006).

172. Prison Legal News v. Werholtz, No. 02-4054-MLB, 2007 U.S. Dist. LEXIS 73629, at *13 (D. Kan. Oct. 1, 2007) (finding a Kansas policy of banning gift subscriptions was not rational and therefore unconstitutional).

173. Beard v. Banks, 548 U.S. 521, 525, 126 S. Ct. 2572, 2576–77, 165 L. Ed. 2d 697, 702–03 (2006).

174. Beard v. Banks, 548 U.S. 521, 533, 126 S. Ct. 2572, 2580, 165 L. Ed. 2d 697, 707 (2006) ("[W]ithholding such privileges 'is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.'" (quoting Overton v. Bazzetta, 539 U.S. 126, 134, 123 S. Ct. 2162, 2168–69, 156 L. Ed. 2d 162, 171 (2003)).

possess publications.[175] One of the Supreme Court justices, Justice Stevens, *dissented* (disagreed with the outcome) because he thought that the rationale of rehabilitation was too broad and could theoretically justify taking away any right or privilege in prison.[176] As this case is relatively recent, it is important to note that there is some disagreement on the issue, even within the Supreme Court.

You cannot be punished for having literature that is prohibited if it is prohibited by an unconstitutional or illegal rule. If you are punished for having this literature, Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings," should help you understand your rights during prison disciplinary proceedings.

Finally, you should remember that state law, and state and federal regulations, might give you additional protections regarding access to literature. For instance, federal regulations allow prisoners in minimum- and low-security facilities to receive soft-cover books from any source, though they can receive hardcover books only from the publisher, a book club, or a bookstore.[177] Prisoners in medium- or high-security facilities must receive all books from the publisher, a book club, or a bookstore.[178] In addition, facility administrators have the ability to reject publications if they contain content, like depictions of violence and sexually explicit material (discussed in more detail below), that would be a security risk.[179] So, you should research additional regulations or laws that might apply to you.

2. Receiving Sexually Explicit Materials

Some regulations specifically prohibit sexually explicit materials. Courts have upheld such regulations based on two different government interests: (1) promoting rehabilitation, and (2) protecting prison security. In *Ballance v. Virginia*, the court upheld the confiscation of photographs of partially nude children from a convicted pedophile, reasoning that "due ... to the prison's interest in rehabilitating this disease," prison officials acted reasonably in confiscating the photographs.[180] Similarly, in *Dawson v. Scurr*,[181] the court held that restrictions on sexually explicit materials were justified for psychologically unfit prisoners because exposure to such materials would interfere with their rehabilitation.

The *Thornburgh v. Abbott*[182] rule gives prison officials discretion to ban sexually explicit material if officials reasonably believe the material poses a threat to prison order. Prison officials are given this discretion because allowing a prisoner to possess such material may lead other prisoners to make assumptions about that prisoner's beliefs, sexual orientation, or gang affiliations, and encourage violence.[183] At least one federal circuit court has held that a ban on sexually explicit material is reasonable in order to prevent sexual harassment of female staff.[184] But, some courts have struck down blanket bans on sexually explicit material and instead require the prison to show that giving a specific publication to prisoners will harm their rehabilitation.[185]

Even if the prison decides to ban sexually explicit materials, some courts have held that both the prisoner and also the publisher are entitled to notice of the ban and an opportunity to respond.[186] The reason

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175. Beard v. Banks, 548 U.S. 521, 532, 126 S. Ct. 2572, 2579–80, 165 L. Ed. 2d 697, 707 (2006).

176. Beard v. Banks, 548 U.S. 521, 547–48, 126 S. Ct. 2572, 2588–89, 165 L. Ed. 2d 697, 716–17 (2006) (Stevens, J., dissenting).

177. 28 C.F.R. § 540.71(a) (2007).

178. 28 C.F.R. § 540.71(a) (2007).

179. For an explanation of content that can amount to a security risk, see 28 C.F.R. § 540.71(b) (2007).

180. Ballance v. Virginia, 130 F. Supp. 2d 754, 760 (W.D. Va. 2000).

181. Dawson v. Scurr, 986 F.2d 257, 260–62 (8th Cir. 1993).

182. Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

183. Thornburgh v. Abbott, 490 U.S. 401, 412–13, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–73 (1989).

184. Mauro v. Arpaio, 188 F.3d 1054, 1059–60 (9th Cir. 1999).

185. *See* Ramirez v. Pugh, 379 F.3d 122, 129 (3d Cir. 2004) (finding that "the connection between the [restrictive statute] and the government's rehabilitative interest" is not "obvious upon consideration of the entire federal inmate population, including those prisoners not incarcerated for sex-related crimes"); Guajardo v. Estelle, 580 F.2d 748, 762 (5th Cir. 1978) ("Before delivery of a publication may be refused, prison administrators must review the particular issue of the publication in question and make a specific, factual determination that the publication is detrimental to prisoner rehabilitation because it would encourage deviate, criminal sexual behavior.").

186. Montcalm Publ'g Corp. v. Beck, 80 F.3d 105, 106 (4th Cir. 1996) (finding that "publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate-suscribers"); Jacklovich v. Simmon, 392 F.3d 420, 433 (10th Cir. 2004) (holding that publishers as well as prisoners have a right to be notified when inmate subscribers are prohibited from receiving the publishers' publications). Note that the 10th Circuit

for granting notice to publishers is that they have a First Amendment right to communicate with individual prisoners if they so choose.[187] Additionally, at least one court has held that prisoners have a right to appeal censorship decisions to someone other than the official who ordered the censorship.[188]

In *Thornburgh v. Abbott*, one of the regulations at issue allowed the warden to ban homosexually explicit material depicting the same gender as the prison population.[189] The Supreme Court held the rule was valid. In doing so, the Court upheld the regulation allowing the warden to permit heterosexual material and reject homosexual material. The regulation also directed non-explicit homosexual material to be permitted.[190] The Court reasoned, "[P]risoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow [prisoner]'s ... sexual orientation ... and cause disorder by acting accordingly ... [I]t is essential that prison officials be given broad discretion to prevent such *disorder*."[191]

"Disorder" presumably means sexual or violent assault. The Court did not explain why explicitly homosexual material would cause disorder or violence. Others have offered at least two theories: identification and cueing. The identification theory holds that possession of explicit homosexual material will identify that prisoner as gay and make that prisoner a target for assault.[192] The cueing theory reasons that dissemination of such material in prison will "lead inmates to believe that homosexual activity is condoned there."[193]

What this means for the prisoner wishing to receive sexually explicit homosexual material is unclear because the discretion given to officials in *Thornburgh v. Abbott* may result in many different decisions and regulations.[194] At least one court has stated in *dicta* (language not critical to the case's holding and therefore not binding on later courts) that because exposure of one's sexual identity in a maximum-security prison is more likely to lead to assault by others than in a minimum-security facility, prison security concerns are more legitimate in a maximum-security facility.[195] Such reasoning could mean that incoming sexually explicit homosexual material may be denied at maximum-security, but not minimum-security, facilities.

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later clarified that *Jacklovich* governed only intentional rejections of the publications, rather than accidents such as a mistake in the mailroom. Jones v. Salt Lake County, 503 F.3d 1147, 1163 (10th Cir. 2007).

187. Montcalm Publ'g Corp. v. Beck, 80 F.3d 105, 109 (4th Cir. 1996).

188. Krug v. Lutz, 329 F.3d 692, 699–700 (9th Cir. 2003).

189. The Program Statement No. 5266.5, which added to the regulation at issue, 28 C.F.R. § 540.71(b)(7) (2007), allowed the warden to reject the following types of sexually explicit material: (1) homosexual (of the same sex as the prison population), (2) sado-masochistic, (3) bestial, or (4) involving children. Thornburgh v. Abbott, 490 U.S. 401, 405 n.6, 109 S. Ct. 1874, 1877 n.6, 104 L. Ed. 2d 459, 468 n.6 (1989).

190. Thornburgh v. Abbott, 490 U.S. 401, 405 n.6, 109 S. Ct. 1874, 1877 n.6, 104 L. Ed. 2d 459, 468 n.6 (1989) (citing Program Statement supplementing 28 C.F.R. § 540.71(b)(7) (2007)).

191. Thornburgh v. Abbott, 490 U.S. 401, 412–13, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–73 (1989) (emphasis added).

192. Clair A. Cripe & Ira Kirschbaum, *Prisons as Censors*, *in* 1 Prisoners and the Law 3–3, 3–14 (Ira P. Robbins ed., 2010).

193. Clair A. Cripe & Ira Kirschbaum, *Prisons as Censors*, *in* 1 Prisoners and the Law 3–3, 3–14 (Ira P. Robbins ed., 2010).

194. Thornburgh v. Abbott, 490 U.S. 401, 417 n.15, 109 S. Ct. 1874, 1883 n.15, 104 L. Ed. 2d 459, 475 n.15 (1989) (noting that "the exercise of discretion called for by these regulations may produce seeming 'inconsistencies,'" but that this does not necessarily mean "arbitrariness or irrationality"). *Compare* Inosencio v. Johnson, 547 F. Supp. 130, 135–36 (E.D. Mich. 1982), *aff'd sub nom.* Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984) (holding the prohibition of a homosexual worship service to be constitutional based on the reasoning that prisoners attending such services would be exposing themselves to attacks from other prisoners), *with* Lipp v. Procunier, 395 F. Supp. 871, 877–78 (N.D. Cal. 1975) (holding the prohibition of homosexual worship services to be a possible violation of prisoners' 1st Amendment right to religious freedom and requiring prison officials to present findings of fact that clearly supported their assertion that such a service would present a danger to the prison population). The Second Circuit has not considered the issue of sexually explicit homosexual materials in prisons, but it has upheld a regulation banning prisoners from keeping sexually explicit photos of their wives and girlfriends on the grounds that such photos may create violence among prisoners due to their personal nature. Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1995). *See also* Thomas v. Scully, No. 89 Civ. 4715, 1990 U.S. Dist. LEXIS 16229 at *3 (S.D.N.Y. Dec. 5, 1990) (unpublished) (following the *Giano* holding). Presumably the court would extend these holdings to sexually explicit photos of gay partners as well.

195. *See* Inosencio v. Johnson, 547 F. Supp. 130, 135 (E.D. Mich. 1982), *aff'd sub nom.* Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984) (citing testimony by the director of the California Department of Corrections that the Department could make a good case for denying prisoners the ability to attend homosexual church service in a maximum-security prison while allowing those in a medium-security facility to attend). *See also* C.F.R. § 540.71(b)(7) (2007).

As a general rule, gay and lesbian prisoners may seek to obtain non-sexually explicit homosexual material through the mail. Federal regulations seem to allow the wholesale admission of these materials into the federal prison environment.[196] State prisoners who desire such material, however, may encounter the same arguments used by prison officials to ban sexually explicit homosexual materials. For instance, one court applied an identification theory in *Harper v. Wallingford*[197] to find that a prisoner's First Amendment rights were not violated when non-explicit mail promoting consensual sexual relationships between adult men and juvenile males was withheld from him. The court found legitimate the prison officials' concern that the material, when seen by other prisoners, would make the prisoner a target as a homosexual and would thus make him vulnerable to assault. However, because one of the main arguments used by prison officials to legitimize their security interests in these restrictions is one of identification, such arguments might fail to persuade courts where it is clear that the prisoner is *already* known to be gay.[198] For more information on gay, lesbian, bisexual, and transgender issues, see *JLM*, Chapter 30.

Courts have also upheld restrictions on explicit heterosexual materials,[199] including sexually explicit photographs of prisoners' wives or girlfriends.[200] While these restrictions are almost always found to be constitutional, a few courts have scrutinized such regulations much more closely. In *Aiello v. Litscher,*[201] the court held that a regulation banning all written or visual materials containing nudity or sexual behavior was too vague because it would also ban important works of art and literature. It noted that a jury could find that the prohibition of such works is not reasonably related to legitimate penological interests. It also concluded that there was no evidence that such materials threaten security or rehabilitation.[202]

F. Access to the News Media

You may want to publicize your case by attracting the media's attention. The Supreme Court has held that a reasonable and effective means of communication between prisoners and the media must exist.[203] But, prisons have a legitimate security interest in limiting access to outside visitors, including the press.[204] The court held that limiting or prohibiting face-to-face interviews with the press does not violate the First Amendment as long as prisoners can still communicate with the press through writing or those allowed to visit.[205] In *Houchins v. KQED*, the Supreme Court repeated that freedom of the press does not grant the media special access to prisons.[206] As such, physical access by the news media (through visitation, tours, photographs, etc.) can be restricted just as physical access by the public based on security interests can. In a

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196. *See* Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (noting that publications must be "detrimental to the security, good order, or discipline of the institution or facilitate criminal activity" before their access can be restricted).

197. Harper v. Wallingford, 877 F.2d 728, 733 (9th Cir. 1989).

198. *See* Espinoza v. Wilson, 814 F.2d 1093, 1098–99 (6th Cir. 1987) (finding that protecting the sexual identity of the prisoners was not a valid reason for restricting access to homosexual publications since the prisoners were already open about being gay but finding in favor of the warden because he stated other legitimate reasons for restricting access).

199. Mauro v. Arpaio, 188 F.3d 1054, 1059–60 (9th Cir. 1999) (upholding restrictions on explicit heterosexual materials as reasonably related to the goal of preventing sexual harassment of female prison guards).

200. Giano v. Senkowski, 54 F.3d 1050, 1055–56 (2d Cir. 1995) (holding that the regulation was rationally related to the prevention of prisoner violence; the court pointed out that other avenues are available for reinforcing emotional bonds, such as non-nude photographs or romantic letters, and for satisfying the right to graphic sexual imagery, such as commercially produced erotica or sexually graphic letters).

201. Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000).

202. Aiello v. Litscher, 104 F. Supp. 2d 1068, 1079–81 (W.D. Wis. 2000). *See also* Kaufman v. McCaughtry, 419 F.3d 678, 685 (7th Cir. 2005) (following *Aiello* in finding that a definition of "pornography" agreed to in a settlement by the parties could not be contested as overly broad).

203. Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

204. Pell v. Procunier, 417 U.S. 817, 826, 94 S. Ct. 2800, 2806, 41 L. Ed. 2d 495, 503–04 (1974); *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 850, 94 S. Ct. 2811, 2815, 41 L. Ed. 2d 514, 519–20 (1974) (*Pell*'s companion case, finding that under the Federal Bureau of Prisons regulations, the media does not have the right to access prisons and inmates beyond the rights granted to members of the general public. *Saxbe* differs from *Pell* in that *Saxbe* only looks at the rights of the media, while *Pell* also addresses the rights of prisoners to communicate with the media).

205. Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). For example, the California policy in *Pell* allowed prisoners face to face visits with members of their family, their clergy, their attorneys, and friends of prior acquaintance. Pell v. Procunier, 417 U.S. 817, 824–25, 94 S. Ct. 2800, 2085, 41 L. Ed. 2d 495, 503 (1974).

206. Houchins v. KQED, 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).

recent case, a court noted that these kinds of restrictions can vary depending on the security of a particular prison or unit.[207]

Federal regulations governing prisoners held by the Federal Bureau of Prisons provide that correspondence sent to the media be treated as if it were privileged[208] and is considered special mail.[209] The rules discussed in Part C of this Chapter for privileged correspondence therefore apply to letters to the media for those prisoners. Correspondence from the media is subject to inspections for contraband, qualification as media correspondence, and content likey to promote either illegal activity or conduct contrary to Bureau regulations.[210] But, a prisoner may not receive pay for any correspondence with the media, act as a reporter, or publish under a byline.[211] This restriction on publishing under a byline was recently successfully challenged in a federal district court in *Jordan v. Pugh*.[212] The court found the absolute restriction was too broad for the stated interest of maintaining prison security, especially considering prisoners were allowed other publishing opportunities.[213] As this is a recent development, you should watch to see if other courts agree.

The warden of a federal prison has a duty to provide information to the media about certain events that take place in the prison. These include deaths, inside escapes, and institutional emergencies.[214] The warden must also provide basic information about a prisoner that is a matter of public record if it is requested by the media, unless the information is confidential.[215]

G. Visitation

Convicted prisoners' constitutional rights to visitation may be severely restricted, although pretrial detainees are almost certainly allowed reasonable visitation rights,[216] since lack of access to visitors like attorneys can infringe the right to due process and counsel.[217] In *Overton v. Bazzetta*, the Supreme Court did not state the scope of a prisoner's constitutional right to freedom of association, instead finding that a regulation restricting visits was reasonably related to the penological interest of security and therefore not a violation of the prisoner's constitutional rights.[218] Regardless of the type of prisoner, visitation rights may be restricted for considerations of institutional administration, security, and rehabilitation.[219] Prison officials may regulate the time, place, and manner of visits,[220] though such regulations, at least regarding pretrial

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207. Hammer v. Ashcroft, 570 F. 3d, 798, 801 (7th Cir. 2009) (upholding a ban on person to person meetings between the media and prisoners in the Special Confinement Unit, which contains most federal death penalty prisoners), *cert. denied*, 130 S. Ct. 1735, 176 L. Ed. 2d 212 (2010).

208. 28 C.F.R. § 540.20(a) (2007).

209. 28 C.F.R. § 540.2c (2007).

210. 28 C.F.R. § 540.20(c) (2007).

211. 28 C.F.R. § 540.20(b) (2007).

212. Jordan v. Pugh, 504 F. Supp. 2d 1109 (D. Colo. 2007).

213. Jordan v. Pugh, 504 F. Supp. 2d 1109, 1124–26 (D. Colo. 2007) (reaching the same outcome under both the *Turner* and *Martinez* standards).

214. 28 C.F.R. § 540.65(a) (2007).

215. 28 C.F.R. § 540.65(b) (2007).

216. *See* Jones v. Diamond, 594 F.2d 997, 1013–14 (5th Cir. 1979), *on reh'g*, 636 F.2d 1364 (1981); *see also* Ky. Dept. of Corr. v. Thompson, 490 U.S. 454, 465, 109 S. Ct. 1904, 1911, 104 L. Ed. 2d 506, 518 (1989) (holding that state regulations setting forth categories of visitors who might be excluded from visitation did not implicate a prisoner's liberty interest in receiving visitors under the Due Process Clause of the 14th Amendment).

217. *See* Procunier v. Martinez, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974) ("[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.").

218. Overton v. Bazzetta, 539 U.S. 126, 131–32, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162, 170 (2003) ("We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question.").

219. *See* Overton v. Bazzetta, 539 U.S. 126, 129, 123 S. Ct. 2162, 2166, 156 L. Ed. 2d 162, 168 (2003) (finding that rehabilitation, maintenance of basic order, and prevention of violence are legitimate objectives of the correctional system); Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974) (finding that a prisoner retains 1st Amendment rights that are not inconsistent with legitimate penological objectives).

220. *See* Martin v. Tyson, 845 F.2d 1451, 1455–56 (7th Cir. 1988) (holding that legitimate safety concerns and other practical constraints justified restrictions imposed on pretrial detainees).

detainees, must be reasonable.[221] Prison officials may also restrict some of the rights of visitors.[222] The *Turner* reasonableness standard also applies to visitation, and so courts can invalidate unreasonable restrictions.[223] Contact visits are not constitutionally required for pretrial detainees or for prisoners.[224]

The decision as to who may visit may be a matter of legitimate security concerns and is largely up to prison officials' discretion. If this is the case, it is up to the prison official to produce evidence that visitation restriction was in response to a security concern. It is then the inmate's burden to show by substantial evidence that the prison officials' response was exaggerated and unjustified. However, within the realm of justified restrictions, methods such as visit lists that only allow certain types of people to visit have been used held to be lawful.[225] In *Overton*, for instance, the Supreme Court upheld a regulation requiring an approved visitor list as reasonably related to security interests.[226] Courts have also upheld rules restricting visits to those who have a personal or professional relationship with the prisoner and rules denying visits by ex-convicts[227] and parties suspected of smuggling contraband.[228] The Supreme Court upheld similar regulations in *Overton*.[229] The Seventh Circuit of the U.S. Court of Appeals recently denied the constitutional claims of a prisoner whose niece and daughter had been removed from his visitor list and who had previously been convicted of violent sex offenses and admitted to raping two children.[230] Based on the holdings in *Overton* and *Turner*, the Seventh Circuit stated that a prison policy that restricts a prisoner's constitutional rights is valid if rationally related to legitimate penological interests, an analysis that requires the court to consider four issues: (1) whether a rational relationship exists between the policy and the interest it purports to advance; (2) whether there exists other ways to exercise the right in question; (3) the impact that accommodating the right will have on prison resources; and, (4) the absence of alternatives to the policy.[231] A 2009 New York case held that the Commissioner of Correctional Services had a rational basis for denying the prisoner's request to participate in a family reunion program, emphasizing that this decision is highly discretionary and will be upheld as long as there is a rational basis.[232] Since the Commissioner in this case considered the appropriate factors, including the prisoner's disciplinary record and participation in counseling sessions, the Commissioner's decision based upon the brutal nature of the prisoner's crimes was completely rational.[233]

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221. *See* Martin v. Tyson, 845 F.2d 1451, 1458 (7th Cir. 1988) (*per curiam*) (upholding policy limiting pre-trial detainee's telephone access to every other day).

222. *See* Gray v. Bruce, 26 Fed. Appx. 819, 823–24 (10th Cir. 2001) (holding that subjecting a prisoner's wife to an "ion spectrometer test," which tests for the presence of illegal drugs, was not a *per se* violation of her 4th Amendment privacy rights; however, the court ultimately held that she had stated enough facts to show that the particular search method applied to her could be unconstitutional because of its unreliability and could violate her Fifth Amendment right to be free from self-incrimination).

223. Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003) (applying *Turner* test to Michigan regulations restricting visits).

224. *See* Block v. Rutherford, 468 U.S. 576, 589, 104 S. Ct. 3227, 3234, 82 L. Ed. 2d 438, 449 (1984) (holding contact visits are a privilege, not a right and that visits can be denied due to security concerns).

225. *See* Pell v. Procunier, 417 U.S. 817, 826–28, 94 S. Ct. 2800, 2806–07, 41 L. Ed. 2d 495, 503–05 (1974) (holding that placing certain restrictions on visitations may further significant governmental interests and is therefore permitted).

226. Overton v. Bazzetta, 539 U.S. 126, 129, 123 S. Ct. 2162, 2166 156 L. Ed. 2d 162, 168 (2003).

227. *See* Farmer v. Loving, 392 F. Supp. 27, 31 (W.D. Va. 1975) (allowing ban on visitation by ex-prisoners).

228. *See* Robinson v. Palmer, 841 F.2d 1151, 1156–57 (D.C. Cir. 1988) (finding a ban on visits by prisoner's wife, who was caught smuggling marijuana into prison, was justified by prison's interest in preventing drug smuggling and because prisoner had other ways to communicate with his wife); Thorne v. Jones, 765 F.2d 1270, 1275 (5th Cir. 1985) (finding a ban on visits from prisoner's mother, who was suspected of smuggling drugs and refused to submit to a strip search, was justified by security interests); Rowland v. Wolff, 336 F. Supp. 257, 260 (Neb. 1971) (holding the interest of the state in preventing the introduction of lethal weapons outweighs a prisoner's interest in being visited by his sisters).

229. Overton v. Bazzetta, 539 U.S. 126, 133–34, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 171 (2003).

230. Stojanovic v. Humphreys, 309 Fed. Appx. 48 (7th Cir. 2009).

231. Stojanovic v. Humphreys, 309 Fed. Appx. 48, 52 (7th Cir. 2009).(held that not all prongs must be addressed for the restriction to be valid if the other factors speak overwhelmingly in favor of the restriction).

232. Philips v. Commissioner of Correctional Services, 885 N.Y.S.2d 138, 138 (N.Y. App. Div. 2009). *See also* Cabassa v. Gourd, 836 N.Y.S.2d 351 (N.Y. App. Div. 2007) (decision to deny an inmate convicted of sexually assaulting four teenage girls, three of them at gunpoint, from participating in a family reunion program was supported by rational basis and his involuntary protective custody status and the associated security concern).

233. Philips v. Commissioner of Correctional Services, 885 N.Y.S.2d 138, 139 (N.Y. App. Div. 2009).

Visits by immediate family will generally receive greater protection. Nevertheless, protection of children plays an important role in cases involving the intersection of visitation restrictions and parental rights. The primary consideration in such cases is the best interests of the children involved, and, at least in New York, Family Court is given enormous discretion in making these decisions.[234] In one 2001 New York case, the court found that an incarcerated father's petition for visitation with his daughters was properly denied based on the children's best interests.[235] The court said that while the mere fact of incarceration is not alone sufficient to deny visitation, the court has discretion to study the record and make a decision based on its totality.[236] In this case, the incarcerated father had virtually no contact with his children since his incarceration began five years previously; the children would have to travel many hours with a paternal grandmother they barely knew in order to visit; and, the children themselves did not express any interest in seeing their father.[237]

Regulations restricting the visits of minor children who are not closely related to the prisoner are routinely upheld as reasonably related to interests both in prison security and in protecting the children.[238] In one case, the court upheld the prison's decision to disallow visitation by a three-month-old niece of an prisoner who had been convicted of sexual assault, despite the prisoner's claims that this restriction violated his familial association rights.[239] The prisoner also argued that the decision to deny visitation was irrational and unreasonable; however, the court found that the restriction bore a connection to legitimate penological interests in safety and rehabilitation because the decision was based on a recommendation by the prisoner's social worker that the prisoner not see female minors because of his past conduct of sexual assaults and failure to receive sexual offender treatment.[240]

Visitation restrictions can also be justified with rehabilitation interests. In such cases, the restrictions usually take away visitation privileges from prisoners who have broken institutional rules. In *Overton*, the Supreme Court found that a Michigan regulation that prevented prisoners with two substance abuse disciplinary violations from receiving visitors (except legal and religious) was reasonably related to prison interests in rehabilitation.[241] But, it was important in this case that the visitation ban was not permanent but could be reinstated for good behavior, and that the prisoners had other ways to communicate with the persons who were denied visitation.[242] A federal court in New York similarly held a prisoner's suspension from the Family Reunion Program did not violate the Constitution, as contact visitation is a priviledge, not a right.[243] If the regulation in your case differs from these regulations (for example, if it is permanent), you may be able to challenge it in court. But, be careful of filing a claim that might be dismissed as frivolous (having no legal merit), since it would become a strike under the Prison Litigation Reform Act ("PLRA").[244] *JLM*, Chapter 14 has more information on the PLRA. In one New York case, the court questioned the legitimacy of the prison's revocation of a prisoner's right to contact visits in response to a failed urine drug test, as well as the apparent lack of connection to any safety or security concerns. The court concluded that the restriction was arbitrary and capricious and therefore a due process violation.[245]

Gay and lesbian prisoners who want visitation from their partners should note the case *Doe v. Sparks*.[246] There, a lesbian prisoner challenged officials' refusal to allow visits from her lover. Prison rules only permitted visits between heterosexual prisoners and their opposite sex partners. The court found the

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234. See e.g., Williams v. Tillman, 734 N.Y.S.2d 727, 728 (N.Y.Sup.Ct. 2001).

235. See e.g., Williams v. Tillman, 734 N.Y.S.2d 727, 728 (N.Y.Sup.Ct. 2001).

236. See e.g., Williams v. Tillman, 734 N.Y.S.2d 727, 728 (N.Y.Sup.Ct. 2001).

237. See e.g., Williams v. Tillman, 734 N.Y.S.2d 727, 728 (N.Y.Sup.Ct. 2001).

238. Overton v. Bazzetta, 539 U.S. 126, 133, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170–71 (2003). See also Wirsching v. Colorado, 360 F.3d 1191, 1199–1200 (10th Cir. 2004) (upholding rule barring sex-offender prisoner from visits with his minor daughter as reasonably related to promoting his rehabilitation and to the child's best interest).

239. Phillips v. Thurmer, 2009 U.S. Dist. LEXIS 46331 (W.D. Wis. 2009).

240. Phillips v. Thurmer, 2009 U.S. Dist. LEXIS 46331 (W.D. Wis. 2009).

241. Overton v. Bazzetta, 539 U.S. 126, 134, 123 S. Ct. 2162, 2168–69, 156 L. Ed. 2d 162, 171–72 (2003).

242. Overton v. Bazzetta, 539 U.S. 126, 134, 135, 123 S. Ct. 2162, 2168–69, 156 L. Ed. 2d 162, 171–72 (2003).

243. *See* Giano v. Goord, 9 F. Supp. 2d 235, 241 (W.D.N.Y. 1998) (holding that prisoner has no right to visitation even if removal from the program was based on a faulty urine test).

244. Giano v. Goord, 9 F. Supp. 2d 235, 242 (W.D.N.Y. 1998).

245. Matter of Rivera v. New York City Dept. of Corr., 24 Misc. 3d 536, 541, 876 N.Y.S.2d 631, 635, 2009 NY Slip Op 29144 4, 4 (N.Y. Sup. Ct. 2009).

246. Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990).

visitation policy, supposedly established to meet security and disciplinary needs, had a rational relationship to those needs, but that other prison policies undercut this rational relationship.[247] Thus, the court held the policy unconstitutional. In its opinion, the court found the connection between the prison policy and the asserted goals of security and discipline "so remote as to be arbitrary."[248] *Whitmire v. Arizona*[249] is another helpful decision for gay and lesbian couples. There, the court reversed a decision dismissing a gay couple's equal protection challenge to an Arizona policy prohibiting same-sex kissing and hugging but allowing heterosexuals to embrace during visits, finding this policy was not rationally related to prison safety.[250]

The analysis in courts today would likely be even more protective of the rights of same-sex couples. For one thing, the Supreme Court has grown increasingly suspicious of classifications based on sexual orientation, even though the Court has not definitively decided whether such classifications should receive the highest level of scrutiny.[251] And, after *Lawrence v. Texas*,[252] decided ten years after *Sparks* and one year after *Whitmire*, the Court would likely recognize a constitutional right of privacy to homosexual conduct protected under the Due Process and Equal Protection clauses of the Constitution.[253]

One area in which the rights of same-sex couples is particularly relevant is extended family visitation programs, which allow certain prisoners visitation with their family for several days at a time at a private location on the prison campus. In June 2007, California became the first state to grant lesbian and gay prisoners in registered domestic partnerships the same rights to conjugal visits, or extended family visitations, as married heterosexual couples.[254] The extent of such rights provided in other states remains untested and uncertain.[255] New York has instituted a Family Reunion Program in about one-third of its correctional facilities. The program allows inmates to spend up to several days in privacy with their spouse, children, or parents. In January 2009, the Department of Correctional Services updated its "eligible relations" policy to include same-sex partners validly married to a prisoner in a jurisdiction that recognizes same-sex marriage.[256] At the same time, same-sex partners who are not married in this way and who have instead registered their relationship through New York's domestic partnership program are still excluded from participating in the Family Reunion Program.[257] However, New York courts may be receptive to discrimination claims, because New York law explicitly prohibits discrimination on the basis of sexual

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247. Policies limiting the freedoms of gay prisoners often focus, in the case of the prison's security interests, on the danger of the gay prisoner being identified as such and thus becoming a target for sexual or non-sexual assault. As for the prison's disciplinary interests, the usual rationale is the prison runs the risk of appearing to condone gay relations in prison if it does not limit some of these prisoners' freedoms. Doe v. Sparks, 733 F. Supp. 227, 233 (W.D. Pa. 1990).

248. Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

249. Whitmire v. Arizona, 298 F.3d 1134 (9th Cir. 2002).

250. Whitmire v. Arizona, 298 F.3d 1134, 1135–37 (9th Cir. 2002).

251. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 387 (2009); *See e.g.*, Romer v. Evans, 513 U.S. 1146, 115 S. Ct. 1092, 130 L. Ed. 2d 1061 (1995).

252. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (holding that a Texas law that made it a crime for persons of the same sex to engage in certain intimate conduct was unconstitutional because it violated the due process right to privacy).

253. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 388–89 (2009).

254. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 369 (2009). *See also* Cal. Fam. Code § 297.5(h) (2010).

255. In Connecticut, the extended family visitation program is available to spouses if their children are present. Since the Supreme Court of Connecticut held in 2008 that marriage could not be restricted to opposite-sex couples, it would appear that same-sex couples share an equal opportunity to participate in these programs, so long as their children or adopted children are present. *See* Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 372 (2009). New Mexico is another state that has instituted extended family visitation programs, open to spouses and other nuclear family members, in several of its correctional facilities. Although New Mexico does not perform same-sex marriage and has rejected domestic partnership recognition for same-sex couples, the state does recognize same-sex marriages legally performed in other states or countries and has a non-discrimination law that extends to sexual orientation. Kacy Elizabeth Wiggum, *Defining Family in American Prisons,* 30 Women's Rts. L. Rep. 357, 375–77 (2009). Finally, in Washington State, the Department of Corrections allows an extended family visiting program for eligible inmates and members of their immediate family, defined as children, grandchildren, parents, siblings, or spouse. Washington State's Domestic Partnership Law, which grants a number of rights to registered same-sex couples, together with the state's anti-discrimination laws, may provide a legal foundation through which a court could compel the Department of Corrections to open the extended visitation program to registered same-sex couples. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 379–80 (2009).

256. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 377–78 (2009).

257. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 378 (2009).

orientation, and New York domestic partners have the same right to visitation as any spouse at hospitals, nursing homes, and other health care facilities.[258]

Because *Turner* reasonableness governs visitation, the availability of other means of communicating with those who cannot visit is important.[259] For instance, prisoners can still communicate through telephone calls and letters with those restricted from visiting.[260] In addition, *Turner* says courts should consider the burden of accommodating rights, like security and personnel costs of allowing many visitors. [261]

Keep in mind that federal, state, and local regulations may give you additional visitation rights that courts have not found constitutionally mandated. Prisoners in facilities run by the New York Department of Correctional Services should consult the Family Handbook for visitation restrictions. Most visitors do not need special permission, but the Superintendent must approve in advance in writing visitors under parole or probation, with past or pending criminal histories, or who are also Department employees or volunteers.[262] The Superintendent also has the power to deny visitation as necessary for security or other interests.[263]

H. Using Telephones

While some courts have held prisoners have a First Amendment right to telephone access,[264] some refuse to hold prisoners have such a right.[265] Even courts recognizing a right to telephone access say the right can be severely limited.[266] Restrictions on phone use are also governed by *Turner* reasonableness. While courts point to prison security as a valid reason for restricting phone use,[267] they also reason that other ways of

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258. Kacy Elizabeth Wiggum, Defining Family in American Prisons, 30 Women's Rts. L. Rep. 357, 379 (2009).

259. Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

260. *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (finding prisoners have other means of communication and noting these alternatives need not be ideal, just available).

261. *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (finding that accommodating visitation would have a significant negative impact on financial resources and visitor safety).

262. State of New York, Department of Correctional Services, Handbook for Families and Friends of New York State DOCS Inmates, 8 (2007).

263. State of New York, Department of Correctional Services, Handbook for Families and Friends of New York State DOCS Inmates, 9 (2007).

264. *See* Johnson v. California, 207 F.3d 650, 656 (9th Cir. 1999) (affirming that prisoners have a First Amendment right to telephone access but holding that prisoners are not entitled to a specific rate for their telephone calls); *see also* Walton v. N.Y. State Dept. of Corr. Servs., 18 Misc. 3d 775, 787, 849 N.Y.S.2d 395, 405 (N.Y. Sup. Ct. 2007) (on remand from New York Court of Appeals, upholding constitutional right to telephone access but dismissing claim that rates under a contract between the Department of Correctional Services and MCI, a telephone provider, violated families' and others' rights under the New York constitution). Many decisions involve pretrial detainees' phone access rights. *See* Johnson v. Galli, 596 F. Supp. 135, 138 (D.C. Nev. 1984) (holding that the First Amendment protects reasonable access to telephone communication for a pretrial detainee); Moore v. Janing, 427 F. Supp. 567, 576 (D.C. Neb. 1976) (affirming the unconstitutionality of institutional eavesdropping on the telephone calls of pretrial detainees but finding timing restrictions on telephone access reasonable); Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–52 (8th Cir. 1989) (finding a policy limiting pretrial detainees to one call to their lawyers every two weeks "patently inadequate" to secure assistance of counsel); Johnson v. Brelje, 701 F.2d 1201, 1207–08 (7th Cir. 1983) (finding limiting pretrial detainee to two 10-minute calls a week and no incoming calls violated his right to court access). Check if your state has enacted laws granting prisoners rights to phone access.

265. United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000) (stating that "[p]risoners have no per se constitutional right to use a telephone"); Pitsley v. Ricks, No. 96-CV-372 (NAM/DRH), 1999 U.S. Dist. LEXIS 21612, at *10 (N.D.N.Y. Sept. 3, 1999) (*unpublished*) (granting defendants superintendants' motion for summary judgment based on qualified immunity because there was no clear constitutional right to access to telephones by prisoners).

266. *See*, *e.g.*, United States v. Felipe, 148 F.3d 101, 110 (2d Cir. 1998) (upholding the constitutionality of severe restrictions on a prisoner's telephone use where those restrictions were related to the state's interest in preventing him from ordering further crime from within the prison); Carter v. O'Sullivan, 924 F. Supp. 903, 909 (C.D. Ill. 1996) (holding the computerized collect calling system employed by a prison, which blocked certain callers and prevented three way calling, was a "reasonable restriction" on the constitutional right to telephone communication and finding "[m]onitoring of inmate telephone calls is acceptable because of legitimate concerns regarding prison security."); Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986) (holding that prisoners have a 1st Amendment right to telephone access but this right can be limited for the legitimate security interests of the prison and finding that denial of access to a telephone in the 30 minutes of imprisonment was not a violation of the prisoner's rights).

267. United States v. Felipe, 148 F.3d 101, 110 (2d Cir. 1998) (applying the *Turner* test to severe limitations on communications and finding the goal of prison security legitimate to justify restrictions); Gilday v. Dubois, 124 F.3d 277, 293–94 (1st Cir. 1997) (finding no right for a prisoner to use the telephone "on his own terms" and holding that interference of calls by prisoners to numbers not on a pre-approved list was not a violation of their constitutional rights

communicating, like letter-writing and visits, limit the need for telephones.[268] So, unless telephone access is eliminated entirely or impedes attorney representation,[269] courts usually uphold phone use restrictions.

In *Johnson v. California,*[270] the court said prisoners were not entitled to a specific telephone rate and found it valid to charge prisoners higher rates than non-prisoners. In *Shoot v. Roop,*[271] the court upheld a rule requiring all calls to be operator-assisted and collect (preventing prisoners from calling toll-free numbers). In *Washington v. Reno,*[272] the court upheld a regulation restricting calls to persons on an approved list. Courts have also upheld restrictions on the number of calls prisoners can make.[273]

Many courts have held prisons must provide for unmonitored phone calls between a prisoner and his attorney, so long as it is arranged in advance.[274] Without advance arrangement, these calls can be monitored like any other call. Call monitoring in the absence of other arrangements does not violate prisoners' Fourth Amendment privacy rights for two reasons. First, there is no reasonable expectation of privacy in outbound calls from prison.[275] Second, prisoners are considered to have consented to monitoring when they receive notice of the surveillance, either by signs near the telephones or informational handbooks.[276] Courts also note prisoners have the alternative of corresponding with their lawyers confidentially through the mail.[277]

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or of the Massachusetts Wiretap Act); Carter v. O'Sullivan, 924 F. Supp. 903, 909 (C.D. Ill. 1996) (upholding the constitutionality of the computerized collect calling system employed by a prison, which blocked certain callers and prevented three way calling); Wooden v. Norris, 637 F. Supp. 543, 555 (M.D. Tenn. 1986) (holding a coinless telephone system requiring operator assistance did not infringe on prisoners' 1st Amendment rights); Hutchings v. Corum, 501 F. Supp. 1276, 1296 (W.D. Mo. 1980) (holding restriction of telephone access to only one five minute call per week sufficient to meet prisoners' constitutional rights).

268. United States v. Lentz, 419 F. Supp. 2d 820, 835–36 (E.D. Va. 2005) (holding that monitoring telephone calls to counsel was not an infringement on prisoners' 6th Amendment rights because prisoners "are not entitled to any particular method of access to the courts or to their lawyers" and they had other means for confidential communication); Bellamy v. McMickens, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) (declaring "states have no obligation to provide the best manner of access to counsel" and denying a claim of deprivation when the restrictions on the prisoner's calls were not an absolute denial of access to counsel); Pino v. Dalsheim, 558 F. Supp. 673, 675 (S.D.N.Y. 1983) (holding "the procedures providing for unlimited personal and mail communication with an attorney are constitutionally sufficient;" although prisoners and their attorneys may prefer to communicate by telephone, the state was not constitutionally obligated to ease restrictions); Wooden v. Norris, 637 F. Supp. 543, 554 (M.D. Tenn. 1986) (stating "in evaluating plaintiffs' claims in the instant case with regard to the effect the current telephone system and policies have on the ability of inmates' families to communicate with them, the Court will consider the alternative means of communication offered by the prison administration and the justification offered by the defendants for utilizing this particular telephone system").

269. *See* Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (denying prisoner's claim that he had been deprived his 1st Amendment right to telephone access when he was given access to telephone calls for specific emergencies and calls to his lawyer); *see also* Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–52 (8th Cir. 1989) (finding a policy limiting pretrial detainees to one call to their attorney every two weeks "patently inadequate" to secure assistance of counsel); *see also* McClendon v. City of Albuquerque, 272 F.Supp.2d 1250, 1258 (D.N.M. 2003) (finding restrictions including a ban on attorney visits and a five-minute limit on attorney phone calls "would 'unjustifiably obstruct the availability of professional representation'").

270. Johnson v. California, 207 F.3d 650, 656 (9th Cir. 1999), *rev'd on other grounds*, Johnson v. California, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).

271. Shoot v. Roop, No. 92-35532, 1993 U.S. App. LEXIS 5890, at *5–6 (9th Cir. Mar. 16, 1993) (*unpublished*).

272. Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994). *see also* Carter v. O'Sullivan, 924 F. Supp. 903, 906 (C.D. Ill. 1996) (upholding collect call system requiring prisoners to provide officials with a list of up to 30 individuals the prisoner wished to call).

273. *See* Pope v. Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) (upholding a restriction limiting number of persons a prisoner can call to 10); Robbins v. South, 595 F. Supp. 785, 789 (D. Mont. 1984) (upholding a restriction of one call per week); Moore v. Janing, 427 F. Supp. 567, 576–77 (D. Neb. 1976) (upholding a restriction of three five-minute calls per week).

274. *See* Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991) ("[O]fficials may tape a prisoner's telephone conversations with an attorney only if such taping does not substantially affect the prisoner's right to confer with counsel."); Martin v. Tyson, 845 F.2d 1451, 1458 (5th Cir. 1988) (allowing unmonitored line for legal and monitored for other calls).

275. United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (holding that "any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls.").

276. United States v. Workman, 80 F.3d 688, 693–94 (2d Cir. 1996) (holding a sign placed below telephones warning that calls would be monitored constituted sufficient notice of surveillance and use of the telephones after such notice indicated implied consent); *see also* United States v. Verdin-Garcia, 516 F.3d 884, 894 (10th Cir. 2008) (holding "[a] prisoner's voluntarily made choice ... to use a telephone he knows may be monitored implies his consent to be

I. Conclusion

Limitations on your right to communicate with the outside world, as discussed in this Chapter, may be among the most frustrating restrictions you have to face. In most circumstances, prison authorities have great discretion to restrict your right to communicate based on the way they think the exercise of your right affects penological interests. If you feel the discretion prison officials exercise is not reasonably related to a legitimate prison interest, and as such violates your constitutional rights, you may want to challenge the restriction or its application to you, but you should be careful that your claim does not appear frivolous.[278]

monitored.").

277. *See e.g.*, United States v. Felipe, 148 F.3d 101, 110–11 (2d Cir. 1998); Gilday v. Dubois, 124 F.3d 277, 294 (1st Cir. 1997) (citing retention of the right to correspond with counsel and family through the mail as one factor in establishing the reasonableness of a restrictive telephone system); Pino v. Dalsheim, 558 F. Supp. 673, 675 (S.D.N.Y. 1983) (holding "the procedures providing for unlimited personal and mail communication with an attorney are constitutionally sufficient").

278. The Prison Litigation Reform Act (PLRA) has a "three strikes" provision requiring prisoners to pay court costs if three of their suits have been dismissed as frivolous (without legal merit) or as failing to state a claim. So, proceed carefully, using this Chapter as a guide to successful and unsuccessful suits. 42 U.S.C. §1997e (2010). For more information on the PLRA, see Chapter 14 of the *JLM*.

A JAILHOUSE LAWYER'S MANUAL

Chapter 20: Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence

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CHAPTER 20

USING ARTICLE 440 OF THE NEW YORK CRIMINAL PROCEDURE LAW TO ATTACK YOUR UNFAIR CONVICTION OR ILLEGAL SENTENCE*

A. Introduction

If you have been convicted in a New York state court, it may be possible for you to challenge your conviction, and possibly have your conviction overturned. Under certain circumstances (such as the discovery of new evidence or when important evidence wasn't included at your trial) you may ask the trial court to either *vacate* (cancel) the judgment or set aside your sentence. You can make this request in a *motion*[1] brought under Article 440 of the New York Criminal Procedure Law.[2] Part B of this Chapter explains what Article 440 motions are, the grounds upon which you may make an Article 440 motion, and the circumstances under which a court will consider your Article 440 motion. Part C explains how to make an Article 440 motion. Part D describes what usually happens after you make an Article 440 motion. Part E details the kinds of favorable decisions possible through an Article 440 motion. Part F explains how to appeal a court's denial of your Article 440 motion. Part G summarizes important things to think about when making an Article 440 motion. Finally, Appendix B to this Chapter contains forms for filing Article 440 motions.

If you have been convicted in another state court (besides New York), see Appendix A for a list of similar post-conviction relief statutes from other states.

B. When to Use Article 440

1. What is an Article 440 Motion?

An Article 440 motion challenges the legality of your conviction or sentence.[3] If your Article 440 motion succeeds, you will receive a new trial or a new sentence. An Article 440 motion is not an *appeal*[4] and is not a substitute for an appeal or second appeal.[5] In an appeal, you request a higher court (i.e., the *appellate division* or a *court of appeals*) to review errors of the *trial court*. In a traditional appeal, you may only raise issues appearing in the trial record. The following list describes information included within your trial record. This information is part of a traditional appeal and is not usually included in an Article 440 motion:

(1) The *complaint* and the *indictment*;
(2) The *minutes* of any hearing to *suppress evidence* (a hearing to exclude evidence resulting from an illegal search or seizure) and other hearings; and
(3) The report of the formal proceedings in the trial court. This includes:
  (a) the pleadings and motions made by both sides;
  (b) the minutes of a guilty plea if you made one;
  (c) the minutes of the trial court, including *objections* made by both sides and court rulings;
  (d) the *charges* to the *jury*, if it was a jury trial;
  (e) the minutes of the *arraignment* and the sentencing;
  (f) the minutes of any adjournment; and

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1. A motion is a request to a court or judge asking for a ruling or order in your favor.

2. The laws pertaining to Article 440 motions can be found in §§ 440.10–440.60 of the New York Criminal Procedure Law ("N.Y. Crim. Proc. Law").

3. Other ways of attacking your conviction include filing a state or federal writ of habeas corpus. Please see Chapter 13, "Federal Habeas Corpus," and Chapter 21, "State Habeas Corpus," of the *JLM*, which describe the federal writ of habeas corpus and the state writ of habeas corpus, respectively. Both of these writs can be used to obtain post-conviction relief for state and federal constitutional violations.

4. For more on how to appeal your conviction, see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

5. *See* People v. Harris, 109 A.D.2d 351, 353, 491 N.Y.S.2d 678, 682 (2d Dept. 1985) (explaining that an Article 440 motion "is designed to inform the court of facts not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the judgment.").

(g) any trial testimony and evidence such as documents, photographs, reports, etc.

An Article 440 motion allows you to inform the trial court of facts that cannot be raised on appeal because they were not in the trial record,[6] since facts presented for the first time on appeal cannot be considered by an appellate court.[7] There are two types of Article 440 motions: a "motion to vacate judgment" and a "motion to set aside sentence."

A motion to vacate (cancel) a judgment can be found in Section 440.10 of the New York Criminal Procedure Law. This motion challenges the fairness and/or legality of your conviction. It allows you to attack your conviction by stating that the trial court acted improperly when it found you guilty. If this motion is granted, you receive a new trial or appeal.

The second kind of motion, a motion to set aside your sentence, is based on Section 440.20 of the New York Criminal Procedure Law. This motion enables you to attack your sentence. In this motion you cannot challenge your guilt; rather, you argue that the punishment is too harsh for the crime. For example, you can challenge your sentence if it exceeds the maximum sentence allowed by the law.

Article 440 was created to partially replace the *remedy* of *coram nobis*, although some courts may still refer to an Article 440 motion as a writ of *coram nobis*.[8] A writ of *coram nobis* is an order by an appeals court to a lower court to consider facts not on the trial record, which might have changed the outcome of the lower court case if known at the time of trial. Though a writ of *coram nobis* is not available in situations covered by Article 440,[9] it may still be brought in situations in which an Article 440 motion is unavailable. For example, a *coram nobis* motion, not an Article 440 motion, should be used to raise a claim of ineffective assistance of *appellate* counsel.[10]

Article 440 was also created to replace the remedy of state habeas corpus, which challenges the government's right to keep you in prison by evaluating whether your imprisonment is legal. State habeas corpus is still available for New York state prisoners in some situations, but courts generally require you to make an Article 440 motion instead (most frequently, state habeas can still be used to challenge parole and bail decisions). The remedy for a habeas corpus violation is immediate release from custody. Under an Article 440 motion, the relief granted is not immediate release but rather a new trial, appeal, or sentence.[11]

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6. *See* People v. Bell, 161 A.D.2d 772, 772–73, 556 N.Y.S.2d 118, 119 (2d Dept. 1990) (holding that direct appeal cannot be had for matters based outside of the record); People v. Piparo, 134 A.D.2d 295, 295, 520 N.Y.S.2d 621, 622 (2d Dept. 1987) (stating that facts not contained in the record are not reviewable on direct appeal).

7. However, in a death penalty case, an Article 440 motion is heard directly by the Court of Appeals (New York's highest court). N.Y. Ct. App. R. 510.4.

8. *See* People v. Crimmins, 38 N.Y.2d 407, 414, 343 N.E.2d 719, 724, 381 N.Y.S.2d 1, 6 (1975) (stating that "motion to vacate judgment" was formerly known as "*coram nobis*"); People v. Donovan, 107 A.D.2d 433, 443, 487 N.Y.S.2d 345, 352 (2d Dept. 1985) (stating that CPL 440.10 represents the codification of common law post-judgment *coram nobis* proceedings); People v. Lyon, 143 Misc. 2d 690, 692, 541 N.Y.S.2d 702, 704 (Suffolk County Ct. 1989) (referring to CPL 440.10 as a post-judgment writ of *coram nobis*).

9. *See* People v. Perez, 162 Misc. 2d 750, 763, 616 N.Y.S.2d 928, 937 (1994) (holding that writ of *coram nobis* is unavailable where an Article 440 motion is applicable).

10. *See* People v. Bachert, 69 N.Y.2d 593, 600, 509 N.E.2d 318, 323, 516 N.Y.S.2d 623, 628 (1987) (stating that a claim of ineffective assistance of appellate counsel is covered by a writ of *coram nobis* and not an Article 440 motion). If you file a *coram nobis* motion in New York on the basis that you received ineffective assistance of appellate counsel or that you were wrongfully deprived of counsel on appeal, and the Appellate Division denies your motion, you may be able to appeal the denial to the Court of Appeals. However, the denial of your *coram nobis* motion must have occurred on or after November 1, 2002, and you must first be granted a certificate of leave to appeal by either a judge of the Court of Appeals or a justice of the Appellate Division department that denied your motion. N.Y. Crim. Proc. Law § 450.90 (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 450.90 practice cmnt. at 273 (McKinney 2005). Remember that you should still use an Article 440 motion for a claim of ineffective assistance of trial (versus appellate) counsel, at least where the trial record does not contain sufficient facts for an appellate court to review your claim on appeal. See Part B(2)(a) of this Chapter for a discussion of the standard under which a court will examine ineffective assistance of trial counsel.

11. See *JLM*, Chapter 21, "State Habeas Corpus," for more information.

2. What You Can Complain About In an Article 440 Motion

(a) Motion to Vacate Judgment

Article 440.10 lists eight wrongs that you may complain about in a motion to vacate judgment.[12] These eight wrongs are as follows.

(1) The trial court lacked *jurisdiction* to decide your case.[13]

(2) The judge or prosecutor (or a person representing one of them) used fraud, *misrepresentation* (false statements), or *duress* (physical or undue psychological pressure) to secure your conviction.[14] You cannot simply claim, however, that the judge or district attorney used fraud or misrepresentation.[15] As with every Article 440 motion, you must support your claim with specific facts in the form of an *affidavit* and, if possible, witnesses.[16]

(3) At trial, the prosecutor introduced (or the judge allowed in) *material* (important) evidence which the prosecutor or judge knew was false at the time of trial.[17] Again, you cannot just state that the judge or district attorney knew certain facts were false; you must show that they knew the facts to be false.[18]

(4) The prosecutor introduced material evidence that was obtained in violation of your rights under the U.S. or New York State Constitutions.[19]

(5) You could not understand or participate in the trial because you suffered from a mental disability of some kind.[20] For instance, in one case, a prisoner claimed in his Article 440 motion that he did not remember or understand his *plea* or the sentencing proceedings. In support of his motion, the prisoner noted that he had been diagnosed after the judgment as suffering from psychosis associated with brain trauma. In light of this fact, the court held that there should be a hearing on the prisoner's motion to vacate the conviction for manslaughter.[21]

(6) The record of your case failed to include *prejudicial* (improper and biased) conduct that occurred at your trial and that would have led an appellate court to reverse the judgment against you if the appellate court could have learned of the conduct from the record.[22] Such conduct includes the prosecutor's failure to supply you with *Brady* material, which is any evidence in the prosecutor's possession or knowledge that is favorable to the defense and material to guilt or punishment.[23] This material is often referred to as *exculpatory* evidence. To have a conviction overturned based upon the failure to produce *Brady* material there must be a reasonable *probability* that the evidence would have affected the ultimate outcome of the trial.[24] However, if your trial was in a New York state

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12. N.Y. Crim. Proc. Law §§ 440.10(1)(a)–(h) (McKinney 2005 & Supp. 2009).

13. N.Y. Crim. Proc. Law § 440.10(1)(a) (McKinney 2005 & Supp. 2009). For an explanation of jurisdiction, see Chapter 2 of the *JLM*, "Introduction to Legal Research."

14. N.Y. Crim. Proc. Law § 440.10(1)(b) (McKinney 2005 & Supp. 2009).

15. *See* People v. Gates, 168 A.D.2d 995, 996, 564 N.Y.S.2d 938, 938 (4th Dept. 1990) (finding that an unsupported claim of fraud is not enough to overturn a conviction).

16. *See* People v. Session, 34 N.Y.2d 254, 256, 313 N.E.2d 728, 729, 357 N.Y.S.2d 409, 411 (1974) (finding that affidavits from co-defendants stating that the Assistant District Attorney had threatened them with increased charges if they testified on behalf of defendant were insufficient to require a hearing on Article 440 motion because the affidavits did not contain any supporting evidentiary facts useful to the defendant's case).

17. N.Y. Crim. Proc. Law § 440.10(1)(c) (McKinney 2005 & Supp. 2009).

18. *See* People v. Brown, 56 N.Y.2d 242, 246–47, 436 N.E.2d 1295, 1297, 451 N.Y.S.2d 693, 695 (1982) (upholding trial court's denial of defendant's motion to vacate judgment because defendant's motion papers did not contain any evidence demonstrating that prosecution was aware of witness' false testimony).

19. N.Y. Crim. Proc. Law § 440.10(1)(d) (McKinney 2005 & Supp. 2009). For more information on such violations, see *JLM*, Chapter 13, "Federal Habeas Corpus", which lists possible violations of the U.S. Constitution, and Chapter 21, "State Habeas Corpus," which lists possible violations of New York State's Constitution. Be aware you may not be able to raise these constitutional violations if you raised them unsuccessfully on appeal. See Part B(3) of this Chapter.

20. N.Y. Crim. Proc. Law § 440.10(1)(e) (McKinney 2005 & Supp. 2009).

21. People v. Fixter, 79 A.D.2d 861, 861, 434 N.Y.S.2d 484, 485 (4th Dept. 1980).

22. N.Y. Crim. Proc. Law § 440.10(1)(f) (McKinney 2005 & Supp. 2009); *see* People v. Cleveland, 132 A.D.2d 921, 921, 518 N.Y.S.2d 477, 478 (4th Dept. 1987) (finding that defendant's claim that the District Attorney had previously represented him on other charges and was therefore disqualified from prosecuting him could be raised in an Article 440 motion since the conduct which was claimed to be improper and prejudicial did not appear in record).

23. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) (holding that the suppression of evidence by the prosecution denied petitioner due process).

24. Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 506 (1995) (holding that for

court and your defense counsel made a specific request for the evidence in question, and such evidence was not disclosed, there need only be a reasonable *possibility* that disclosure would have changed the outcome.[25] The reasonable probability test is harder to satisfy than the reasonable possibility test. Under the reasonable probability test, the undisclosed evidence receives no more weight than it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how the evidence would have affected the jury's deliberations. While you do not have to show that, with the evidence, you would not have originally been convicted, the evidence must be substantial enough as to call into question the fairness of your conviction.[26] On the other hand, the reasonable possibility test focuses on the evidence withheld, and the court must determine whether the failure to disclose it may have contributed to the verdict.[27] Additionally, the evidence in both cases must be admissible in court. For example, polygraph (lie detector) test results suggesting that a witness lied are of no use since they are not admissible as evidence.[28] *Brady* material may also include evidence in the possession of other law enforcement agencies involved in your prosecution (for example, FBI Crime Lab notes). However, if an out-of-state agency refuses to turn over materials, the prosecution cannot be held responsible for failure to disclose.[29]

(7) After your trial, you uncovered new evidence that you could not have discovered before or during your trial. To succeed on this ground, you must show that the evidence (a) will probably change the result in your case if a new trial is granted; (b) was discovered after the trial; (c) could not have been discovered before or during the trial by the exercise of *due diligence* (proper research); (d) is material to the issue of your guilt; and (e) does not simply duplicate or contradict other evidence.[30] Furthermore, if you would like to make an Article 440 motion on the grounds of newly-discovered evidence, you must make the motion within a reasonable time after you find the new evidence. But you can only make an Article 440 motion on the basis of newly discovered evidence if you were found

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Brady purposes, "[t]he question [of reasonable probability] is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence; a 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (quoting U.S. v. Bagley, 473 U.S. 667, 678, 501 S. Ct. 3375, 3382, 87 L. Ed. 2d 481, 492 (1985))).

25. *See* People v. Bond, 95 N.Y.2d 840, 843, 735 N.E.2d 1279, 1281, 713 N.Y.S.2d 514, 516 (2000) (vacating second degree murder conviction because a reasonable possibility existed that the result would have been different if prosecutor had disclosed, in response to a specific *Brady* request, key witness' denial of having seen the shooting); People v. Vilardi 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–21, 556 N.Y.S.2d 518, 523–24 (1990) (ordering retrial on arson charges because prosecution withheld material and exculpatory evidence from defense; holding that a showing of "reasonable possibility" that failure to disclose favorable evidence contributed to verdict is the appropriate standard under New York State constitutional law where the defendant has made a specific request for the exculpatory material).

26. Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 506 (1995) ("A 'reasonable probability' of a different result is … shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (quoting U.S. v. Bagley, 473 U.S. 667, 678, 501 S. Ct. 3375, 3382, 87 L. Ed. 2d 481, 492 (1985))).

27. *See, e.g.*, People v. Bond, 95 N.Y.2d 840, 843, 735 N.E.2d 1279, 1281, 713 N.Y.S.2d 514, 516 (2000) (vacating second degree murder conviction because a reasonable possibility existed that the result would have been different if prosecutor had disclosed, in response to a specific *Brady* request, key witness' denial of having seen shooting); People v. Williams, 50 A.D. 3d 1177, 1179–80, 854 N.Y.S. 2d 586, 589–90 (3d Dept. 2008) (finding a "reasonable possibility" existed of a different result if requested evidence that would have impeached a key witness had been properly disclosed); *cf.* People v. Phillips, 55 A.D. 3d 1145, 1149, 865 N.Y.S. 2d 787, 791 (3d Dept. 2008) (finding no "reasonable possibility" that disclosure of a witness' investigation for drug-related offenses would have produced a different result since witness' credibility was already blemished during cross-examination).

28. *See* People v. Scott, 88 N.Y.2d 888, 891, 667 N.E.2d 923, 924, 644 N.Y.S.2d 913, 915 (1996) (finding failure to produce scratch sheet alluding to polygraph examination of witness is not grounds for vacating conviction in part because polygraph results would have been inadmissible as evidence).

29. *See* People v. Santorelli, 95 N.Y.2d 412, 421–22, 741 N.E.2d 493, 497–98, 718 N.Y.S.2d 696, 700–01 (2000) (refusing to vacate conviction based upon prosecutor's failure to provide reports from a parallel FBI investigation where the FBI, "an independent Federal law enforcement agency not subject to State control," was unwilling to turn over the reports to the prosecutor).

30. N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2005 & Supp. 2009); *see* People v. Latella, 112 A.D.2d 321, 322, 491 N.Y.S.2d 771, 772–73 (2d Dept. 1985) (setting standards for newly discovered evidence); People v. Sherman, 83 Misc. 2d 563, 565, 372 N.Y.S.2d 546, 548–49 (Sup. Ct. N.Y. County 1975) (holding indictment of police officer who testified at trial and investigation of judge who signed search warrant was not enough to grant an Article 440 motion).

guilty after a full trial; if you pled guilty, you cannot make an Article 440 motion on the basis of newly discovered evidence.[31]

(8) Your conviction was obtained in violation of your constitutional rights.[32] Chapter 13 of the *JLM*, "Federal Habeas Corpus," provides a long list of possible violations of your rights under the U.S. Constitution. You may raise any of these violations in your Article 440 motion as long as they are applicable to your case and your motion satisfies the conditions described in Part B(3) of this Chapter.[33] For example, if you fail to present your constitutional attack in your direct appeal of your conviction, you will not be able to make an Article 440 motion based on that constitutional claim later on, unless your claim falls into one of the exceptions described in Part B(3) of this Chapter.[34]

In addition to federal constitutional violations, you may also raise violations of your rights under New York State's Constitution. These rights are generally very similar to your federal constitutional rights. For example, the law under both constitutions forbids attorneys from purposefully discriminating against people by race or gender in selecting a jury.[35] This claim could therefore be raised as a violation of your rights under the New York State Constitution, as well under the U.S. Constitution.

You should be aware that some of your rights under the New York State Constitution are broader than the same rights under the U.S. Constitution. For example, the New York State Constitution provides you with greater protection against unreasonable police searches than the U.S. Constitution.[36] The New York State Constitution also provides you with greater protection against a court imposing a longer sentence upon you after a successful appeal.[37] In addition, the New York State Constitution requires a prosecutor to supply you with a wider category of evidence than the U.S. Constitution requires.[38] Finally, your right to a lawyer is broader under the New York State Constitution than the U.S. Constitution.[39]

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31. *See* People v. Latella, 112 A.D.2d 321, 322, 491 N.Y.S.2d 771, 772–73 (2d Dept. 1985) (holding that a guilty plea forecloses an Article 440 motion); People v. Sherman, 83 Misc. 2d 563, 565, 372 N.Y.S.2d 546, 548 (Sup. Ct. N.Y. County 1975) ("There was no verdict after trial here. The defendant pleaded guilty before trial. Thus, on its face, defendant's pleading requires a denial of this motion.").

32. N.Y. Crim. Proc. Law § 440.10(1)(h) (McKinney 2005 & Supp. 2009).

33. As noted in *JLM*, Chapter 13, "Federal Habeas Corpus," raising a federal constitutional violation in an Article 440 motion is often necessary to satisfy *exhaustion* (doing all you can to get state courts to change your conviction or sentence), which is required to raise the violation in a petition for federal habeas corpus.

34. *See* People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–35 (1st Dept. 1990) (holding that failure to raise an issue on appeal when defendant had knowledge to do so forecloses an Article 440 motion).

35. *See, e.g.*, People v. Kern, 75 N.Y.2d 638, 649–53, 554 N.E.2d 1235, 1241–43, 555 N.Y.S.2d 647, 653–55 (1990) (discussing the New York State Constitution's ban on racial discrimination in jury selection); *see also* Batson v. Kentucky, 476 U.S. 79, 84–98, 106 S. Ct. 1712, 1716–1724, 90 L. Ed. 2d 69, 79–89 (1986) (discussing the Federal Constitution's ban on racial discrimination in jury selection).

36. *See* People v. Dunn, 77 N.Y.2d 19, 25, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990) (finding that police use of a specially trained narcotics detection dog to conduct "canine sniff" outside defendant's apartment is a search under the New York Constitution).

37. *See* People v. Van Pelt, 76 N.Y.2d 156, 161–62, 556 N.E.2d 423, 425–26, 556 N.Y.S.2d 984, 986–87 (1990) (finding that a sentence following retrial that was for a longer period than the sentence from the first trial was presumed to be vindictive and must be set aside, even if the second trial judge was different from the first trial judge).

38. *See* People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990) (holding where the prosecutor was made aware by a specific discovery request that defendant considered exculpatory material important to the defense, standard of materiality is "reasonable possibility" that failure to disclose the material contributed to the verdict, instead of "reasonable probability"); *cf.* People v. Lesiuk, 161 A.D.2d 21, 25, 560 N.Y.S.2d 711, 713 (3d Dept. 1990) (stating that standard is "reasonable probability" where the prosecution has tried hard to produce a missing exculpatory police informant), *aff'd* 81 N.Y.2d 485, 617 N.E.2d 1047, 600 N.Y.S.2d 931 (1993). A reasonable probability test is harder to satisfy than the reasonable possibility test. The difference between the tests is that under the reasonable probability test, the undisclosed evidence receives no more weight than it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how that evidence would have affected the jury's deliberations. On the other hand, the reasonable possibility test focuses on the evidence withheld and the court must determine whether the failure to disclose it possibly contributed to the verdict. *See* People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990); People v. Lesiuk, 161 A.D.2d 21, 25, 560 N.Y.S.2d 711, 713 (3d Dept. 1990).

39. *See* People v. Velasquez, 68 N.Y.2d 533, 536, 503 N.E.2d 481, 483, 510 N.Y.S.2d 833, 835 (1986) ("In this State the right to counsel, both as to the time of its attachment and as to its waiver, is broader than the protection afforded under Federal law."); People v. Hobson, 39 N.Y.2d 479, 483–84, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976) (detailing New York case law that extended protections for the defendant under the State Constitution beyond those guaranteed by the Federal Constitution).

Because you may have greater rights under the New York Constitution than the U.S. Constitution, be sure to include claims of state constitutional violations in your Article 440 motion. Indeed, it is a good idea when claiming a violation of a specific federal constitutional provision (for example, the Fourth Amendment's prohibition against unreasonable searches and seizures) to cite the equivalent state constitutional provision (which, in this example, would be Article I, Section 12 of New York's Constitution).

Another example of state and federal constitutional violations that can be raised in an Article 440 motion is ineffective assistance of counsel at trial; in other words, you had a lawyer, but he or she did not represent you effectively at your trial. You should be aware though, that it is firmly established in New York that a claim of ineffective assistance of counsel may not be based solely upon your lawyer's unsuccessful use of a certain trial strategy even if that strategy was offensive, outrageous,[40] daring, or innovative.[41] In addition, it is not enough to simply claim that your lawyer was ineffective. You must identify the specific acts or omissions of counsel that you believe were so ineffective that you were, in essence, deprived of your right to counsel. Then, you must also show that this lack of counsel prejudiced your defense to such an extent that the trial result is unreliable.[42] For example, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment if the error had no effect on the judgment. However, if you can show that your attorney had a conflict of interest while representing you, and that this conflict made the attorney's performance worse, courts will presume there was prejudice.[43] Your attorney would have had a conflict of interest if your attorney had a work-related reason or a substantial personal reason to give you less than a full effort. One possible reason would be if your attorney, without telling you or the judge, also represented a witness who testified against you.[44]

(b) Motion to Set Aside Sentence

Unlike the Article 440.10 motion to challenge your conviction (discussed above), an Article 440.20 motion allows you to attack your sentence as unauthorized, illegally imposed, or in some other way invalid.[45] A sentence is unauthorized if it exceeds the maximum length of time allowed by law.[46] For example, third

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40. *See* People v. Sullivan, 153 A.D.2d 223, 226–27, 550 N.Y.S.2d 358, 359–60 (2d Dept. 1990) (holding that defense attorney's reference to victims as "skells," "pimps," or "junkies" was not ineffective counsel because it must, in the absence of any proof to the contrary, be presumed to have been devised as part of a trial strategy).

41. *See* People v. Baldi, 54 N.Y.2d 137, 151–52, 429 N.E.2d 400, 407–08, 444 N.Y.S.2d 893, 900–01 (1981) (holding that defense attorney's strategy of testifying at his client's trial in an attempt to present an insanity defense was not ineffective assistance even though the attorney did not pursue a claim of innocence).

42. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (stating you must first specify the error made by counsel, and then show that the error prejudiced your defense to such an extent that it affected the result of the trial). In New York, you are entitled to meaningful representation. People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."). New York has retained the *Baldi* "meaningful representaton" standard in preference to the federal *Strickland* standard in evaluating claims of ineffective assistance of trial counsel. People v. Stultz, 2 N.Y.3d 277, 282, 810 N.E.2d 883, 886, 778 N.Y.S.2d 431, 434 (2004) (stating that the appropriate standard for effective assistance of counsel is the same meaningful representation standard as *People v. Baldi*). You should note, however, "meaningful representation" does not mean perfect representation. People v. Benevento, 91 N.Y.2d 708, 697 N.E.2d 584, 587, 629 N.Y.S.2d 629, 632 (1998) (quoting People v. Modica, 64 N.Y.2d 828, 829, 476 N.E.2d 330, 331, 486 N.Y.S.2d 931, 932 (1985)).

43. *See* Cuyler v. Sullivan, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 347 (1980) (stating that a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice); *see also* Winkler v. Keane, 812 F. Supp 426, 431 (S.D.N.Y. 1993) (finding that existence of a contingency fee arrangement between defendant and his attorney does not amount to a *per se* claim of ineffective assistance of counsel); People v. Wandell, 75 N.Y.2d 951, 952, 554 N.E.2d 1274, 1275, 555 N.Y.S.2d 686, 687 (1990) (stating that attorney must inform client and trial court of conflicting interests so that court may conduct a record inquiry to determine whether client understands the implications of the conflict); People v. Gomberg, 38 N.Y.2d 307, 314–16, 342 N.E.2d 550, 555, 379 N.Y.S. 2d 769, 776–77 (1975) (holding that trial judge's inquiry into possible conflict of interest between defendants and their counsel, and defendants' opportunity to retain separate counsel, fulfilled obligation to protect defendants' rights).

44. See *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more examples of conflicts of interest.

45. N.Y. Crim. Proc. Law § 440.20(1) (McKinney 2005 & Supp. 2009).

46. *See* People v. Fuller, 119 A.D.2d 692, 692, 501 N.Y.S.2d 116, 116 (2d Dept. 1986) (vacating sentence longer than length of time imposable for the crime committed).

degree burglary, a Class D felony,[47] carries a maximum sentence of seven years if you are a first or second felony offender.[48] Thus, you could make an Article 440 motion to attack a sentence of seven years and one day for third degree burglary if you are a first or second felony offender. However, you could not attack a sentence of seven years. Although this sentence may seem long or excessive in comparison to sentences that other defendants have received for the same crime, the Penal Law authorizes a seven-year sentence.[49] You cannot raise a claim that your sentence was too harsh or excessive under this motion as long as the sentence was authorized.[50]

In addition to the unauthorized sentence described above, there may be other grounds upon which you can raise an Article 440 motion to set your sentence aside as illegal. Some of these grounds include:

(1) *Due process* errors in the sentencing procedures;[51]
(2) The sentencing court disregarded your *right of allocution,* which means that the judge failed to ask you at your sentencing if you wished to address the court on your own behalf;[52]
(3) The sentencing court disregarded your right to be present at sentencing;[53]
(4) The court violated your First Amendment right of free association by, for example, considering at sentencing your membership in a racist organization where this membership was not relevant to any of the issues at your trial;[54]

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47. N.Y. Penal Law § 140.20 (McKinney 1999). The N.Y. Penal Law describes and classifies every felony. In order to determine whether your sentence was authorized by law, you should first find out what class of felony you were convicted of by looking up your offense in the Penal Law. Burglary and related offenses, for example, are defined in § 140.20 through § 140.35 of the Penal Law. Then, consult § 70.00 of the Penal Law, which specifies the maximum and minimum terms of sentence which can be imposed for the various classes of felonies.

48. N.Y. Penal Law § 70.00 (McKinney 2009).

49. *See* People v. Baraka, 109 Misc. 2d 271, 272–73, 439 N.Y.S.2d 827, 829–30 (N.Y. County Crim. Ct. 1981) (holding that the court deciding an Article 440 motion has no authority to disturb a sentence that conforms to the Penal Law).

50. N.Y. Crim. Proc. Law § 440.20(1) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.20 practice cmt. at 10 (McKinney 2005). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for more information on appeals.

51. *See* People v. Bellamy, 160 A.D.2d 886, 887–88, 554 N.Y.S.2d 320, 321 (2d Dept. 1990) (vacating sentence and finding that, while judge had authority to vacate a previously-imposed minimum permissible sentence, defendant's right to due process was violated when judge then imposed maximum permissible sentence, without offering any justification for doing so).

52. N.Y. Crim. Proc. Law § 380.50(1) (McKinney 2005 & Supp. 2009) gives you the right to make such a statement. To have your sentence set aside on this ground, you must show that, had your right been honored, you would have said or revealed something that would have required the court to conduct further inquiry before sentencing you. *See* People v. St. Claire, 99 A.D.2d 982, 982, 473 N.Y.S.2d 19, 20 (1st Dept. 1984) (stating that violation of right to allocution should be raised in Article 440.20 motion); People v. Quiles, 72 A.D.2d 610, 610, 421 N.Y.S.2d 119, 119–20 (2d Dept. 1979) (where defendant at sentencing raised the possibility of a defense—behavior that possibly negated his criminal intent—the trial court was obligated to conduct further inquiry); People *ex rel.* Boddingham v. LaVallee, 50 A.D.2d 692, 692, 375 N.Y.S.2d 477, 478 (3d Dept. 1975) (holding that defendant who was denied right of allocution is entitled only to resentencing and not release from incarceration).

53. N.Y. Crim. Proc. Law § 380.40 (McKinney 2005 & Supp. 2009) gives you the right to be present at sentencing and at resentencing. *See* People v. Brown, 155 A.D.2d 608, 608, 547 N.Y.S.2d 664, 664 (2d Dept. 1989) (finding that the court's failure to produce the defendant at resentencing denied him his statutory right to be present). You may waive this right if you are being charged with a misdemeanor or petty offense, in which case a court may sentence you in your absence. N.Y. Crim. Proc. Law § 380.40(2) (McKinney 2005 & Supp. 2009). To succeed on an Article 440 motion based on a denial of this right, you must show that, had you been present, you would have said something that would have obligated the court to investigate your case further. However, your right to be present may have been forfeited by your actions if you were removed from the courtroom due to misbehavior. *See* People v. Herrera, 160 A.D.2d 416, 416, 554 N.Y.S.2d 30, 30–31 (1st Dept. 1990) (based on defendant's behavior "it is clear that defendant voluntarily absented himself from the sentencing proceedings, thereby waiving such right."). You may also have forfeited your right to be present if you failed to appear after being advised that sentence would be pronounced in your absence. *See* People v. Griffin, 135 A.D.2d 730, 731, 522 N.Y.S.2d 632, 634 (2d Dept. 1987) (holding that defendant waived his right to be present at his predicate felony hearing and sentencing by not appearing even though "he knew when he refused to attend that the hearing court would proceed in his absence."). Finally, if you willfully failed to appear in order to frustrate the sentencing process, your right to be present may have been forfeited by your actions. *See* People v. Corley, 67 N.Y.2d 105, 110, 491 N.E.2d 1090, 1092, 500 N.Y.S.2d 633, 635 (1986) (affirming sentence imposed in defendant's absence where "defendant willfully absented himself from the court for the purpose of frustrating the sentencing process.").

54. *See* Dawson v. Delaware, 503 U.S. 159, 160, 112 S. Ct. 1093, 1095, 117 L. Ed. 2d 309, 314 (1992) (holding that

(5) The court sentenced you as a second- or third-time offender, but the prior conviction was obtained in violation of your constitutional rights or was in some other way invalid.[55] For example, you may challenge the constitutional validity of the prior convictions or the decision to count them as predicates (prior convictions). Perhaps the most common error in this area is the use of out-of-state convictions as predicate felonies. Your out-of-state conviction will only count as a felony if your criminal conduct would have been a felony in New York, or if in the other state your conduct was punishable by a sentence of more than one year imprisonment and is also punishable by a sentence of more than one year under New York law.[56] For example, if you were convicted of promoting prostitution by soliciting persons to patronize a prostitute in New Jersey, where such activity is a felony, your conviction cannot be used as a predicate felony in New York since the equivalent New York crime, promoting prostitution in the fourth degree, is a misdemeanor;[57]

(6) The court erroneously imposed *consecutive* sentences (one sentence running after another) when you should have been sentenced to *concurrent* sentences (two sentences running at the same time).[58] In general, consecutive sentences cannot be imposed where (1) a single act constitutes two or more offenses, or (2) a single act constitutes one offense and is a material element of another.[59] For example, if you committed armed robbery, you can be charged with the crimes of robbery and weapons possession. However, you cannot be sentenced consecutively for these crimes as they were part of the same act.

Remember, a motion under Section 440.20 deals solely with your sentence and has no effect on your underlying conviction. If your motion is granted, the court will vacate your sentence and resentence you in accordance with the law.[60]

(c) Request for DNA Testing

In a relatively new section of Article 440, a defendant may request in his or her 440 motion that a forensic DNA test be done on evidence introduced at trial.[61] The court will order that a test be done if it determines that the following requirements are met:

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admitting evidence at the capital sentencing proceeding of defendant's membership in racist gang was error where that evidence was not relevant to any issue in the punishment phase).

55. *See* People v. Simmons, 143 A.D.2d 153, 154, 531 N.Y.S.2d 928, 928–29 (2d Dept. 1988) (finding that defendant's prior conviction for buying, receiving, and concealing stolen property under an Alabama statute that did not specify monetary value for stolen property did not qualify as a predicate felony for purposes of second felony offender status, as the New York statute required proof that the value of the stolen property exceeded $250). If you did not raise an objection at the time the prosecution identified to you the prior felony to be used for sentencing enhancement, an appeals court will not review this sentencing issue. *See* People v. Sullivan, 153 A.D.2d 223, 232–33, 550 N.Y.S.2d 358, 364 (2d Dept. 1990) ("When the defendant fails to raise an objection, and when, as a result, the legality of the sentence cannot be determined by this court upon the information contained in the appellate record, review as a matter of law should be denied."). If no objection was made due to mutual mistake, the appellate court can still reverse if the use of the predicate (prior) felony was clear error (meaning that it was apparent on the record). *See* People v. Eason, 168 Misc. 2d 44, 46–47, 641 N.Y.S.2d 1018, 1020 (Sup. Ct. Queens County 1996) (setting aside sentence where the defendant was improperly determined to be a second felony offender because of a mutual mistake (the prior felony had not yet been sentenced, and so was not actually available as a predicate), and the error was clear on the record); *see also* N.Y. Crim. Proc. Law §§ 400.15(7)(b), 400.16, 400.20(6), & 400.21(7)(b) (McKinney 2005 & Supp. 2009).

56. N.Y. Penal Law § 70.06(1)(b)(i) (McKinney 2009) ("The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed").

57. People v. Johnson, 127 A.D.2d 1003, 1003, 513 N.Y.S.2d 60, 60 (4th Dept. 1987) (holding New Jersey felony conviction for promoting prostitution did not constitute felony for New York sentencing purposes because crime would have been misdemeanor in New York, for which a term of imprisonment in excess of one year was not authorized).

58. *See* People v. Riggins, 164 A.D.2d 797, 797, 559 N.Y.S.2d 535, 536 (1st Dept. 1990) (finding that Court had no authority to change concurrent sentences to consecutive ones on its own without being asked by either side).

59. *See* N.Y. Penal Law § 70.25(2) (McKinney 2009); People v. Jeanty, 268 A.D.2d 675, 679–81, 702 N.Y.S.2d 194, 200–01 (3d Dept. 2000) (holding that the lower court erred in making a sentence for robbery in the first degree and burglary in the first degree consecutive to a felony murder sentence because the conduct constituting the robbery and burglary offense could have been a material element of the felony murder; however, the court also held that aggregate sentence of 75 years to life was proper).

60. N.Y. Crim. Proc. Law § 440.20(4) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.20 practice cmt. at 9 (McKinney 2005).

61. N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005 & Supp 2009).

(1) Your 440 motion requests forensic testing on specific and particular evidence, which is clearly identified;
(2) The evidence upon which you are requesting a DNA test was obtained in connection with the trial that resulted in your conviction; and
(3) There is a reasonable probability that if the results of a DNA test had been admitted at the trial, the verdict would have been more favorable to you.[62]

The third requirement is probably the most important one. The court will not order a DNA test if it believes there is no reasonable probability the verdict would have been different even if you are right about whatever you are trying to prove with the DNA test.[63] For more information on DNA testing, see Chapter 11 of the *JLM*, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence."

3. When You Can Get Relief Under Article 440

There are strict requirements as to when you may make a motion to vacate judgment under Section 440.10. In contrast, the requirements for making a motion to set aside a sentence under Section 440.20 are more relaxed. The requirements for making each type of motion are discussed separately below.

(a) When You Are Not Entitled to Move to Vacate a Judgment Under Section 440.10

There are four circumstances in which the court has no choice but to deny your motion to vacate a judgment under Section 440.10.[64] These four circumstances are as follows:

(1) You cannot make a Section 440.10 motion if your claim was raised on appeal and the court denied your complaint on the merits (in other words, when the appellate court found that your legal arguments could not overcome your guilty conviction).[65] There is an exception to this rule that applies when the law has changed after your appeal was decided, and the courts have agreed to apply the new law *retroactively* (in other words, when courts apply a new law to cases which have been tried, decided, or appealed before the change in the law occurred).[66] The Court of Appeals will only give full retroactivity to new laws when the purpose of the new law is to protect the fact-finding process from unreliably obtained information which relates directly and substantially to guilt or innocence.[67] "Full retroactivity" means you can raise the new law in a post-conviction proceeding, such as an Article 440 motion, in order to attack a conviction that was handed down and appealed before the new law came into effect. However, full retroactivity has been applied very rarely in New York.[68] The courts decide whether a new rule should apply retroactively after considering the following three factors:

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62. N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005 & Supp. 2009). See note 38 of this Chapter for an explanation of "reasonable probability."

63. N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005 & Supp. 2009); *see also* People v. Tookes, 167 Misc. 2d 601, 605–06, 639 N.Y.S.2d 913, 916 (Sup. Ct. N.Y. County 1996) (finding no reasonable probability where: (1) there was no case for mistaken identity, (2) there was clear evidence of rape, (3) defendant failed earlier to pursue an enzyme analysis, and (4) a showing that defendant's DNA did not match the crime scene sample would not likely have resulted in a "verdict more favorable to the defendant"). See note 38 of this Chapter for an explanation of "reasonable probability."

64. N.Y. Crim. Proc. Law §§ 440.10(2)(a)–(d) (McKinney 2005 & Supp. 2009).

65. N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 2005 & Supp. 2009); *see*, *e.g.*, People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934 (1st Dept. 1990) (holding that arguments raised and rejected on their merits on direct appeal may not be subsequently raised in an Article 440 motion).

66. N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 2005 & Supp. 2009).

67. People v. Laffman, 161 A.D.2d 111, 112–13, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) ("Where a new rule … has as its purpose preserving the fact-finding process from unreliably obtained information bearing directly and substantially on a defendant's guilt or innocence, the rule should be applied retroactively ….").

68. *See* People v. Hill, 85 N.Y.2d 256, 263, 648 N.E.2d 455, 458, 624 N.Y.S.2d 79, 82 (1995) (vacating the conviction and remanding for a new trial in holding that the new *Ryan* rule, requiring the defendant to have been aware of the amount of illegal drugs he possessed, should be applied retroactively to prevent someone from being held guilty even though one of the elements of the crime had not been shown); People v. Laffman, 161 A.D.2d 111, 111–13, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) (vacating the judgment and remanding for a new trial where the defendant was shown to the victim handcuffed and alone with one other suspect in the police station for identification. The station house identification procedures were found to be improper in a subsequent case which applied retroactively to these cases). *But see* People v. Pepper, 53 N.Y.2d 213, 221–22, 423 N.E.2d 366, 369–70, 440 N.Y.S.2d 889, 892–93 (1981) (finding the defendant was not entitled to retroactive application of a court decision that held that once an indictment or

(a) the new rule's purpose;
(b) the extent of the reliance on the old rule (in other words, whether there were a great number of cases and, as a result, a large number of defendants convicted and incarcerated under the old rule); and
(c) the effect on the administration of justice in applying the new rule retroactively (in other words, whether the reliance on the old rule has been so great that applying the new rule retroactively would result in so many overrulings and retrials that it would over-burden the criminal courts. In such a situation, the courts are unwilling to apply the new rule retroactively).[69]

(2) You cannot make a Section 440.10 motion on the basis of an error that you may still raise in an appeal of your conviction, or that you have already raised in an appeal that is pending (if the appeals court has not yet handed down a decision).[70] Remember, Article 440 is not a substitute for an appeal. However, you may complain in a Section 440.10 motion about an error without first appealing the error if the record of your trial does not contain sufficient facts to allow an appeals court to review the error.[71] For example, if you have found new evidence that was not available at the time of the trial, and therefore was not included in the record, you may bring a Section 440.10 motion directly.[72] But be very careful about deciding to use an Article 440 motion to complain about a decision without first bringing a direct appeal. The court reviewing your Article 440 motion will decide whether the record of your trial contains sufficient facts for an appeal. If the court finds that the record was sufficient for direct appeal, your 440 motion will be dismissed, and if you did not file or pursue a direct appeal, it may be too late to do so.[73] Sometimes there may be doubt as to whether there are

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complaint has been filed, a defendant cannot waive his constitutional right to counsel unless in presence of counsel); People v. Douglas, 205 A.D.2d 280, 292, 617 N.Y.S.2d 733, 740 (1st Dept. 1994) (stating that the *Ryan* decision, which held that defendant's knowledge of drug weight was to be proved by the prosecution, will not be applied retroactively); People v. Byrdsong, 161 Misc. 2d 232, 235, 613 N.Y.S.2d 543, 544–45 (Sup. Ct. Queens County 1994) (holding that the retroactivity of a rule, which stated that defendants generally had the right to be present during *Sandoval* hearings to determine whether the prosecution should be permitted to raise prior convictions and bad acts on cross-examination of the defendant, was limited to only direct appeals and not to post-conviction hearings); People v. Alvarez, 151 Misc. 2d 697, 701, 573 N.Y.S.2d 592, 594–95 (Sup. Ct. Kings County 1991) (stating that the *Van Pelt* decision, which held that a presumption of vindictiveness applies where a second sentence is higher after retrial than the original sentence, will not be applied retroactively).

69. People v. Pepper, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 891–92 (1981) (outlining the three-part test for retroactivity but holding that the defendant was not entitled to the benefit of retroactivity because changes in the rules governing a defendant's right to pre-trial counsel were applied retroactively only to cases still on direct review at the time of the change in law)*; see also* People v. Mitchell, 80 N.Y.2d 519, 528–29, 606 N.E.2d 1381, 1386, 591 N.Y.S.2d 990, 995 (1992) (applying the three-part *Pepper* test in holding that a new state statutory right applied only prospectively and not retroactively because (1) the new rule did not fix any constitutional problems and only indirectly related to the fact-finding process, (2) the courts had substantially relied on the old rule, and (3) retroactive application would substantially burden the justice system); People v. Douglas, 205 A.D.2d 280, 290, 617 N.Y.S.2d 733, 739 (1st Dept. 1994) (holding that retroactivity cannot apply because, despite the compelling argument that could be made for the first prong of this test, the second prong was violated because the vast majority of drug cases relied on the old rule, and the third prong would therefore be violated because retroactivity would place a substantial burden on the administration of justice); People v. Perez, 162 Misc. 2d 750, 762–63, 616 N.Y.S.2d 928, 936 (Sup. Ct. Kings County 1994) (observing as dicta that a certain new rule would not apply retroactively, even though retroactive application would further the new rule's purpose, because retroactivity would violate the second and third prongs of this three-pronged test due to past substantial reliance and the potential for future substantial burden on the administration of justice).

70. N.Y. Crim. Proc. Law § 440.10(2)(b) (McKinney 2005 & Supp. 2009); *see* People v. Cooks, 67 N.Y.2d 100, 104, 491 N.E.2d 676, 678, 500 N.Y.S.2d 503, 505 (1986) (holding that if the record is sufficient for review of the issue on direct appeal, the issue cannot be collaterally reviewed in an Article 440 motion); People v. Griffin, 115 A.D.2d 902, 904, 496 N.Y.S.2d 799, 801 (3d Dept. 1985) (denying the defendant's Article 440 motion because judgment was already on appeal to the Appellate Division and defendant failed to demonstrate the existence of pertinent, new evidence not in the record). Part B(1) of this Chapter contains a list of information found in your trial record.

71. N.Y. Crim. Proc. Law § 440.10(2)(b) (McKinney 2005 & Supp. 2009). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a full discussion of how to appeal your sentence and/or conviction.

72. N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2005 & Supp. 2009).

73. *See* People v. Cooks, 67 N.Y.2d 100, 104, 491 N.E.2d 676, 678, 500 N.Y.S.2d 503, 505 (1986) (holding that if the defendant could have raised the issue on direct appeal, the judge must dismiss the Article 440 motion); N.Y. Crim. Proc. Law § 440.10 practice cmt. at 250 (McKinney 2005) ("[S]hould the record be found by the motion court to have been sufficient for review of the point on direct appeal, the motion must be dismissed … and the defendant, having permitted

sufficient facts in the record for an appeals court to review. In that situation, you should be careful to file a timely direct appeal, and not just rely on an Article 440 motion, in case your Article 440 motion is denied.[74]

(3) If you failed to raise an error on appeal, either because you did not include the error in your appeal or because you simply did not appeal your conviction at all, you cannot raise that error in an Article 440 motion unless you have a good excuse for not raising the issue on appeal.[75] One example of a good excuse would be where the error was overlooked due to ineffective assistance of counsel. (But if you believe your lawyer was ineffective because your lawyer did not tell you of your right to appeal, you must make a motion instead under N.Y. Crim. Proc. Law Section 460.30.)[76] Another good excuse is where an appeal seemed useless due to the state of the law at the time, but the law changed later and courts applied the new law retroactively; because of those changes, you can argue that your conviction is fundamentally unfair.[77]

(4) The judge must deny your Section 440.10 motion if it is based on an issue that involves only the validity of your sentence, rather than your conviction.[78] You must complain about your sentence in a motion to set aside your sentence under N.Y. Crim. Proc. Law § 440.20, not Section 440.10.

(b) When You May File a Motion to Vacate Judgment Under Section 440.10

While a judge must deny your Section 440.10 motion in the four circumstances listed above, there are other circumstances in which a judge may, but is not required to deny, deny your Section 440.10 motion.[79] These circumstances are as follows:

(1) You did not "preserve the issue for review on appeal." An issue is not preserved for review on appeal if you failed to object to errors that occurred during trial, or failed to request that the court give a particular instruction to the jury or ruling on an issue, or failed to present facts that would support your claim and which you should have been able to discover through due diligence (proper research), or in some way failed to make sure that an issue would appear in the trial record.[80] The following are

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the time for perfecting the appeal to elapse, will be left without a remedy.").

74. N.Y. Crim. Proc. Law § 440.10 practice cmt. at 249 (McKinney 2005).

75. N.Y. Crim. Proc. Law § 440.10(2)(c) (McKinney 2005 & Supp. 2009); *see*, *e.g.*, People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–35 (1st Dept. 1990) (holding that the defendant's failure to present his constitutional attack in his direct appeal prevented any consideration of it in an Article 440 motion); People v. Cunningham, 104 Misc. 2d 298, 304, 428 N.Y.S.2d 183, 188 (Sup. Ct. Bronx County 1980) (holding that a court must deny an Article 440 motion where a defendant could have, but did not, raise the issue on direct appeal, despite a subsequent retroactively effective change in the law regarding that issue).

76. N.Y. Crim. Proc. Law § 440.10 practice cmt. at 248 (McKinney 2005) (discussing that the writ of *coram nobis*—where a defendant petitions a court to set aside a conviction on the basis of facts that were not brought up before the judgment due to duress, fraud or excusable mistake—is available in addition to § 440.10 and that the writ of *coram nobis* can be used to bring a claim of ineffective counsel even though the statute itself does not provide for that remedy); s*ee also* People v. Bachert, 69 N.Y.2d 593, 599, 516 N.Y.S.2d 623, 627, 509 N.E.2d 318, 322 (1987) (holding that § 440.10 did not invalidate the writ of *coram nobis* and therefore review of ineffective counsel by the appellate court was available).

77. *See* N.Y. Crim. Proc. Law § 440.10(3)(b) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. at 251 (McKinney 2005) (discussing how a court, under § 440.10(3)(b), may choose not to bar relief if there has been a retroactively effective change in law).

78. N.Y. Crim. Proc. Law § 440.10(2)(d) (McKinney 2005 & Supp. 2009).

79. N.Y. Crim. Proc. Law §§ 440.10(3)(a)–(c) (McKinney 2005 & Supp. 2009). Although the court may deny the motion under any of the circumstances specified, in the interest of justice and for good cause shown, it can use its discretion to grant the motion and vacate the judgment.

80. N.Y. Crim. Proc. Law § 440.10(3)(a) (McKinney 2005 & Supp. 2009); *see* People v. Green, 177 A.D.2d 856, 857, 576 N.Y.S.2d 625, 626 (3d Dept. 1991) (holding that County Court properly denied § 440.10 motion where defendant could have challenged the prosecutor's use of peremptory challenges to eliminate black jurors at trial, but failed to do so); People v. Nuness, 151 A.D.2d 987, 988, 542 N.Y.S.2d 76, 77 (4th Dept. 1989) (holding that because defendant did not object at trial to prosecutor's failure to turn over police notes or request a hearing to determine the existence of the notes, the issue was not preserved for appeal and could not be raised in a § 440.10 proceeding); People v. Craft, 123 A.D.2d 481, 482, 506 N.Y.S.2d 492, 493 (3d Dept. 1986) (holding that the shackling of the defendant in the presence of the jury was not a basis for a § 440.10 motion because defendant did not object at trial nor request an instruction to the jury to disregard the shackling); People v. Donovon, 107 A.D.2d 433, 443–44, 487 N.Y.S.2d 345, 352–53 (2d Dept. 1985) (holding that because the defendant did not claim at trial that his confession was obtained in violation of his right to counsel, the defendant could not raise this issue for the first time in a § 440.10 motion). As explained in Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," you or your lawyer must protest errors that occur at trial when they happen in

examples of some of the issues you may raise in an Article 440 motion even though the issues were not preserved for review on appeal.

(a) You may complain that you received ineffective assistance of counsel at trial, depending upon what information is contained in your trial record. Since details of your lawyer's performance at trial are not usually obvious from the trial record, the New York Court of Appeals believes that an Article 440 motion is usually better than an appeal for an ineffective assistance of counsel claim.[81] However, if the trial record does contain facts that would allow an appellate court to review a claim of ineffective assistance of counsel, it is important that you raise the claim on direct appeal.[82]

(b) You may raise an issue in your motion if you could not have raised the issue at trial because, at that time, you could not have discovered the relevant facts.[83] For example, in one Article 440 motion, a defendant complained that the prosecutor had not revealed an agreement to recommend a more lenient sentence for a prosecution witness in exchange for the witness's testimony against the defendant. The trial court denied the motion on the ground that the defendant could have raised this issue at trial and the intermediate appellate court *affirmed* the trial court's order. But the Court of Appeals disagreed, finding that the defendant could not have known of or discovered the agreement at the time of trial and, therefore, could not have raised the issue at trial.[84]

(c) You may claim that there was prejudicial or harmful newspaper publicity about your case before and during the trial. However, if you did not alert the trial court to such newspaper publicity, and therefore, this negative publicity was not included in the record for the appeals court to review, a judge may decide to deny a Section 440.10 motion which raises this issue.[85]

(2) A trial court has discretion to either consider or reject a second motion to vacate the judgment as long as (i) the issue was not decided on direct appeal and (ii) it was included in your first Article 440 motion.[86] Again, there is an exception to this rule if the law has changed since your earlier motion and the change has been held to apply retroactively.[87]

(3) The third situation where a trial court has discretion to grant or reject your motion is when you could have raised this issue in a previous Section 440.10 motion, but failed to do so. Unless you can demonstrate good cause for failing to include the issue in your prior motion, the court will deny your second motion.[88] It is important, therefore, that you include all possible grounds for complaint when drawing up your Section 440.10 motion since you may not be able to raise any claims you leave out in another Article 440 motion.

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order to ensure that these errors will be reviewed on appeal.

81. *See* People v. Brown, 45 N.Y.2d 852, 853–54, 382 N.E.2d 1149, 1149–50, 410 N.Y.S.2d 287, 287 (1978) (observing that often the record does not provide enough information for appeal on effectiveness of counsel, so an Article 440 motion is usually a better method for ineffectiveness of counsel claims); *see also* N.Y. Crim. Proc. Law § 440.10(3)(a) (McKinney 2005 & Supp. 2009) (stating that a court may deny a motion to vacate a judgment where the defendant failed to raise an issue prior to sentencing, even though facts in support of the issue raised in the Article 440 motion could have been readily made to appear on the record had the defendant acted with due diligence, but also noting that "[t]his paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right.").

82. *See* People v. Gonzalez, 158 A.D.2d 615, 615, 551 N.Y.S.2d 586, 587 (2d Dept. 1990) (denying an Article 440 motion in part because ineffectiveness of counsel claims were based on matters in the record, so they should have been raised on direct appeal rather than in an Article 440 motion).

83. *See* People v. Qualls, 70 N.Y.2d 863, 865–66, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–62 (1987) (finding defendant could not have discovered with due diligence evidence of the prosecutor's misconduct based on the prosecutor's misrepresentation of the substance of its cooperation agreement with a witness and its knowing use of perjured testimony, and thus defendant was entitled to a hearing on his Article 440 motion).

84. People v. Qualls, 70 N.Y.2d 863, 867, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 462 (1987).

85. N.Y. Crim. Proc. Law § 440.10(3)(b) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. at 250 (McKinney 2005).

86. N.Y. Crim. Proc. Law § 440.10(3)(b) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. at 251 (McKinney 2005).

87. N.Y. Crim. Proc. Law § 440.10(3)(b) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. at 251 (McKinney 2005).

88. N.Y. Crim. Proc. Law § 440.10(3)(c) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. at 251 (McKinney 2005).

(c) Alleging Omission of *Rosario* Materials

You may file a 440 motion if the government failed to give you what is called *Rosario* material. *Rosario* material is any recorded statement of a prosecution witness (including police officers) possessed by the police or prosecution that relates to the subject matter of the witness's trial testimony. By law, the prosecutor must provide you with statements that relate to the witness's testimony at your trial.[89] But, note that the prosecutor's failure to disclose such material does not mean that your conviction will be automatically overturned. Instead, a court must find that there is a reasonable possibility that the failure to disclose such statements materially contributed to a verdict against you. Only then will the court reverse your conviction on appeal.[90] Likewise, if you raise the issue of omitted *Rosario* materials in an Article 440 motion, the court will reverse your conviction only if you can prove that the omission of the materials was not harmless error (in other words, that the omission prejudiced your defense).[91] If you raise this claim for the first time in an Article 440 motion, you must demonstrate there was a reasonable possibility that the failure to disclose these statements contributed to the verdict against you.[92]

Furthermore, it is unlikely that a court will reverse your conviction on this ground if the material withheld by the prosecution duplicates (repeats) material in the record,[93] or if the prosecution merely delayed in producing the material.[94] However, courts construe "duplication" very narrowly. Unless the excluded material appears in the record in nearly identical form, the court will probably not reject your claim on the grounds that the undisclosed *Rosario* material was duplicative.[95]

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89. N.Y. Crim. Proc. Law § 240.45(1)(a) (McKinney 2005 & Supp. 2009); *see* People v. Rosario, 9 N.Y.2d 286, 290–291, 173 N.E.2d 881, 883–84, 213 N.Y.S.2d 448, 450–51 (1961) (finding that trial court should have turned over to defense counsel, on their request, statements given before trial by prosecution witnesses relating to their trial testimony, so that defense counsel could have used statements on cross-examination).

90. *See* N.Y. Crim. Proc. Law § 240.75 (McKinney 2005 & Supp. 2009) (removing the previous rule that failure to turn over *Rosario* material was *per se* (automatic) reversible error, and replacing that rule with the "reasonable possibility" standard); People v. Sorbello, 285 A.D.2d 88, 95–96, 729 N.Y.S.2d 747, 753 (2d Dept. 2001) (holding that § 240.75, which replaced the old *per se* reversible error rule that applied when a *Rosario* violation was found with a standard of harmless error, applies retroactively to all cases that are being prosecuted or appealed as of its February 1, 2001 effective date); *see also* People v. Rosas, 297 A.D. 2d 390, 390–91, 746 N.Y.S. 2d 610, 611 (2d Dept. 2002) (finding a reasonable possibility that failure to disclose certain statements that related to the identification of the defendant by the victim's son may have materially affected the verdict); People v. Potter, 283 A.D. 2d 1011, 1011–12, 725 N.Y.S. 2d 778, 779 (4th Dept. 2001) (granting new trial because of the reasonable possibility that failure to disclose tapes and statement relating to the witness' trial testimony materially contributed to the verdict); *cf.* People v. Delosanto, 3070 A.D. 2d 298, 299, 763 N.Y.S. 2d 629, 630–31 (2d Dept. 2003) (denying reversal despite finding that a *Rosario* violation was committed because there was no reasonable possibility that disclosure of grand jury minutes would have contributed to the trial).

91. *See* People v. Jackson, 78 N.Y.2d 638, 641, 585 N.E.2d 795, 797, 578 N.Y.S.2d 483, 485 (1991) (stating that motion for post-conviction relief brought after a completed direct appeal will only be successful if defendant can prove both improper conduct by prosecutor and prejudice to the defense); People v. Machado, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (holding that in an Article 440 motion, defendant/movant must prove that the failure to turn over *Rosario* material prejudiced the outcome of the defendant/movant's case, even if an appeal is pending at the time the Article 440 motion is filed).

92. *See* People v. Nikollaj, 155 Misc. 2d 642, 649, 589 N.Y.S.2d 1013, 1018 (Sup. Ct. Queens County 1992) (granting defendant new trial because prosecution's withholding of *Rosario* materials prejudiced defendant's case, and there was a reasonable possibility that the violations contributed to the verdict clearly existed); People v. Machado, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (stating that defendant/movant must prove the omission of materials prejudiced his case and contributed to the verdict against him; conviction will not be automatically reversed regardless of whether defendant's direct appeal is still pending or completed); People v. Vilardi, 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–21, 556 N.Y.S.2d 518, 523–24 (1990) (explaining that the standard for determining whether an omission of *Rosario* material was prejudicial is whether there was a reasonable possibility that prejudice resulted).

93. *See* People v. Cortez, 184 A.D.2d 571, 573, 584 N.Y.S.2d 609, 611 (2d Dept. 1992) (finding that conviction need not be reversed if material withheld by prosecution is duplicative of other evidence in the record); People v. Ray, 140 A.D.2d 380, 382–83, 527 N.Y.S.2d 864, 866 (2d Dept. 1988) (stating that prosecution must prove that the undisclosed statements are indeed duplicative).

94. *See* People v. Blagrove, 183 A.D.2d 837, 837, 584 N.Y.S.2d 86, 87 (2d Dept. 1992) (stating that prosecution's delay in turning over material relating to a prosecution witness' testimony will only result in a reversal if the defense was substantially prejudiced by the delay, and finding no delay where "the defendant received the notes prior to the doctor's testimony, and had a full opportunity to cross-examine him based upon the notes … [and] the defendant was generally apprised of the fact that the notes were based on the autopsy report and other physical evidence.").

95. *See* People v. Young, 79 N.Y.2d 365, 370–71, 591 N.E.2d 1163, 1166–67, 582 N.Y.S.2d 977, 980–81 (1992) (finding that two documents cannot be duplicative if "there are variations or inconsistencies between them," including

(d) When You May File a Motion to Set Aside a Sentence under Section 440.20

Like a motion to vacate a judgment under Section 440.10, you do not have to wait until you have appealed your conviction to make a motion to vacate your sentence under Section 440.20. You can make this motion at any time after your sentencing.[96] But, if you challenged your sentence when you appealed your conviction and lost, you cannot challenge your sentence again through a Section 440.20 motion.[97] There is an exception to this rule that applies if the law has changed since your appeal and the new law is made retroactive.[98] In addition, the judge may deny your motion if the issue was decided in a previous Section 440.20 motion or a similar non-appeal proceeding, such as a habeas corpus motion. The court may grant your motion, however, if it is in the interest of justice and good cause is shown.[99]

C. How to File an Article 440 Motion

1. Preparing Your Motion Documents

Appendix B of this Chapter contains forms to help you prepare an Article 440 motion. Whether you are making a motion to vacate a judgment or to set aside your sentence, you will need at least two documents. The first document is a Notice of Motion. It informs the court that you are challenging your conviction and/or sentence and also states the basis for your challenge. The notes following the sample Notice of Motion in Appendix B tell you how to fill out this document.

The second document is an *affidavit*. This is a statement of facts made by someone with firsthand knowledge of the facts. Either you, a witness at your trial, or someone else who knows facts that will convince the court your conviction or sentence was improper can prepare and swear to an affidavit. Appendix B of this Chapter provides a sample affidavit written as though you (the defendant) made the affidavit.[100]

To write an effective affidavit, you must do more than make general claims such as "I was deprived of my constitutional right to counsel" or "the officer had no probable cause to arrest me." If either of these claims is the basis for your motion, you must detail the specific circumstances under which you were denied counsel, or state in a clear and detailed manner what led to your arrest. For example, if you requested a lawyer at trial and the judge told you that you were not entitled to a lawyer, you should include in your affidavit the name of the judge, the exact words he or she used (if you can remember them), the date (or approximate date) that the statement was made, and the names of any witnesses who heard the judge make the statement.

If a judge thinks that there is no reasonable possibility that the facts stated in your affidavit are true, he or she will deny your motion.[101] Therefore, you should be as detailed and precise about the facts of your story as possible. In addition, if any witnesses are available, you should have them write affidavits that support your story. You should also be careful to include all of the possible grounds or issues on which you could

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omissions; exception to automatic reversal rule for duplicate material is "simply not consistent with the principles underlying our case law," and should be read very narrowly to apply when material is in fact a duplication of material in the record).

96. N.Y. Crim. Proc. Law § 440.20(1) (McKinney 2005 & Supp. 2009); N.Y. Crim. Proc. Law § 440.20 note 24 at 25 (McKinney 2005).

97. N.Y. Crim. Proc. Law § 440.20(2) (McKinney 2005 & Supp. 2009); *see*, *e.g.*, People v. Chapman, 115 A.D.2d 911, 911, 496 N.Y.S.2d 588, 588 (3d Dept. 1985) (finding that appeal to set aside sentence bars the Article 440 motion).

98. A court will review a claim that you raised in a previous Article 440 motion if the law has changed since your appeal and the new law applies to cases decided before the change. N.Y. Crim. Proc. Law § 440.20(3) (McKinney 2005 & Supp. 2009) ("[T]he court may deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court, unless since the time of such determination there has been a retroactively effective change in the law controlling such issue.").

99. N.Y. Crim Proc. Law § 440.20(3) (McKinney 2005 & Supp. 2009). Note, however, that it is rare for the court to grant a 440.20 motion on these grounds. *See, e.g.*, People v. Baraka, 109 Misc. 2d 271, 274, 439 N.Y.S.2d 827, 830 (1981) (reading the "interest of justice" and "good cause" grounds narrowly).

100. A witness affidavit would look almost the same as the defendant's affidavit, except that the witness must identify himself and explain why he is aware of the facts to which he is swearing.

101. *See* People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 638 (1974) (denying motion based on incredible and unsubstantiated claim that trial judge, deceased at time of motion, had made an off-the-record sentencing promise to defendant). *But see* People v. Seminara, 58 A.D.2d 841, 843, 396 N.Y.S.2d 472, 475 (2d Dept. 1977) (granting motion for hearing where defendant claimed that judge's law secretary made probation promise to defendant and claim was supported by affidavit from his trial attorney).

bring an Article 440 motion.[102] If you leave one out, a court will probably not allow you to raise the ground in a later motion.[103]

You must swear in the presence of a notary that the facts stated in your affidavit are true.[104] If prison officials refuse to provide you with a notary, you can verify your affidavit through a witness. In order to verify your affidavit you should sign your own name at the bottom of the form. You should also ask a friend to witness (watch) as you sign the affidavit and have the friend sign his or her own name under the line that reads "sworn to before me" at the end of the affidavit. Finally, you should write an explanation under the signature of the friend who witnessed your signature regarding the fact that the prison officials refused to provide a notary. Appendix A of *JLM*, Chapter 17, contains a "Sample Verification" (A-2) that can be filled out by a friend.

2. When and Where to File

(a) When to File

While there is no *statute of limitations* (time limit) for making an Article 440 motion,[105] a court may decide not grant your motion if you wait too long after your sentencing.[106] For example, one court denied a Section 440.10 motion that was made three years after the defendant's conviction because the defendant could not explain why he could not have discovered the facts underlying his claim earlier.[107] Furthermore, Article 440 itself requires you to make a motion based on the ground of newly discovered evidence *within a reasonable time* after you discover the new evidence.[108]

(b) Where to File

An Article 440 motion must be brought in the trial court where you were convicted. It cannot be brought in the court of another county where you happen to be imprisoned. To file your motion, mail your Notice of Motion, your affidavit(s), and all supporting documents to the clerk of the court in which you were convicted.[109] See Appendix II of the *JLM* for the addresses of the supreme courts (the trial courts) for each county in New York State. You must also send a copy of your papers to the district attorney of the county in which you were convicted. See Appendix III in the back of the *JLM* for a list of the addresses of the district attorneys' offices for each county in New York.

3. How to Get Help From a Lawyer

You do not have a right to a lawyer to help you prepare your Article 440 motion. But, if the court decides to hold a hearing based on your motion and affidavits and you request a lawyer, the court may decide to assign you one.[110] You should request a lawyer because he or she can usually help you present a better case.

To request a lawyer, you need to file poor person's papers. Poor person's papers state that you would like a lawyer, but are unable to pay for one. These papers also allow you to request that the clerk of court serve the district attorney with all of your papers, thereby relieving you of having to serve the papers yourself.

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102. N.Y. Crim. Proc. Law § 440.30(1) (McKinney 2005 & Supp. 2009).

103. N.Y. Crim. Proc. Law § 440.10(3)(c) (McKinney 2005 & Supp. 2009).

104. N.Y. Crim. Proc. Law § 440.30(1) (McKinney 2005 & Supp. 2009).

105. *See* People v. Corso, 40 N.Y.2d 578, 580, 357 N.E.2d 357, 359, 388 N.Y.S.2d 886, 889 (1976) (holding that there is no time limit on § 440.10 claims).

106. *See* People v. Wilson, 81 Misc. 2d 739, 740, 365 N.Y.S.2d 961, 962–63 (Sup. Ct. Nassau County 1975) (denying motion to vacate judgment, and finding that fact that defendant waited almost five years to complain of his conviction was a "significant factor"); People v. Byrdsong, 161 Misc. 2d 232, 236, 613 N.Y.S.2d 543, 545 (Sup. Ct. Queens County 1994) (declaring that a post-conviction motion filed nine years after trial and seven years after appeals was, in the interest of finality, too late to continue further litigation).

107. *See* People v. Friedgood, 58 N.Y.2d 467, 470–71, 448 N.E.2d 1317, 1319, 462 N.Y.S.2d 406, 408 (1983).

108. N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2005 & Supp. 2009).

109. If your trial was moved to a different county (for example, to avoid pretrial publicity), you should send your motion to the court in the county where you were indicted. *See* People v. Klein, 96 Misc. 2d 564, 566, 409 N.Y.S.2d 374, 375–76 (Sup. Ct. Suffolk County 1978) (holding the appropriate venue for a hearing in the nature of *coram nobis* would be in the county of the indictment, rather than the county to which the case was transferred for the purpose of trial).

110. *See* N.Y. County Law § 722(4) (McKinney 2004 & Supp. 2009); People *ex rel.* Anderson v. Warden, 68 Misc. 2d 463, 470, 325 N.Y.S.2d 829, 837 (Sup. Ct. Bronx County 1971) ("Assignment of counsel other than for an evidentiary hearing is discretionary in both habeas corpus and Article 440 proceedings.").

Poor person's papers are also known as a request to proceed *in forma pauperis*. Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," describes poor person's papers in more detail and also contains sample poor person's papers. You may make and use a copy of the papers in Appendix B, Chapter 9 of the *JLM* (but do not tear them out of the book), as long as you:

(1) Replace all references to "Appeal" with "Motion to Vacate Judgment" or "Motion to Set Aside Sentence," whichever is applicable;
(2) Delete all references to "Appellate Division" and "Judicial Department" (make sure that "Supreme Court" still appears); and
(3) Make sure that the county in which you were convicted is included wherever there is a reference to the Supreme Court.

D. What to Expect After You Have Filed Your Article 440 Motion

Once you have filed your motion, the district attorney will ordinarily file an answer to your motion with the judge who received your motion. The district attorney must also send you or your lawyer a copy of the answer.[111] The answer will usually deny some or all of the allegations in your motion and supporting papers.

After reviewing the facts and arguments set forth in your motion and supporting affidavits, and in the district attorney's answer, the judge may grant or deny your motion, or hold a hearing. If your papers state a legal ground for vacating the judgment or setting aside your sentence, and the facts in support of that ground are not disputed, the judge will grant your motion.[112] If your papers do not state a legal ground for vacating the judgment or setting aside your sentence, or lack facts to support a legal ground, the judge will deny your motion.[113] The judge will also deny your motion without a hearing if:

(1) The facts you use to support your motion are not supported by sworn statements (affidavits);
(2) A fact necessary to support your motion is clearly shown to be false by documentary proof; or
(3) A fact necessary to support your motion is contradicted by the record from your trial or is made solely by you and unsupported by other evidence, and there is no reasonable possibility the allegations are true.[114]

Otherwise, the judge must grant a hearing on your motion.[115] Whether the court grants you a hearing or not, the court must state for the official record what facts it found to be true, how it viewed the law, and why it decided the way it did.[116]

If the judge decides to hold a hearing, you have the right to attend this hearing, although you may *waive* (decide not to use) this right.[117] Since at your hearing you will bear the *burden of proof*, meaning you will have the responsibility of proving that your claims are true,[118] it is recommended that you *do not* waive the right to appear. To meet your burden of proof, you must persuade the judge that the facts of your story are true by a *preponderance* of the evidence, which means that the facts are more likely to be true than not true.[119] In other words, you must convince the judge that the evidence supporting your claim outweighs the evidence against your claim.

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111. N.Y. Crim. Proc. Law § 440.30(1) (McKinney 2005 & Supp. 2009).

112. N.Y. Crim. Proc. Law § 440.30(3)(a)–(c) (McKinney 2005 & Supp. 2009). See Part B(2) of this Chapter for information about legal grounds for vacating a judgment.

113. N.Y. Crim. Proc. Law § 440.30(4)(a) (McKinney 2005 & Supp. 2009); *see*, *e.g.*, People v. Risalek, 172 A.D.2d 870, 870, 568 N.Y.S.2d 172, 174 (3d Dept. 1991) (denying motion where defendant's allegations of fraud and coercion were contradicted by transcripts and other allegations in motion were not supported by affidavits or other evidence, and defendant failed to preserve the objection to the plea he knowingly entered into); People v. Portalatin, 132 A.D.2d 581, 582, 517 N.Y.S.2d 301, 302 (2d Dept. 1987) (denying hearing because allegations of prosecutorial misconduct were not preserved or without merit); People v. Batts, 96 A.D.2d 842, 842–43, 465 N.Y.S.2d 600, 601 (2d Dept. 1983) (denying motion for failure to set forth sufficient grounds to justify a hearing).

114. N.Y. Crim. Proc. Law § 440.30(4)(b)–(d) (McKinney 2005 & Supp. 2009).

115. N.Y. Crim. Proc. Law § 440.30(5) (McKinney 2005 & Supp. 2009); *see*, *e.g.*, People v. Ferreras, 70 N.Y.2d 630, 631, 512 N.E.2d 301, 302, 518 N.Y.S.2d 780, 781 (1987) (finding that defendant who submitted personal affidavit supporting claim of ineffective counsel due to conflict of interest was entitled to hearing on motion).

116. N.Y. Crim. Proc. Law § 440.30(7) (McKinney 2005 & Supp. 2009).

117. N.Y. Crim. Proc. Law § 440.30(5) (McKinney 2005 & Supp. 2009).

118. N.Y. Crim. Proc. Law § 440.30(6) (McKinney 2005 & Supp. 2009). In contrast, the prosecutor bore the burden of proof at your trial; he had to prove you guilty beyond a reasonable doubt.

119. N.Y. Crim. Proc. Law § 440.30(6) (McKinney 2005 & Supp. 2009); *see*, *e.g.*, People v. Richard, 156 A.D.2d 270, 270, 548 N.Y.S.2d 659, 660 (1st Dept. 1989) (denying defendant's Article 440 motion because claims were not supported

Even if the hearing convinces the court that the facts stated in your motion and affidavit are true, the court will not automatically grant your motion. The facts that you use must also persuade the judge that your conviction or sentence was unfair.[120] Part B of this Chapter explains what kinds of acts by the trial judge or prosecutor may make a conviction or sentence unfair for the purposes of Article 440.

E. What Relief the Court Can Provide Under Article 440

1. Motion to Vacate Judgment

In deciding on a Section 440.10 motion, the court has several choices:

(1) As noted above, even if the court finds that the facts you have stated are true, the court may deny your motion if the court does not find that your conviction was unfair;[121]
(2) The court may grant your Section 440.10 motion to vacate judgment and dismiss the indictment or charge against you, entitling you to be either released from prison, or (more likely) to receive a new trial;[122] or
(3) If your motion raises new evidence, the judge may vacate the judgment and order a new trial,[123] or he may reduce your conviction to one for a lesser included offense, provided the district attorney agrees.[124]

2. Motion to Set Aside Sentence

If the judge decides to grant your motion to set aside your sentence under Section 440.20, he will not change your underlying conviction. The court must resentence you in accordance with the New York Penal Code's guidelines and limits for sentences.

F. How to Appeal if Your Article 440 Motion Is Denied

You do not have the automatic right to appeal a denial of your Article 440 motion to an intermediate appellate court (in New York, this is the Appellate Division).[125] To appeal, therefore, you must request leave (permission) from a judge of the intermediate appellate court to which you want to appeal.[126] You must request leave to appeal within thirty days after you receive a copy of the court's order denying your Article

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by the required preponderance of evidence).

120. *See*, *e.g.*, People v. Lehrman, 155 A.D.2d 693, 693, 548 N.Y.S.2d 260, 261 (2d Dept. 1989) (finding defendant failed to demonstrate that jury misconduct impaired his right to trial); People v. Rhodes, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dept. 1983) (stating that to prevail on Article 440 motion based on claim of juror misconduct, defendant must not only prove misconduct by a preponderance of the evidence, but also show that the misconduct created a substantial risk of prejudice); People v. Dean, 125 A.D.2d 948, 949, 510 N.Y.S.2d 41, 41 (4th Dept. 1986) (denying Article 440 motion because defendant could have raised issue on appeal and defendant failed to show denial of due process).

121. *See*, *e.g.*, People v. Machado, 90 N.Y.2d 187, 188, 681 N.E.2d 409, 410, 659 N.Y.S.2d 242, 243 (1997) (holding that, even though reversal is required upon a direct appeal when prosecution fails to turn over a pre-trial witness statement, in Article 440 motions made after a direct appeal has concluded, the defendant must demonstrate prejudice); People v. Dean, 125 A.D.2d 948, 949, 510 N.Y.S.2d 41, 41 (4th Dept. 1986) (denying Article 440 motion because defendant could have raised issue on appeal and defendant failed to show denial of due process).

122. N.Y. Crim. Proc. Law § 440.10(4) (McKinney 2005 & Supp. 2009).

123. N.Y. Crim. Proc. Law § 440.10(5)(a) (McKinney 2005 & Supp. 2009).

124. N.Y. Crim. Proc. Law § 440.10(5)(b) (McKinney 2005 & Supp. 2009); *see* People v. Reyes, 92 A.D.2d 776, 777, 459 N.Y.S.2d 614, 614 (1st Dept. 1983) (reducing defendant's sentence of robbery in first degree to robbery in second degree after evidence showed gun was a toy pistol). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a detailed explanation and example of lesser included offense.

125. N.Y. Crim. Proc. Law § 450.15 (McKinney 2005); *see* People v. Farrell, 85 N.Y.2d 60, 70, 647 N.E.2d 762, 768, 623 N.Y.S.2d 550, 556 (1995) (holding that the New York Constitution does not prevent the Legislature from limiting a defendant's right to appeal a denial of a non-final post-judgment collateral motion), *recognized as superseded in part by* People v. Cole, 1 Misc. 3d 531, 534, 765 N.Y.S.2d 477, 480 (Sup. Ct. N.Y. County 2003). However, you do have the right to appeal an order that sets aside your sentence after the district attorney makes an Article 440 motion under § 440.40 for the purpose of seeking a longer sentence against you. N.Y. Crim. Proc. Law § 450.10(4) (McKinney 2005).

126. N.Y. Crim. Proc. Law § 460.15 (McKinney 2005). Assuming you were convicted in a New York supreme court and filed your Article 440 motion there, you would appeal from a denial of your Article 440 motion to the appellate division of the department in which you were convicted. *See* note 129 below for a listing of the counties included in each department.

440 motion.[127] When you request this permission, you must apply for a "certificate granting leave to appeal."[128] In order to apply for a certificate, you must also check the appropriate appellate division rules for the department where the intermediate appellate court you are appealing to is located.[129] If the judge of the appellate court grants you permission to appeal, you will receive the certificate indicating that you may appeal.[130] Within fifteen days after you receive this certificate, you must file the certificate and a notice of appeal in the court that denied your Article 440 motion.[131] You must also *serve* the certificate and notice of appeal upon the district attorney of the county where your trial court is located.[132] Once you have completed these steps, you have "taken" your appeal.[133]

You should be aware that judges seldom grant permission to appeal from denials of Article 440 motions. Nonetheless, it is essential that you seek leave to appeal from a denial of your Article 440 motion. As noted in Chapter 13 of the *JLM*, "Federal Habeas Corpus", such an appeal is absolutely necessary to satisfy the exhaustion requirements for raising a claim in a federal habeas corpus petition.

If a judge of the intermediate court denies you permission to appeal, the appeals process ends at that stage and cannot be pursued further.[134] (Note, however, that you may still be able to raise your claim in a federal habeas corpus petition as described in Chapter 13, "Federal Habeas Corpus," of the *JLM*.) If you do receive permission to appeal and the appellate court then denies your appeal, you may appeal the denial to the New York Court of Appeals, the state's highest court.[135] To do so, you must request permission to appeal from a judge of the Court of Appeals.[136] You must make your request within thirty days after the intermediate appellate court hands down the denial you are trying to appeal.[137] Again, if you are granted permission to appeal, you will be issued a certificate indicating you have permission to appeal. Upon issuance of the certificate, your appeal is "taken."[138]

In addition, the district attorney has the right to appeal an Article 440 motion that sets aside either your conviction or your sentence.

G. Conclusion

With an Article 440 motion, you can challenge your conviction (Section 440.10) or your sentence (Section 440.20). Remember that if you have already appealed your case and lost, you cannot raise any issue already decided by the appellate court in the course of your appeal. However, if your appeal is pending, you can still make an Article 440 motion. You can then make a motion to consolidate (combine) the appeal and the 440 motion in the interests of judicial economy (efficiency). If you consolidate, the range of factual matters the

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127. N.Y. Crim. Proc. Law § 460.10(4)(a) (McKinney 2005).

128. N.Y. Crim. Proc. Law § 460.10(4)(a) (McKinney 2005).

129. N.Y. Crim. Proc. Law § 460.15(2) (McKinney 2005). These rules are located in N.Y. Comp. Codes R. & Regs. tit. 22, § 600.8(d) (for the 1st Dept.), § 670.6(b) (for the 2d Dept.), § 800.3 (for the 3d Dept.), and 1000.13(o) (for the 4th Dept.). The 1st Department includes the counties of the Bronx and New York. The 2nd Department includes the counties of Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester. The 3rd Department includes the counties of Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, and Washington. The 4th Department includes the counties of Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, and Yates.

130. N.Y. Crim. Proc. Law § 460.15 (McKinney 2005).

131. N.Y. Crim. Proc. Law § 460.10(4)(b) (McKinney 2005). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a definition of a notice of appeal and a description of the appeals process, generally, and also for a sample notice of appeal from a denial of an Article 440 motion.

132. N.Y. Crim. Proc. Law § 460.10(4)(b) (McKinney 2005).

133. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," to see what steps may still be necessary to legally perfect your appeal.

134. N.Y. Crim. Proc. Law § 450.15 (McKinney 2005).

135. N.Y. Crim. Proc. Law § 460.10(5) (McKinney 2005).

136. You may also seek permission from an appellate division judge if the appellate division denied your motion. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence" for more information.

137. N.Y. Crim. Proc. Law §§ 460.10(5)(a), 460.20 (McKinney 2005).

138. N.Y. Crim. Proc. Law § 460.10(5)(b) (McKinney 2005). Again, however, you must still perfect your appeal. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

court may examine will be expanded in the appeal, and all of the errors presented together may more convincingly persuade the court that your trial was unfair.

You must prove that the facts stated in your motion and affidavit are true and that they state a legal ground that is serious enough to require a court to grant your motion. If you are claiming that the court made a mistake during the trial, you must show that the mistake affected your chance of being found innocent, or that the mistake was so serious that defendants must be protected from this type of mistake, even if the mistake may not have affected your verdict. If you could have raised a claim in an earlier Article 440 motion, or if you have already made an Article 440 motion on the same ground(s) and lost, a court will probably deny your present motion.

If you plead guilty at your trial, you will have a harder time succeeding on a motion to vacate judgment.

APPENDIX A

STATE POST-CONVICTION RELIEF STATUTES

Alabama	ALA. CODE § 15-21-1 *et seq.*
Alaska	ALASKA STAT. § 12.75.010 *et seq.*
Arizona	ARIZ. R. CRIM. P. 32; ARIZ. REV. STAT. § 13-4121 *et seq.*
Arkansas	ARK. R. CRIM. P. 37; ARK. CODE ANN. § 16-112-101 *et seq.*
California	CAL. PENAL CODE § 1473 *et seq.*
Colorado	COLO. R. CRIM. P. 35; COLO. REV. STAT. § 13-45-101 *et seq.*
Connecticut	CONN. GEN. STAT. ANN. § 52-466 *et seq.*
Delaware	DEL. SUP. CT. CRIM. R. 35; DEL. CODE ANN. tit. 10, § 6901 *et seq.*
D.C.	D.C. CODE § 23-110; D.C. CODE § 16-1901 *et seq.*
Florida	FLA. R. CRIM. P. 3.850
Georgia	GA. CODE ANN. § 9-14-1 *et seq.*
Hawaii	HAW. REV. STAT. § 660-3 *et seq.*
Idaho	IDAHO CODE ANN. § 19-4901 *et seq.*
Illinois	725 ILL. COMP. STAT. 5/122-1 *et seq.*
Indiana	IND. CODE ANN. § 34-25.5-1-1 *et seq.;* IND. R. P. FOR POST-CONVICTION REMEDIES R. PC 1.
Iowa	IOWA CODE ANN. § 663A.1 *et seq.*
Kansas	KAN. STAT. ANN. § 60-1501 *et seq.*
Kentucky	KY. R. CRIM. P. 11.42; KY. REV. STAT. ANN. § 419.020 *et seq.*
Louisiana	LA. CODE CRIM. PROC. ANN. art. 924 *et seq.*
Maine	ME. REV. STAT. ANN. tit. 15, § 2121 *et seq.;* ME. REV. STAT. ANN. tit. 14, § 5501 *et seq.*
Maryland	MD. CODE ANN., CRIM. PROC. §7-101 *et seq.*; MD. CODE ANN. CTS. & JUD. PROC. § 3-701 *et seq.*
Massachusetts	MASS. R. CRIM. P. 30; MASS. GEN. LAWS ch. 276, § 19
Michigan	MICH. COMP. LAWS ANN. § 600.4301 *et seq.*
Minnesota	MINN. STAT. ANN. § 590.01 *et seq.*
Mississippi	MISS. CODE ANN. § 99-39-1 *et seq.*
Missouri	MO. S. CT. R. CRIM. P. 29.12-15; MO. ANN. STAT. § 547.360.
Montana	MONT. CODE ANN. § 46-21-101 *et seq.*; MONT. CODE ANN. § 46-22-101 *et seq.*
Nebraska	NEB. REV. STAT. § 29-3001 *et seq.*
Nevada	NEV. REV. STAT. §§ 34.720, 176.515.
New Hampshire	N.H. REV. STAT. ANN. § 534:1 *et seq.*
New Jersey	N.J. STAT. ANN. § 2A:67-1 *et seq.*
New Mexico	N.M. STAT. ANN. § 31-11-6
North Carolina	N.C. GEN. STAT. 15A-1411 *et seq.*; N.C. GEN. STAT. 17-1 *et seq.*
North Dakota	N.D. CENT. CODE § 32-22-01 *et seq.*
Ohio	OHIO REV. CODE ANN. § 2953.21 *et seq.*
Oklahoma	OKLA. STAT. ANN. tit. 22, § 1080 *et seq.*
Oregon	OR. REV. STAT. § 138.510 *et seq.*
Pennsylvania	42 PA. CONS. STAT. ANN. § 6501 *et seq.*
Rhode Island	R.I. GEN. LAWS § 10-9.1-1 *et seq.*; R.I. GEN. LAWS § 10-9-3 *et seq.*
South Carolina	S.C. CODE ANN. § 17-27-10 *et seq.*
South Dakota	S.D. CODIFIED LAWS § 21-27-1 *et seq.*
Tennessee	TENN. CODE ANN. § 40-9-119 *et seq.*
Texas	TEX. CODE CRIM. PROC. ANN. art. 11.01 *et seq.*
Utah	UTAH CODE ANN. § 78B-9-101 *et seq.*
Vermont	VT. STAT. ANN. tit. 13, § 7131 *et seq.*
Virginia	VA. CODE ANN. § 8.01-654 *et seq.*
Washington	WASH. REV. CODE ANN. § 7.36.010 *et seq.*
West Virginia	W. VA. CODE § 53-4A-1 *et seq.*
Wisconsin	WIS. STAT. ANN. § 974.06 *et seq.*
Wyoming	WYO. STAT. ANN. § 7-14-101 *et seq.*; WYO. STAT. ANN. § 1-27-101 *et seq.*

APPENDIX B

SAMPLE ARTICLE 440 MOTIONS AND SUPPORTING PAPERS

This Appendix contains the following materials:

B-1. Sample Notice of Motion by Defendant to Vacate Judgment
B-2. Sample Defendant's Affidavit in Support of Motion to Vacate Judgment
B-3. Sample Notice of Motion by Defendant to Set Aside Sentence
B-4. Sample Defendant's Affidavit in Support of Motion to Set Aside Sentence

DO NOT TEAR THESE FORMS OUT OF THE *JLM*. Copy them on your own paper and fill them out according to the facts of your particular case. The endnotes following the sample documents tell you how to fill in the necessary information. Remember, your affidavit is a sworn statement; you can be punished if you intentionally include any statements that you know are false. Change the wording of the forms, if necessary, so that all the statements apply to your case. You must sign your affidavit in the presence of a notary public.

No poor person's papers (*in forma pauperis*) have been included in these forms. Part C(3) of this Chapter tells you how to use poor person's papers to obtain a lawyer in an Article 440 proceeding. Sample poor person's papers may be found in Chapter 9 of the *JLM*.

Appendix II at the end of the *JLM* lists the addresses and jurisdictions of the New York state courts to which these papers should be addressed.

B-1. Sample Notice of Motion by Defendant to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____ [1]

The People of the State of New York	
Plaintiffs,	NOTICE OF MOTION TO VACATE JUDGMENT
- against -	Indictment No._____[2]
_____,[3]	
Defendant.	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,[4] duly sworn to the ____ day of _____, _____,[5] (and documents attached thereto) and upon the accusatory instrument and_____ _____,[6] and all proceedings previously held herein, defendant will move this Court at Criminal Term, Part _____[7] thereof, at the Courthouse located at_____,[8] on the _____ day of _____, _____ at ____ a.m.,[9] or as soon thereafter as counsel may be heard, for:

An order pursuant to Criminal Procedure Law § 440.10(__)[10] vacating the judgment entered against the above-named defendant on the _____ day of _____, _____,[11] on the following grounds:

1. _____
2. _____[12]

[*if applicable, include*:] An order pursuant to N.Y. Crim. Proc. Law § 440.30(1-a), directing that forensic Deoxyribonucleic Acid (DNA) testing be performed on evidence specified in the annexed affidavit;

An order, pursuant to N.Y. Crim. Proc. Law § 440.30(5), to produce the defendant at any hearing to be conducted for the purpose of determining this motion; and

Such other and further relief as the Court may deem just and proper.

Dated: _____
_____, _____[13]
_____[14]
_____[15]
Defendant, *pro se*.[16]

To:
District Attorney of
_____ County,
_____, New York[17]

B-2. Sample Defendant's Affidavit in Support of Motion to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[18]

The People of the State of New York	:	
Plaintiffs,	:	AFFIDAVIT
- against -	:	Indictment No._____[19]
_____,[20]	:	
Defendant.	:	

State of New York)
County of _____[21] ss.:)

_____,[22] being duly sworn, deposes and says:

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of a motion, pursuant to section 440.10, subdivision _____,[23] to vacate the judgment of conviction herein, upon the ground that _____.[24]

2. I was indicted for _____.[25] At the arraignment I entered a plea of "not guilty" and posted bail in the amount of $_____.[26] I was tried in this court before Hon. Judge_____[27] on_____, _____.[28] The case was submitted to a jury, which rendered a verdict of guilty.[29]

3. On _____, _____,[30] I was sentenced to _____.[31]

4. The evidence adduced at my trial may be summarized as follows:

_____
_____
_____.[32]

5. _____.[33]

6. [*If applicable, include:*] Among the evidence gathered by the State in its investigation of the crime and admitted at my trial [*or*] but not admitted at my trial was _____, which contains Deoxyribonucleic Acid (DNA). DNA testing of _____ is relevant to proof of guilt in that _____ _____. My conviction occurred prior to January 1, 1996, to wit, on _____ _____, _____.[34]

7. The ground(s) for relief raised upon this motion has (have) not previously been determined on the merits upon a prior motion or proceeding in a court of this state, or upon an appeal from the judgment, or upon a prior motion or proceeding in a federal court.[35]

WHEREFORE, I respectfully request that my conviction be vacated on the ground that_____ _____,[36] and that this Court grant such other and further relief as it may deem just and proper [*or if applicable:*] WHEREFORE, I respectfully request an Order of this Court pursuant to N.Y. Crim. Proc. Law § 440.30(1-a), directing that forensic Deoxyribonucleic Acid (DNA) testing be conducted upon _____ _____.[37]

_____[38]

_____[39]

Sworn to before me this:
day of _____, 20____

_____[40]
NOTARY PUBLIC

B-3. Sample Notice of Motion by Defendant to Set Aside Sentence

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[41]

The People of the State of New York Plaintiffs, - against - _____,[43] Defendant.	NOTICE OF MOTION TO SET ASIDE SENTENCE Indictment No._____[42]

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,[44] sworn to the _____ day of _____, 20___,[45] (and documents attached thereto) and upon the accusatory instrument and all other papers filed and proceedings had herein, defendant will move this Court, Part _____[46] thereof, at the Courthouse located at _____,[47] on the _____ day of _____, 20____, at ____ a.m.,[48] or as soon thereafter as counsel may be heard, for:

(1) an order, pursuant to Criminal Procedure Law, section 440.20, setting aside the sentence heretofore imposed upon the above-named defendant on the _____ day of _____, _____;[49] or, in the alternative, ordering a hearing to determine whether such sentence should be set aside on the ground(s) that:

_____[*reasons*],[50]

(2) An order, pursuant to Crim. Proc. Law § 440.30(5), to produce the defendant at any hearing conducted to determine this motion; and

(3) Such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are to be served upon the undersigned at least __[51] days prior to the return of this motion.

Dated:_____

_____[52]

_____[53]

Defendant, *pro se*.

To:

District Attorney of

_____ County,

_____, New York[54]

B-4. Sample Defendant's Affidavit in Support of Motion to Set Aside Sentence

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[55]

The People of the State of New York Plaintiffs, - against - _____,[57] Defendant.	AFFIDAVIT Indictment No._____[56]

State of New York)
County of _____[58] ss.:)

_____,[59] being duly sworn, deposes and says:

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of a motion, pursuant to section 440.20 to set aside the sentence herein, upon the ground that _____ _____.[60]

2. I was indicted for _____.[61] At the arraignment I entered a plea of "not guilty" and posted bail in the amount of $_____.[62] I was tried in this court before Hon. Judge _____ _____[63] on _____, _____.[64]

3. After a trial[65] held on _____ _____, _____,[66] I was found guilty of count(s) _____[67] of the indictment charging _____ in the _____ degree, a Class _____ felony.[68] Bail was revoked and I was held in the _____, located at _____, _____,[69] New York, until the sentencing for my conviction held on _____, _____[70] before Hon. Judge _____ _____[71] in Criminal Term Part _____ of the _____[72] County Supreme Court.

4. I was sentenced to a _____ term of imprisonment at _____Correction Facility, ___ _____,[73] New York.

5. _____.[74]

6. _____.[75]

7. The ground(s) for relief described by this affidavit has (have) not previously been determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court.[76]

WHEREFORE, I respectfully request that this Court enter an order, pursuant to section 440.20 of the Criminal Procedure Law, setting aside the sentence imposed upon me and resentencing me in accordance with law, and granting such other and further relief as the Court may deem just and proper.

_____
_____[77]
Sworn to before me this:
day of _____, 20____
_____[78]
NOTARY PUBLIC

Fill in the blanks indicated in the sample documents as follows:

1. Fill in the name of the county in which the court hearing your motion is located.
2. Fill in your indictment number.
3. Fill in your name.
4. Since you should submit an affidavit with your motion, you should fill your name in here. Also, if you are submitting affidavits of other people who have taken part in your case, their names should be filled in, and the word "affidavit" changed to "affidavits."
5. Fill in the date or dates on which you or others signed your affidavits: day, month, year.
6. Describe briefly other documents, if any, that you are attaching because they will help you make your case to the court. For example, you can mention a transcript of your trial.
7. Fill in the "Part" number of the court, if you know it.
8. Fill in the address of the court.
9. Fill in the date on which the hearing will be held.
10. Fill in the subsection of § 440.10 that corresponds to the ground upon which you are making your motion. See Section B(2) of this Chapter for information on these subsections.
11. Fill in the day, month, and year on which the judgment of conviction was entered against you.
12. List the reasons why you think the court should vacate the judgment against you. See Section B(2) of this Chapter for more information.
13. Fill in date on which you signed this notice, and the city and state in which you signed it.
14. Sign your name here.
15. Fill in your complete mailing address here.
16. *Pro se* means that you are acting as your own legal representative (without a lawyer).
17. Fill in the name of the district attorney, and the county and town in which he or she is located.
18. Fill in the name of the county in which the court hearing your motion is located.
19. Fill in your indictment number.
20. Fill in your name.
21. Fill in the name of the county in which you are signing this affidavit.
22. Your name, in capital letters.
23. Fill in the subsection of § 440.10 that corresponds to the ground upon which you are making your motion. See Section B(2) of this Chapter.
24. List briefly the ground that corresponds to the subsection of N.Y. Crim. Proc. Law § 440.10 provided above. See Section B(2) of this Chapter for a list of grounds.
25. Fill in the name of the offense for which you were indicted.
26. Fill in the amount of bail you posted.
27. Fill in the trial judge's name.
28. Fill in the date or dates including the day, month, and year on which your trial took place.
29. If you did not have a jury trial, simply indicate that the judge found you guilty.
30. Fill in the day, month, and year on which judgment was given in your case.
31. Fill in the sentence ordered in your case.
32. Summarize the evidence that the prosecution relied upon and that the jury was allowed to consider.
33. Summarize the facts which support the reasons you set out in numbers 1 through 8, above, for challenging your conviction.
34. Fill in the evidence, if any, containing DNA samples; how that evidence proves your innocence; and the date, prior to January 1, 1996, that your conviction occurred, if applicable.
35. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect that fact. If the law has changed since you previously litigated the issues, you should state this.
36. Briefly state the reasons for your motion.
37. Fill in the evidence upon which you want DNA testing performed.
38. Sign your name, ***in the presence of a notary public***. If your prison will not give you access to a notary, see Appendix A, Endnote 102 to Chapter 16 of the *JLM*.
39. Print your complete mailing address below your signature.
40. The notary will sign and fill in the date here after seeing you sign the document.
41. Fill in the name of the county in which the court hearing your motion is located.
42. Fill in your indictment number.
43. Fill in your name.
44. Since you should submit an affidavit with your motion, your name should be filled in here. Also, if you are submitting affidavits of other people who took part in the case, their names should be filled in, and the word "affidavit" changed to "affidavits."
45. Fill in the date you signed your affidavit.
46. Enter the number of the court part, if you know it.

47. Enter the address and city of the court hearing your motion.
48. Enter the date and time of your hearing.
49. Enter the day, month, and year on which you were sentenced.
50. Give the reasons your sentence should be set aside. See Section B(2) of this Chapter. The three grounds are (a) sentence unauthorized; (b) sentence illegally imposed; or (c) sentence invalid otherwise, as a matter of law. If you can raise more than one ground, you should include all that apply.
51. Fill in the amount of notice you feel is necessary, considering the length of time you will need to develop arguments to answer their affidavit.
52. Fill in date on which you signed this notice, and the city and state in which you signed it.
53. Sign your name and print your complete mailing address underneath.
54. Enter the name of the district attorney, followed by his or her county and address.
55. Fill in the name of the county in which the court hearing your motion is located.
56. Fill in your indictment number.
57. Fill in your name.
58. Fill in the name of the county in which you are signing this affidavit.
59. Your name, in capital letters.
60. List briefly the reasons why you think the court should vacate the sentence against you. See Section B(2) of this Chapter for a list of possible reasons.
61. Fill in the name of the offense for which you were indicted.
62. Fill in the amount of bail you posted.
63. Fill in the trial judge's name.
64. Fill in the date or dates, including day, month, and year on which your trial took place.
65. If you pled guilty, leave out this first sentence in paragraph 3. Instead, write: "I entered a plea of guilty to (give the name of the crime), a Class (give the class of the felony: A, B, C, etc.) felony."
66. If you had a trial, fill in the date or dates, including the day, month, and year of the trial.
67. If you had a trial, fill in the numbers of the counts of the indictment of which you were convicted.
68. If you had a trial, fill in the names, degrees (if any), and classes of the offenses of which you were convicted.
69. Give the name and address of the facility where you were held while you were waiting to be sentenced.
70. Fill in the date, including the day, month, and year of your sentencing.
71. Fill in the name of the judge who sentenced you.
72. Enter the county and part number of the court that sentenced you.
73. Enter the terms of the sentence that you received and the name and address of the facility in which you are to serve your sentence.
74. Indicate whether or not an appeal has been taken in your case. If so, give the name of the court, the date and the name of the judge who heard your appeal.
75. Give the reasons why you think your sentence is illegal. See Section B(2) of this Chapter for a list of possible reasons.
76. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect the previous court proceedings. If the law has changed since you previously litigated the issues, you should state this.
77. Sign your name, ***in the presence of a notary public***, and print your complete mailing address below your signature.
78. The notary will sign and fill in the date here after seeing you sign the document.

A JAILHOUSE LAWYER'S MANUAL

Chapter 21: State Habeas Corpus: Florida, New York, and Texas

Columbia Human Rights Law Review

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Legal Disclaimer

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CHAPTER 21

STATE HABEAS CORPUS: FLORIDA, NEW YORK, AND MICHIGAN*

A. Introduction

This Chapter discusses how the writ of habeas corpus is applied in three states: Florida, New York, and Michigan.[1] The rules about habeas corpus in Florida, New York, and Michigan are often similar. This Introduction will give you a short overview of habeas corpus. Part B has specific information about Florida petitions, Part C has specific information about New York petitions, and Part D has specific information about Michigan petitions. These Parts offer important information, including how, where, and when to file your petition. If you are in prison in a state other than Florida, New York or Michigan, and wish to file a habeas corpus petition in state court, the laws may differ in important ways from the ones described below.[2] You should be sure to check the laws in your own state before filing a state habeas petition.[3]

1. What is a Writ of Habeas Corpus?

When you file a petition for a writ of habeas corpus, you are asking a judge for a hearing to determine whether your imprisonment is lawful. This hearing is not another trial. Instead of deciding whether you were guilty or not, the judge will evaluate the fairness of the procedure used to convict and sentence you. To get a writ of habeas corpus, you must file a petition for a civil (not criminal) proceeding in either state or federal court. A prisoner filing a habeas corpus petition is often referred to as a "petitioner" or "relator." This chapter will cover filing a petition in state, not federal, court. To learn more about federal habeas corpus, you should read *JLM*, Chapter 13, "Federal Habeas Corpus."

2. Requirements for Habeas Relief

There are four requirements you must fulfill in order to get state habeas relief:

(1) you must be in custody;
(2) you must be entitled to immediate release if your petition is successful;
(3) you must be a state prisoner; and
(4) there must be no other legal procedure to get the relief you want.

(a) Custody

Custody means you must be confined by the state in some way. Therefore, usually you cannot challenge a sentence you have not yet begun to serve. In Florida, New York and Michigan, you may apply for habeas corpus if you are in jail or prison. However, whether you may apply for habeas corpus if you are on parole, released on a bond, or released on your own recognizance ("ROR")[4], depends on which state convicted you. See Parts A(3)(c), B(3)(c), C(2)(c), and D(2)(c) of this Chapter for more information about habeas corpus petitions if you are on probation or parole.

(b) Immediate Release

Florida,[5] New York,[6] and Michigan[7] courts will usually refuse to consider your habeas corpus petition unless a successful petition will result in your immediate release. For example, if you are serving time for

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* This Chapter was revised by Tanya Sehgal based in part on previous versions by Renate Lunn, Alison Wright and Jennifer Morrison.

1. "Habeas corpus" is often shortened to "habeas." Also, "petition for a writ of habeas corpus" is sometimes shortened to "petition for habeas corpus."

2. See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Conviction or Illegal Sentence," for a list of statutes for state post-conviction relief in other states. *JLM*, Chapter 2, "Introduction to Legal Research" can help you to conduct further research on the laws in your state.

3. If you are incarcerated in a federal prison, you cannot file for state habeas corpus. You must file a petition for federal habeas corpus. See *JLM*, Chapter 13 for more information about federal habeas corpus.

4. Released on your own recognizance (often shortened to "ROR'd" or simply "ROR") means that the court has released you because you have given a written promise to appear at your next court date.

5. *See* North v. State, 217 So. 2d 608, 609 (Fla. Dist. Ct. App. 1st Dist. 1969) (denying petition for writ of habeas corpus when defendant was no longer in custody). *See also* Schmunk v. State *ex rel* Sandstrom, 353 So. 2d 907, 907 (Fla. Dist. Ct. App. 4th Dist. 1977) (denying petition when defendant was fined for a traffic violation, but never in custody).

6. *See* People *ex rel.* Daniels v. Beaver, 303 A.D.2d 1025, 1025, 757 N.Y.S.2d 195, 195 (4th Dept. 2003) (holding

several convictions, you may not petition for a writ of habeas corpus to challenge only one conviction or sentence, since you will remain imprisoned for the other convictions regardless of the outcome of your petition.[8]

However, you may be able to petition for habeas corpus even though it will not result in your immediate release if you complain about a specific aspect of your incarceration. For example, if you are incarcerated at the wrong facility or your bail was set too high, you may petition for a writ of habeas corpus. Though you will not be released when your petition is granted, you will be transferred to the correct facility or your bail will be lowered.

(c) State Prisoner

If you are a federal prisoner, state habeas corpus relief is not available to you.[9] See *JLM*, Chapter 13, "Federal Habeas Corpus," for help with applying for a habeas writ in federal court if you are a federal prisoner or if you are unsure about whether you are a federal prisoner. Importantly, if you are a state prisoner, you must submit your petition in the state where you are incarcerated.[10]

(d) No Other Options

You may not petition the court for a writ of habeas corpus if there are other ways to get the relief you seek. Other procedures include appeal, administrative procedures, and grievance procedures. If you have not yet finished your appeal or are in the middle of a grievance hearing, you should not file a habeas petition until you are done with those other procedures. When you appeal, you are asking the court to reconsider the decision of the lower court. When you file a habeas petition, on the other hand, you are asking the court to consider whether the conviction and sentencing procedure was fair. You should read *JLM*, Chapter 15,

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that trial court properly dismissed habeas petition where, even if petitioner had been denied the right to appear before the Parole Board, he would not have been entitled to immediate release); People *ex rel.* Chaikin v. Warden, 63 N.Y.2d 120, 125, 470 N.E.2d 146, 148, 480 N.Y.S.2d 719, 721 (App. Div. 1984) ("[H]abeas corpus generally will lie only where the defendant would become entitled to his immediate release upon the writ being sustained."); People *ex rel.* Kaplan v. Comm'r of Corr., 60 N.Y.2d 648, 649, 454 N.E.2d 1309, 1309, 467 N.Y.S.2d 566, 566 (App. Div. 1983) (denying writ of habeas corpus because only remedy to which petitioner was entitled would be a new trial or new appeal, not immediate release). *See also* People *ex rel.* DeFlumer v. Strack, 212 A.D.2d 555, 555, 623 N.Y.S.2d 1, 1 (2d Dept. 1995) (denying habeas petition where petitioner challenged several conditions of his conditional release); People *ex rel.* Travis v. Coombe, 219 A.D.2d 881, 881, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (denying habeas petition where conditions for conditional release were not met and petitioner was therefore not entitled to immediate release even if the writ was sustained).

7. *See* People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (finding that the conditional writ of habeas corpus granted to the defendant (stating that he be retried in 90 days or released) was legitimate, but that the state does not lose its right to re-prosecute if it does not retry within the allotted time).

8. In Florida: *see* Alderman v. State, 188 So.2d 803, 804 (Fla. 1966) (denying writ of habeas corpus when relator was legally incarcerated on concurrent sentence); Gorman v. Cochran, 127 So. 2d 667, 667–68 (Fla. 1961) (denying writ of habeas corpus to relator who was attacking future sentences he had not yet begun to serve).
In New York: *see* People *ex rel.* Brown v. New York State Div. of Parole, 70 N.Y.2d 391, 398, 516 N.E.2d 194, 197, 521 N.Y.S.2d 657, 660 (App. Div. 1987) (denying writ of habeas corpus because "relator, in addition to being held on the parole violation, is being held on unrelated pending criminal charges. Because success on the merits in this proceeding would not entitle him to immediate release from custody, the remedy of habeas corpus is unavailable.").
In Texas: *see Ex parte* Padgett, 230 S.W.2d 813, 814 (Tex. Crim. App. 1950) (holding prisoner confined under two different sentences, only one challenged in his habeas petition, was not entitled to discharge on a writ of habeas corpus).

9. In Florida: *see* Simmons v. State, 579 So. 2d 874, 874 (Fla. Dist. Ct. App. 1st Dist. 1991) (holding that the state circuit court is without power to issue a writ of habeas corpus for a prisoner who is not in the custody of the state).
In New York: *see* N.Y. C.P.L.R. 7002(a) (2009); N.Y. C.P.L.R. 7002(c)(3) (2009) ("The petition … shall state … that a court or judge of the United States does not have exclusive jurisdiction to order [the petitioner] released.").
In Texas: *see* Tex. Code Crim. Proc. Ann. art. 11.63 (Vernon 2005 & Supp. 2009) (prohibiting state habeas corpus relief to prisoner held under federal authority); *see also Ex parte* Di Van Nguyen, 31 S.W.3d 815, 816 (Tex. Crim. App. 2000) (denying habeas corpus relief to a petitioner in Immigration and Naturalization Service custody, stating that only a federal court could issue a writ of habeas corpus to petitioner).

10. In New York: *see* People *ex rel.* Warren v. People, 171 A.D.2d 768, 768, 567 N.Y.S.2d 321, 321 (2d Dept. 1991) (dismissing federal prisoner's habeas corpus petition because the petitioner was incarcerated outside of New York).
In Texas: *see Ex parte* Rodriguez, 169 Tex. Crim. 367, 367–68, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960) (holding that relator must apply for habeas corpus relief first to the judge of the trial court).
In Florida: *see* Dugger v. Jackson, 598 So. 2d 280, 282, 17 Fla. L. Weekly 1264, 1266 (Fla. Dist. Ct. App. 1st Dist. 1992) (vacating lower court's grant of habeas corpus writ because the state of conviction, South Carolina, had not given its authority for the Florida court to hear such claim).

"Inmate Grievance Procedures," for more information about prisoner grievance proceedings, and *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for a discussion of an appeal. Each state has its own exceptions to and standards for the general rule that other procedures must not be available.

3. What You Can Complain About in Your Habeas Petition

(a) Before Trial[11]

If you are incarcerated before your trial (detained), you may be able to claim one of the following grounds for habeas relief: improper *extradition*, excessive bail, or delay. In Florida, you can also challenge a search warrant or probable cause. These grounds are discussed in detail in Part B of this Chapter.

(i) Extradition

An extradition is a warrant for arrest demanding that the arrested person be returned to and tried in the state issuing the warrant. If you were arrested in Florida, New York, or Michigan on an extradition warrant from another state, you may contest extradition to that state by petitioning the court in the state in which you are in custody for a writ of habeas corpus.[12] But, the Supreme Court has held that in such circumstances the state court may only consider the following issues: whether the documents from the demanding state[13] are in order, whether you are a fugitive, whether you have been charged with a crime in the demanding state, and whether you are the person named in the extradition warrant.[14]

You may challenge the extradition warrant on the following two grounds: (1) if you can prove by conclusive evidence that you were not in the demanding state at the time the crime was committed,[15] or (2) if you have been held longer than allowed by the laws of the state in which you are held.

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11. See *JLM,* Chapter 3, "Your Right to Learn the Law and Go to Court" for more information generally on your rights before trial.

12. For example, if you are arrested in Florida on an extradition warrant from Georgia, you could contest your extradition to Georgia using the Florida state habeas corpus procedures.

13. The demanding state is the state that requested the arrest and the state to which the prisoner will be extradited (sent) for prosecution. The state in which the prisoner is being held is known as the asylum state.

14. *See* Michigan v. Doran, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521, 527 (1978) ("[A] court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."); State v. Luster, 596 So. 2d 454, 456, 17 Fla. L. Weekly 206, (Fla. 1992) (adopting *Michigan v. Doran* in Florida); *Ex parte* Potter, 21 S.W.3d 290, 299 (Tex. Crim. App. 2000) (applying *Michigan v. Doran* to Texas); People *ex rel.* Coster v. Andrews, 104 Misc. 2d 506, 512, 428 N.Y.S. 2d 594, 597–98 (Sup. Ct. Broome County 1980) (applying *Michigan v. Doran* to New York).
In New York: *see also* People v. Culwell, 163 Misc. 2d 576, 579–80, 621 N.Y.S.2d 490, 492 (Sup. Ct. Schoharie County 1995) (granting writ of habeas corpus and finding that petitioner was not a fugitive where the demanding state failed to comply with N.Y. Crim. Proc. Law § 570.16 (McKinney 2009), which required proof that petitioner either committed a crime in the demanding state *or* did acts in New York which would constitute a crime in the demanding state).

15. In Florida, this ties into the other factors. If you were not in the demanding state at the time of the incident then you are also not a fugitive from justice. *See* Galloway v. Josey, 507 So. 2d 590, 594, 12 Fla. L. Weekly 182, 182 (Fla. 1987) (granting habeas petition and holding that once a petitioner comes forward with clear and convincing evidence to rebut the presumption that he was a fugitive, the burden shifts to the state to produce competent evidence discrediting the prisoner's proof to such a degree that it ceases to be clear and convincing). *See also* State v. Cox, 306 So. 2d 156, 159, (Fla. Dist. Ct. App. 2d Dist. 1974) ("[T]he question of whether an accused is a fugitive from justice asks nothing more than whether he was bodily present in the demanding state at the time of the offense and thereafter departed from that state."); State *ex rel.* Smith v. Clark, 33 So. 2d 721, 722, 160 Fla. 113, 114 (1948) (denying habeas petition where record determined that petitioner was in the state at the time of the commission of the robbery); Trent v. McLeod, 179 So. 906, 907, 131 Fla. 617, 618–19 (1938) (denying habeas petition where nothing in the record supported petitioner's claim that he was not in the demanding state); State *ex rel.* Stringer v. Quigg, 107 So. 409, 412, 91 Fla. 197, 203 (1926) (holding that the court must consider, among other things, whether the warrant shows that he was in the demanding state at the time that the offense was committed); Kuney v. State, 102 So. 547, 549, 88 Fla. 354, 358 (1924) (reversing lower court because it did not consider whether petitioner was in the demanding state at the time of the alleged offense).
In New York: *see* People *ex rel.* Friedman v. Comm'r of New York City Dept. of Corr., 66 A.D.2d 689, 690, 411 N.Y.S.2d 267, 268–69 (1st Dept. 1978) (holding that failure to specify when crime was committed deprived petitioner of the right to prove that he was out of the state at the time). *But see* People *ex rel.* Pata v. Lindemann, 75 A.D.2d 654, 655, 427 N.Y.S.2d 445, 446 (2d Dept. 1980) (denying habeas petition and holding that where the indictment charged crimes of a continuing nature which allegedly took place throughout the entire period covered by the indictment, it was up to the accused to prove his absence from the demanding state throughout the entire period).

(ii) Bail

You do not have a constitutional right to bail, but if you are granted bail, it must not be excessive. Florida, New York, and Michigan all permit you to ask for habeas relief if you have been denied bail, or if the bail was excessive.[16] Each state, however, has different criteria for determining when bail is excessive. Make sure to read the state-specific parts of this Chapter and research your state's laws.

(iii) Delay

You may file for habeas corpus if you have been incarcerated without formal charges filed against you for a period of time longer than the maximum your state allows. There are two types of formal charges. The first is called an *information*. This is a formal charging document. An information may be filed by a prosecutor without a grand jury. In New York, prosecutors usually charge misdemeanors using an information. The second type of formal charge is an *indictment*, which a grand jury issues.

(b) After Your Conviction

If you are incarcerated after your conviction, you may be able to claim one of the following grounds for habeas relief:

(1) confinement beyond your sentence or a miscalculation of sentence;
(2) violation of fundamental constitutional or statutory rights;
(3) new or void law;
(4) ineffective assistance of counsel; or
(5) discovery of new evidence.

In New York, you can also file on the grounds of unreasonable delay[17] or violation of the conditions of your sentence.[18] Each state has a different approach. For more information on grounds for habeas petitions in particular states, see Parts B (Florida), C (New York), and D (Michigan) of this Chapter.

(c) While You Are On Probation or Parole

You can also file a habeas corpus petition if your parole or probation is withdrawn. No matter which state you are in, you have the right to a probable cause hearing to determine whether you violated the conditions of your parole.[19] You must be given notice of this hearing and you have the right to appear, speak on your own behalf, present witnesses, and cross-examine witnesses testifying against you. This hearing is to determine whether you will be held in custody until the decision on whether to revoke (take away) your parole is issued. You also have the right to a *final revocation hearing* "within a reasonable time" after you have been taken into custody.[20] For more information about parole, see *JLM*, Chapter 35, "Getting Out Early: Conditional and Early Release," and *JLM*, Chapter 36, "Parole."

In Florida, you may challenge errors in parole revocation proceedings and orders of the Florida Probation and Parole Commission by petitioning for a writ of habeas corpus.[21] You may file a habeas petition

16. In Florida: *see* Fla. R. Crim. P. 3.850(a) (West 2009). In New York: *see* N.Y. C.P.L.R. 7010(b) (McKinney 1998 and Supp. 2010).

17. *See* People *ex rel.* Anderson v. Warden, New York City Corr. Inst. for Men, 68 Misc. 2d 463, 468, 325 N.Y.S.2d 829, 835 (Sup. Ct. Bronx County 1971) ("[I]f there is an unreasonable delay in the disposition of an article 440 motion, the defendant can, perhaps, properly bring a writ of habeas corpus."); *see also* People *ex rel.* Lee v. Smith, 58 A.D.2d 987, 987, 397 N.Y.S.2d 266, 267 (4th Dept. 1977) (granting a hearing on the merits of relator's habeas corpus petition, even though an appeal was pending, because the relator's appeal had been pending for more than four years). You should read Part C(2)(b)(vi) of this Chapter for more information about "unreasonable delay" habeas grounds in New York.

18. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (App. Div. 1961) ("[I]t seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry."). You should read Part C(2)(b)(vii) of this Chapter for more information about "violation of the conditions of your sentence" habeas grounds in New York.

19. Morrissey v. Brewer, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496–97 (1972). Since this is a Supreme Court case, it applies to all states.

20. Morrissey v. Brewer, 408 U.S. 471, 488, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484, 498 (1972).

21. *See* State v. Sampson, 297 So. 2d 120, 121–22 (Fla. Dist. Ct. App. 4th 1974) (finding that habeas corpus is the proper method for challenging an order of the Florida Parole and Probation Commission); State *ex rel.* Wainwright v. Holley, 234 So. 2d 409, 410 (Fla. Dist. Ct. App. 2d Dist. 1970) (holding that the proper way to challenge error in post-conviction proceedings such as parole revocation is through habeas corpus); *see also* Jackson v. Mayo, 73 So. 2d 881, 882–83 (Fla. 1954) (granting relief where no evidence was offered authorizing revocation of parole); Beal v. Mayo, 70 So. 2d 367, 369 (Fla. 1954) (affirming that where there is a complete absence of any adjudication at all, the judgment and

to challenge the Parole Commission's determinations of presumptive (expected) parole release dates.[22] If you are incarcerated after your presumptive release date, you may petition for a habeas corpus writ.[23]

Petitions for habeas corpus relief can also be brought in connection with parole revocation hearings in New York[24] and Michigan.

(d) Jurisdiction

Another possible ground for habeas relief—but one almost always rejected—is that the court that imprisoned you did not have jurisdiction, or the power to hear and decide a case. In a criminal case, a court must have two types of jurisdiction: (1) personal jurisdiction (the power to judge you, the defendant); and (2) subject matter jurisdiction (the power to judge the offense with which you were charged). If the court that imprisoned you did not have either of these types of jurisdiction, you can petition for habeas corpus.[25]

(i) Personal Jurisdiction

A court has personal jurisdiction when you go to or are taken to court and appear before the judge.[26] Since you almost certainly appeared before a court either at the trial leading to your conviction or at your *arraignment* (if you have not yet gone to trial), you will rarely be able to petition for habeas corpus on the ground that the court lacked personal jurisdiction.

(ii) Subject Matter Jurisdiction

Subject matter jurisdiction is the court's power to decide cases involving the type of offense with which you were charged. The court only has proper subject matter jurisdiction if the right kind of indictment or information has been issued. Because indictments and informations grant jurisdiction, you may petition the court for habeas relief at any time before or after conviction[27] if the indictment against you is defective.[28] An

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sentence will be subject to being set aside on habeas corpus); Sellers v. Bridges, 15 So. 2d 293, 295, 153 Fla. 586, 590–91 (1943) (holding that whether prisoner inexcusably violated conditions of pardon or parole was proper for habeas inquiry).

22. *See* Williams v. Florida Parole Comm'n, 625 So. 2d 926, 934, 18 Fla. L. Weekly 2258 (Fla. 1st Dist. Ct. App. 1993) (finding that the proper remedy to challenge presumptive release date is habeas corpus).

23. *See* Jenrette v. Wainwright, 410 So. 2d 575, 577–78 (Fla. Dist. Ct. App. 1982) (ruling that prisoner whose presumptive parole release date has passed was entitled to immediate release on habeas corpus).

24. Read Part C(2)(c) of this Chapter for more information about bringing a petition for habeas corpus in connection with your parole revocation hearing in New York.

25. *See Ex parte* Livingston, 156 So. 612, 618, 116 Fla. 640, 654 (1934) ("Want of jurisdiction over person or subject matter is always ground for relief on habeas corpus.").

26. *See* Frisbie v. Collins, 342 U.S. 519, 522–23, 72 S. Ct. 509, 511–12, 96 L. Ed. 541, 545–46 (1952) (denying petitioner's application for habeas corpus even though he was brought into the court's jurisdiction by forcible abduction).
In New York: *see* People *ex rel.* Ortiz v. Warden, 119 A.D.2d 526, 528, 501 N.Y.S.2d 667, 668 (1st Dept. 1986) (dismissing petition for habeas corpus, and, by applying two U.S. Supreme Court cases to New York, ruling that even though New York authorities did not provide the proper papers for extradition, court has personal jurisdiction if petitioner is present in court).

27. In Florida: *see Ex parte* Livingston, 116 Fla. 640, 654, 156 So. 612, 618 (1934) (holding that a faulty indictment may be grounds to overturn a conviction and may be challenged at any time). In New York, *see* People *ex rel.* Morris v. Skinner, 67 Misc. 2d 221, 323 N.Y.S.2d 905, 909 (Sup. Ct. Monroe County 1971) (granting habeas relief where information failed to charge petitioner with a crime); 64 N.Y. Jur. 2d, Habeas Corpus § 44 (2010). In Texas: *see Ex parte* McClain, 623 S.W.2d 140 (Tex. Crim. App. 1981) (finding that defective indictment can be attacked for the first time on post-conviction petition for writ of habeas corpus).

28. In Florida: *see* Farrior v. State *ex rel.* Compton, 13 So. 2d 147, 147, 152 Fla. 754, 756 (1943) (finding that habeas is proper remedy for indictment that fails to allege a crime); *see also* Locklin v. Pridgeon, 30 So. 2d 102, 103 158 Fla. 737, 739 (1947) (finding that "the sufficiency of the indictment may be challenged in habeas corpus proceedings when it totally fails to charge an offense under any valid law," and granting a writ of habeas corpus where the statute under which he was convicted was too indefinite and uncertain to comply with due process requirements); *Ex parte* Wilson, 14 So. 2d 846, 846, 153 Fla. 459, 460 (1943) (remanding with instructions where verdict purporting to find petitioner guilty of criminal offense was defective and judgment pronounced by trial court was imperfect); House v. State, 172 So. 734, 735, 127 Fla. 145, 150 (1937) (holding that where a prisoner brought a habeas corpus challenge because his verdict was imperfect in that it did not contain a proper adjudication of the crime as defined in the statute, he should be sent back to the trial court for a proper adjudication); Martin v. State, 166 So. 467, 467, 123 Fla. 143, 144–45 (1936) (holding that petitioner could raise issue of defective information on post-conviction petition for writ of habeas corpus).
In New York: *see* People *ex rel.* Gray v. Tekben, 86 A.D.2d 176, 180, 449 N.Y.S.2d 276, 276 (2d Dept. 1982) (granting habeas corpus where the indictment charging assault in second degree only conferred jurisdiction to enter judgment on such crime or lesser included offenses, and petitioner was convicted of another offense, which was neither included in the

indictment can be defective in many ways, but to get habeas relief it must be so wrong that it fails to charge you with a crime.[29] What constitutes a defective indictment varies from state to state. For instance, a defective indictment might not list all of the elements of the crime, or it might charge you with something not against the law, or it might have been issued after the *statute of limitations* for the offense has run. If the court finds the indictment is defective, it will be voided and you will be entitled to immediate release for that charge. But, the prosecutor may try to re-indict you for the same offense, using an indictment that is not defective.

B. Florida

This Part explains some of the basic rules for filing a habeas corpus petition in Florida.

1. Requirements

The Florida writ of habeas corpus rules can be found in Rule 3.850 of the Florida Rules of Criminal Procedure[30] and in Title VI, Section 79.01 of the Florida State Statutes.[31] To challenge your conviction, sentence, or confinement, you must either file a Rule 3.850 motion or file a habeas petition. If you want to challenge your conviction on any of the grounds specified in Rule 3.850 (see the next sub-point entitled "Requirements for a Rule 3.850 motion), then you must file a Rule 3.850 motion. If your grounds for relief do not fall within those listed in sub-point 2 below, then you may file a habeas petition. Although the Rule 3.850 motion asks for relief similar to a habeas petition, you should be sure to follow its own specific pleading requirements. Prisoners facing the death penalty in Florida must follow a different procedure.[32] The rest of this sub-point will explain the requirements for a habeas petition, and the requirements for a Rule 3.850 petition will follow.

(a) Custody

If you are on parole or probation you are eligible for habeas corpus.[33] However, if you have been released on bond[34] or ROR,[35] you may not file a petition for writ of habeas corpus in Florida.

(b) Immediate Release

You must be entitled to immediate release upon the success of your habeas claim.

(c) State Prisoner

In Florida, if you were convicted in another state, but sent to prison in Florida, the state that convicted you (the sending state) must hear your habeas corpus petition.[36]

(d) No Other Options

If you are appealing administrative action taken against you by the Florida State Department of Corrections or complaining about the conditions of your confinement, you must follow Florida's administrative procedures before filing a petition for relief in state court. Rule 33-103 of the Florida

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indictment nor a lesser included offense of assault), *aff'd*, 57 N.Y.2d 651, 493 N.E.2d 875, 454 N.Y.S.2d 66 (1982).

29. In Florida: *see Ex parte* Stirrup, 19 So. 2d 712, 713, 155 Fla. 173, 175 (Fla. 1944) (holding habeas will not secure release where the indictment was merely defective in its allegations); *see also* Peterson v. Mayo, 65 So. 2d 48, 48 (Fla. 1953) ("Defects in an information are not subject to attack in a habeas corpus proceeding unless the defects are of such magnitude that the information utterly fails to charge any crime or offense under the laws of the State of Florida.").

30. Fla. R. Crim. P. 3.850(a) (West 2009).

31. Fla. Stat. Ann. § 79.01 (West 2009).

32. *See* Fla. R. Crim. P. 3.851 (West 2009) (setting out collateral relief procedures after a death sentence has been imposed and affirmed on direct appeal).

33. *See* State v. Bolyea, 520 So. 2d 562, 563–64, 13 Fla. L. Weekly 117, 117 (Fla. 1988) (holding that a petitioner on probation is in custody); Sellers v. Bridges, 15 So. 2d 293, 295–96, 153 Fla. 586, 590–91 (1943) (holding that parole is sufficient restraint on freedom to consider parolee in custody).

34. *See* State *ex rel.* Curley v. Gatlin, 5 So. 2d 54, 54, 149 Fla. 1, 1 (1941) (holding that prisoner released on an appearance bond is not entitled to habeas relief).

35. *See* Sandstrom v. Kolski, 305 So. 2d 75, 76 (Fla. Dist. Ct. App. 3rd Dist. 1974) (refusing to entertain petition for habeas corpus when petitioner promised to appear in court at a future date, since petitioner was not in custody).

36. *See* Dugger v. Jackson, 598 So. 2d 280, 282, 17 Fla. L. Weekly 1264 (Fla. Dist. Ct. App. 1st Dist. 1992) (vacating lower court's grant of writ of habeas corpus because petitioner had been convicted in South Carolina, and South Carolina had not permitted the Florida court to hear such claim; the relator was ordered to apply for relief from South Carolina).

Administrative Code describes the administrative procedures available to you.[37] Your petition for habeas corpus will not be granted unless you have followed these procedures.[38] For example, you may lose your right to habeas relief on an issue if you file a habeas petition before *exhausting* administrative procedures.[39] Florida courts will also refuse to consider your habeas petition if you could have raised an issue or error on appeal, but did not.[40] *Alleging* "ineffective assistance of counsel" will not allow you to raise issues in your habeas petition that could have otherwise been raised on appeal.[41]

2. Requirements of a Rule 3.850 Motion

(a) Grounds for Motion[42]

You may bring a Rule 3.850 motion for relief from *judgment* or release from custody if:

(1) The judgment entered against you or sentence imposed violates the Constitution, Federal or Florida law.
(2) The court did not have jurisdiction to enter the judgment against you.
(3) The court did not have jurisdiction to impose the sentence.
(4) The sentence exceeded the maximum authorized by law.
(5) Your plea was *involuntary*.
(6) The judgment against you or sentence imposed is otherwise subject to *collateral attack*.

(b) Time Limits

If you believe that your sentence exceeds the limits provided by law, you may file your Rule 3.850 motion at any time. All other Rule 3.850 claims must be filed no later than two years after your judgment and sentence become final. In capital cases (when a death sentence is imposed), you have one year to file your Rule 3.850 motion.[43]

These time requirements are inapplicable if you can prove that you did not know the facts critical to your Rule 3.850 motion before the deadline. You must also show that these facts could not have been discovered through the exercise of *due diligence*. The time limit will also be inapplicable if you are asserting a violation of your constitutional right, which was established after the two-year time period had passed. Finally, you can challenge the Rule 3.850 time period if you retained counsel to file your motion, but your lawyer failed to file the motion on time.[44]

(c) Contents of Motion

Your Rule 3.850 motion must be made under oath and include details about the judgment or sentence under attack. If you have appealed the judgment or sentence, you must include those facts as well as the ruling of the court.[45] You must inform the court whether you have filed a previous post-conviction motion,

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37. Fla. Admin. Code Ann. R. 33-103 (2010).

38. *See* Seccia v. Wainwright, 517 So. 2d 80, 81, 12 Fla. L. Weekly 2886 (Fla. Dist. Ct. App. 1st Dist. 1987) (dismissing prisoner's habeas claim for improper administrative confinement where petitioner failed to exhaust administrative remedies); Sutton v. Strickland, 485 So. 2d 25, 25–26, 11 Fla. L. Weekly 675 (Fla. Dist. Ct. App. 1st Dist. 1986) (dismissing prisoner's petition for writ of habeas corpus on the ground that he failed to exhaust prisoner grievance procedures); Griggs v. Wainwright, 473 So. 2d 49, 49–50, 10 Fla. L. Weekly 1844 (Fla. Dist. Ct. App. 1st Dist. 1985) (holding that a prisoner challenging his confinement must exhaust his administrative remedies before seeking habeas relief).

39. *See* Comer v. Fla. Parole & Prob. Comm'n, 388 So. 2d 1341, 1341 (Fla. Dist. Ct. App. 1st Dist. 1980) (holding that the failure to exhaust all available administrative remedies may procedurally bar relief by writ of habeas corpus).

40. *See* Hardwick v. Dugger, 648 So. 2d 100, 105, 19 Fla. L. Weekly 433 (Fla. 1994) (finding habeas corpus was not an available remedy where errors of law either were or could have been raised on direct appeal); *see also* T.L.W. v. Soud, 645 So. 2d 1101, 1105, 19 Fla. L. Weekly 2520, (Fla. Dist. Ct. App. 1st Dist. 1994) (stating that habeas claim concerning whether the detention of minors is contrary to a Florida statute must first be addressed to trial courts or in a motion for post-conviction relief).

41. *See* Mills v. Dugger, 574 So. 2d 63, 65, 15 Fla. L. Weekly 589 (Fla. 1990) (finding that alleging ineffective counsel will not allow relator to raise issues that should have been raised on appeal), *reh'g denied* (Feb. 28, 1991).

42. Fla. R. Crim. P. 3.850 (West 2009).

43. Fla. R. Crim. P. 3.850 (West 2009).

44. Fla. R. Crim. P. 3.850 (West 2009).

45. *See* Catlett v. State, 367 So. 2d 735 (Fla. Dist. Ct. App. 4th Dist. 1979) (dismissing a motion to vacate because the plaintiff failed to mention prior appeals or Rule 3.850 motions).

and if so, how many motions you have filed.[46] If you have filed a previous motion or motions, you must also state the reason or reasons you did not raise your current Rule 3.850 claims in those prior filings. Finally, you must inform the court of the type of relief sought, as well as a brief statement of facts relied upon in the motion.[47]

3. Determining Whether to File a Rule 3.850 Motion or a Habeas Petition

(a) Before Trial

(i) Extradition

In Florida, you may be held for a maximum of thirty days before extradition to another state.[48] If you have been held for over thirty days awaiting extradition, you may bring a habeas corpus petition in Florida. Extradition issues may be brought to the court pursuant to a writ of habeas corpus, and not according to the procedures laid out in Rule 3.850.[49]

(ii) Bail

You may ask for habeas relief on the ground that you were denied bail[50] or that your bail is excessive.[51] Some courts require petitioners to prove they have tried to make bail, and will not consider a habeas petition if the evidence indicates that you could not post bail in any amount.[52] If the court finds in your favor, it may grant relief or lower your bail. If you have already been convicted, the court will not review any petition requesting bail because you cannot get bail after you are convicted. To challenge your bail proceedings or pretrial detainment conditions, you need not exhaust Rule 3.850 procedures. Instead, you may directly file a habeas petition.[53]

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46. *See* Catlett v. State, 367 So. 2d 735 (Fla. Dist. Ct. App. 4th Dist. 1979) (dismissing a motion to vacate because the plaintiff failed to mention prior appeals or Rule 3.850 motions).

47. Fla. R. Crim. P. 3.850 (West 2009).

48. *See* Hill v. Roberts, 359 So. 2d 911, 913 (Fla. Dist. Ct. App. 2d Dist. 1978) (finding prisoner entitled to discharge on a habeas writ where he was available for extradition for more than 30 days and demanding state took no action to receive him)*; see also* Fla. Stat. Ann. § 941.15 (West Supp. 2006) (setting statutory maximum of 30 days).

49. *See* State v. Luster, 596 So. 2d 454, 454, 17 Fla. L. Weekly S206 (Fla. 1992) (holding that a court considering release on habeas corpus can do no more than decide whether extradition documents sent by demanding state are in order on their face, whether petitioner has been charged with a crime in the demanding state, whether petitioner has been named in the demand, and whether petitioner is a fugitive); Galloway v. Josey, 507 So. 2d 590, 12 Fla. L. Weekly 182, 182 (Fla. 1987) (finding on habeas review that when extradition warrant is based upon facially valid probable cause hearing in another state, accused may only defeat extradition on issue of whether accused is a fugitive by producing clear and convincing proof that he is not a fugitive from justice).

50. *See* Bennett v. State, 118 So. 18, 18, 1896 Fla. 237, 238 (1928) (finding that a person seeking release on bail should do so by filing a habeas corpus petition); *see also* Bradwell v. McClure, 488 So. 2d 566, 567, 11 Fla. L. Weekly 978 (Fla. Dist. Ct. App. 1st Dist. 1986) (granting habeas relief and ordering trial court to set a reasonable bail for petitioner).

51. *See* Nicholas v. Cochran, 673 So. 2d 882, 883, 21 Fla. L. Weekly 989, 989 (Fla. Dist. Ct. App. 4th Dist. 1996) (granting writ after finding that trial court's large increase of bail upon discovering that petitioner possessed more assets than the court had been aware of did not comply with the purposes of bail); Rawls v. State, 540 So. 2d 946, 947, 14 Fla. L. Weekly 935, 935 (Fla. Dist. Ct. App. 5th Dist. 1989) (finding that writ of habeas corpus is available when petitioner can show that the trial court has set bail at an unreasonable amount and that bond schedules do not justify excessive bail). In order to discourage the profits from the sale of drugs being used to post bail, under Fla. Stat. Ann. § 903.046(2)(h) (West 2009), courts may consider the street value of drugs when setting bail on drug-related offenses. *See* Alvarez v. Crowder, 645 So. 2d 63, 63–64, 19 Fla. L. Weekly 2363, 2363 (Fla. Dist. Ct. App. 4th Dist. 1994) (citing Fla. Stat. Ann. § 903.046 (1993) (noting that criteria that should be taken into consideration in evaluating the amount of bail include: "nature of the offense and applicable penalty, family ties, length of residence in the community, employment history, financial resources, the defendant's prior criminal record, risk of flight, danger to the community and street value of any drugs involved."). *But see* Sikes v. McMillian, 564 So. 2d 1206, 1208, 15 Fla. L. Weekly 1949, 1949 (Fla. Dist. Ct. App. 1st Dist. 1990) (finding Fla. Stat. Ann. § 903.046(2)(h) (West 2009) does not support court increasing bail when defendant is charged with purchasing and not selling drugs).

52. *See Ex parte* Smith, 193 So. 431, 431–32, 141 Fla. 434, 434–35 (1940) (holding that reduction of bail will not be considered on habeas petition where the record indicates that petitioner would not have been able to make bail in any amount, but without prejudice to renew petition if petitioner becomes able to make bail).

53. *See* Dupree v. Cochran, 698 So. 2d 945, 22 Fla. L. Weekly D2201 (Fla. Dist. Ct. App. 4th Dist. 1997) (granting petitioner's petition because trial judge failed to state with specificity facts on which she revoked bond); Wilson v. State, 669 So. 2d 312, 21 Fla. L. Weekly D661 (Fla. Dist. Ct. App. 5th Dist. 1996) (finding, upon habeas review, that trial court abused its discretion in committing petitioner to custody for failure to appear at rescheduled trial); Alvarez v. Crowder, 645 So. 2d 63 (Fla. Dist. Ct. App. 4th Dist. 1994) (holding that one million dollars bail for petitioner, charged with trafficking in marijuana was clearly excessive).

(iii) Delay

If no formal charges are filed against you within twenty-one days, you may be entitled to release on a Rule 3.850 motion. The Florida courts had previously recognized delay as a cause of action for habeas relief, and you may raise a habeas claim after exhausting Rule 3.850 procedures.[54] If you are released or charged before the court rules on your habeas petition, your petition becomes *moot* and the court will not consider it.[55] You may also petition the court for a writ of habeas corpus if you request a preliminary hearing and are not granted one in a timely manner.

(iv) Search Warrant and Probable Cause

If you were arrested pursuant to a search warrant, you may file a pretrial motion under Rule 3.850 challenging the validity of the search warrant.[56] You may also challenge your arrest on the ground that there is no probable cause to believe that you committed the crime with which you are charged.[57] Probable cause is a very low threshold and courts are not likely to grant habeas relief on this ground.[58] When deciding your petition, the court will not evaluate conflicting testimony in order to make determinations of fact.[59] The court will leave this determination for trial. After exhausting Rule 3.850 procedures, you may raise these same issues in a habeas petition.

(b) After Your Conviction

(i) Confinement Beyond Sentence

You are also entitled to Rule 3.850 relief if your sentence is void. A court will consider a sentence void if it is completely different than what the law requires (for example, if the judgment fails to state an offense, does not clearly adjudicate the defendant's guilt, or lists a charge not on the indictment).[60] However, courts have not used this argument recently. If you are denied relief under Rule 3.850, you may then raise this claim in a habeas corpus proceeding.

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54. *See* Fla. R. Crim. P. 3.133(b) (West 2009); s*ee also* Beicke v. Boone, 527 So. 2d 273, 275, 13 Fla. L. Weekly 1410, 1410 (Fla. Dist. Ct. App. 1st Dist. 1988) (finding that state's failure to file charges within 21 days of arrest entitled defendant to adversary preliminary hearing on any charge pending against him; the state's failure to present evidence at the required hearing entitled defendant to release on his own recognizance on any charges resulting from the crime for which he was arrested).

55. *See* Bowens v. Tyson, 578 So. 2d 696, 697, 16 Fla. L. Weekly 270, 270 (Fla. 1991) (holding that defendant who was held in custody for 30 days without filing information or indictment was not entitled to automatic pretrial release where state filed information before court heard defendant's motion for release).

56. *See* State *ex rel.* Wilson v. Quigg, 17 So. 2d 697, 698–703, 154 Fla. 349–58 (1944) (considering search warrant's validity on appeal from a habeas corpus proceeding, where defendant was held in part based on the warrant).

57. *See* Jefferson v. Sweat, 76 So. 2d 494, 501 (Fla. 1954) (finding habeas corpus is a proper remedy for testing validity of arrest warrant); State *ex rel.* Hanks v. Goodman, 253 So. 2d 129, 130 (Fla. 1971) (stating defendant has remedy through habeas corpus if there is no probable cause to hold him).

58. *See* Alabama v. White, 496 U.S. 325, 330, 110 S. Ct 2412, 2416, 110 L. Ed. 301, 308 (1990) ("[P]robable cause means 'a fair probability that contraband or evidence of a crime will be found.'") (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983)). *But see* Pierce v. Mims, 418 So. 2d 273, 273 (Fla. Dist. Ct. App. 2d Dist. 1982) (finding no probable cause for arrest warrant when the only evidence presented at preliminary hearing was hearsay).

59. *See* State *ex rel.* Price v. Stone, 175 So. 229, 231, 128 Fla. 637, 641 (Fla. 1937) (denying motion to appoint special commissioner to take testimony because "while on habeas corpus the court will examine the legal sufficiency of the alleged facts to make out a crime, it will not determine the probative force of conflicting testimony upon which the charge is based.").

60. *See* Anglin v. Mayo, 88 So. 2d 918, 921–922 (Fla. 1956) (granting writ of habeas corpus when defendant was sentenced using an outdated statute and the sentence prescribed by the revised statute was shorter); Anderson v. Chapman, 146 So. 675, 677, 109 Fla. 54, 57–58 (1933) ("[I]f the vice of a sentence is not merely that it is defective, but is of an entirely different character from that authorized by law, it is generally held that such sentence is void, and that the prisoner will be discharged on habeas corpus."); *see also* Dean v. State, 476 So. 2d 318, 319, 10 Fla. L. Weekly 2331 (Fla. Dist. Ct. App. 2d Dist. 1985) (reversing sentences of youthful offender that exceeded maximums specified in Youthful Offender Act); R. J. K. v. State, 375 So. 2d 871, 871 (Fla. Dist. Ct. App. 1st Dist. 1979) (granting writ to juvenile because a "trial court cannot commit a juvenile for a specific period of time"); State *ex rel.* Saunders v. Boyer, 166 So. 2d 694, 696–97 (Fla. Dist. Ct. App. 2d Dist. 1964) (remanding case for resentencing because the sentence of one year hard labor for contempt was void due to statutory limitations). *But see* Dixon v. Mayo, 168 So. 800, 800–01, 124 Fla. 485, 487 (Fla. Div. B 1936) (denying writ of habeas corpus when court found relator's argument—that the language of the judgment appeared to find him guilty of a charge different than the one on the indictment—to be "not tenable").

(ii) Fundamental Rights

You may attack prior criminal proceedings under Rule 3.850 by asserting a violation of your fundamental constitutional rights. If you are denied relief, you may raise these issues in a petition for habeas relief. Although there is no comprehensive list of rights that Florida courts have declared "fundamental," courts have consistently allowed petitioners to claim certain rights in habeas petitions. These include the right to a trial by jury,[61] the right to due process,[62] the double jeopardy right not to be convicted twice of the same charge,[63] the right to appeal,[64] and the right to a speedy trial.[65] You may also claim the right to be free from cruel and unusual punishment. That is, you may challenge your prison conditions by alleging they are so unbearable as to constitute cruel and unusual punishment.[66]

(iii) New or Void Law

You may also petition the court under Rule 3.850 on the ground that the statute under which you were prosecuted is unconstitutional.[67] It is very rare for courts to find a statute unconstitutional. If the statute you were prosecuted under is declared unconstitutional, you are entitled to immediate release.

(iv) Ineffective Counsel

You have the right to effective assistance of counsel to help you with your appeal. You may petition the court according to the process laid out in Rule 3.850 if you: (1) are indigent (poor), (2) requested counsel on appeal, and (3) were denied that right.[68] If you did not make your need for counsel known, the court is not likely to consider your petition. You may also petition the court for habeas relief because your counsel was

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61. *See* Sneed v. Mayo, 66 So. 2d 865, 869–70, 874 (Fla. 1953) (holding that habeas corpus is proper to review allegation that petitioner was denied right to trial by jury). To raise this issue in a habeas petition, you must have been denied your right to a jury trial. If you were offered a jury trial and turned it down, then you expressly waived your right to a jury trial and may not petition the court for habeas on this issue.

62. *See* Sneed v. Mayo, 69 So. 2d 653, 655 (Fla. 1954) (despite non-compliance with state statute, court denied writ because constitutional requirement of due process was met); Lightfoot v. Wainwright, 369 So. 2d 110, 111 (Fla. Dist. Ct. App. 1st Dist. 1979) (finding that a person who has been denied right to due process is entitled to habeas relief).

63. *See* Deal v. Mayo, 76 So. 2d 275, 276 (Fla. 1954) (holding that habeas corpus review is proper to test whether petitioner was subject to double jeopardy at trial).

64. *See* Myrick v. Wainwright, 243 So. 2d 179, 180 (Fla. Dist. Ct. App. 2d Dist. 1971) (considering and denying habeas petition because the official court record conclusively established petitioner had been advised of his right to appeal his conviction and sentence); Dennis v. Wainwright, 243 So. 2d 181, 182 (Fla. Dist. Ct. App. 2d Dist. 1971), *aff'd sub nom.*, 247 So. 2d 88 (Fla. Dist. Ct. App. 2d Dist. 1971) (finding that to raise denial of right to appeal because of untimely filing, petitioner must prove that the frustration of right to appeal was due to state action and not to petitioner's negligence).

65. *See* Pena v. Schultz, 245 So. 2d 49, 50 (Fla. 1971) (finding habeas is proper to determine whether speedy trial right was denied); Griswold v. State, 82 So. 44, 48, 77 Fla. 505, 515–17 (1919) (holding absent any showing continuance was granted without good cause, the court presumed one continuance did not violate the accused's speedy trial right). This issue should be brought before trial. It is very unlikely the court will grant relief on this issue after conviction.

66. *See* Graham v. Vann, 394 So.2d 176, 177 (Fla. Dist. Ct. App. 1st Dist. 1981) (affirming writ where petitioners sought relief from prison conditions that "daily imperil their lives and safety" even though a federal case challenging inadequate medical care was pending). Prison conditions may also be challenged using 42 U.S.C. § 1983; see *JLM*, Chapter 16 for more information.

67. *See* Sandstrom v. Leader, 370 So. 2d 3, 5 (Fla. 1979) ("[A] writ of habeas corpus may be utilized by an accused to challenge the constitutionality of a statutory provision under which he is charged."); State *ex rel.* Matthews v. Culver, 114 So. 2d 796, 796 (Fla. 1959) (holding petitioner was being unlawfully detained because he was convicted and sentenced under a statute that was later declared unconstitutional and therefore he must be released); Coleman v. State *ex rel.* Jackson, 193 So. 84, 85, 140 Fla. 772, 774 (1939) (holding habeas corpus is the proper vehicle where the charge made does not constitute a crime under the laws of Florida because the statute under which the charge is being made is unconstitutional); La Tour v. Stone, 190 So. 704, 710–11, 139 Fla. 681 (1939) (stating the right to attack an information by writ of habeas corpus is limited, and habeas corpus proceeding is proper vehicle when the offense charged does not constitute a crime under the laws of the State because the statute invoked is unconstitutional); Roberts v. Schumacher, 173 So. 827, 827, 127 Fla. 461, 462 (1937) (noting habeas corpus is appropriate relief when the statute under which offense was charged is invalid); State *ex rel.* Dixon v. Cochran, 114 So. 2d 228, 229 (Fla. Dist. Ct. App. 2d Dist. 1959) ("[H]abeas corpus proceeding is proper vehicle when statute invoked was held invalid by State Supreme Court.").

68. *See* Baggett v. Wainwright, 229 So. 2d 239, 241–42 (Fla. 1969) (holding prisoners have a constitutional right to counsel for purposes of direct appeal and the state's failure to grant counsel entitles prisoner to habeas relief to enforce that right, provided prisoner makes his need for counsel known). For more information on ineffective assistance of counsel claims, see Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

ineffective.[69] Proving ineffective assistance of counsel is very difficult. The court will only consider whether the attorney's mistakes were so great that they were grossly outside the range of acceptable performance and hindered your appeal to the extent that they undermined its result.[70] You must show there is a good chance that if your counsel had not made these mistakes, the outcome on appeal would have been different.[71] You may not use a habeas corpus proceeding to allege ineffective assistance of counsel at trial; that issue may only be raised on appeal.[72] Finally, you do not need to exhaust Rule 3.850 procedures if you are challenging the ineffectiveness of appellate counsel. In those circumstances, you may directly file a habeas petition.[73]

(v) New Evidence

If there is newly discovered evidence in your case, you may attack the judgment against you pursuant to Rule 3.850 procedures.[74] If you later file a habeas petition, be aware that the evidence must be very strong.[75] It must be so strong that, if admitted, it would probably produce an acquittal on retrial.[76] In addition, you must be able to prove that the information was not known by you or your attorney and could not have been discovered by you or your attorney at time of trial.[77] The court will be required to hold an evidentiary hearing on your claim for post-conviction relief, unless the evidence is plainly refuted by the record.[78] You

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69. *See* Owen v. Crosby, 854 So. 2d 182, 188, 28 Fla. L. Weekly 615, 615 (Fla. 2003) (holding that petition for post-conviction relief is proper method to raise claims of ineffective assistance of appellate counsel); Brazeail v. State, 821 So. 2d 364, 364, 27 Fla. L. Weekly D1606 (Fla. 2002) (finding that defendant, who claimed his guilty plea was involuntary due to counsel's inaccurate advice successfully pled the performance prong of an ineffective assistance of counsel claim); Groover v. Singletary, 656 So. 2d 424, 425, 20 Fla. L. Weekly 151, 151 (Fla. 1995) (denying habeas petition because all claims had been raised in prior Rule 3.850 proceedings and were found to be procedurally barred or without merit and therefore appellate counsel was not ineffective for failing to raise them); Nerey v. State, 634 So. 2d 206, 206–07, 19 Fla. L. Weekly 661 (Fla. Dist. Ct. App. 3d Dist. 1994) (denying habeas petition and finding appellate counsel was not ineffective because counsel could reasonably have concluded that involuntary *Miranda* rights waiver argument would not prevail).

70. *See* Rogers v. Singletary, 698 So. 2d 1178, 1180–81, 21 Fla. L. Weekly 503, 22 Fla. L. Weekly 561 (Fla. 1996) (applying Pope v. Wainwright, 496 So. 2d 798, 11 Fla. L. Weekly 533 (Fla. 1986), and denying writ of habeas corpus where court found that relator did knowingly and intelligently waive the right to counsel for his appeal); Pope v. Wainwright, 496 So. 2d 798, 800, 11 Fla. L. Weekly 533 (Fla. 1986) (limiting determinations of ineffective appellate counsel to "first, whether the alleged omission are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result" (citing Johnson v. Wainwright, 463 So. 2d 207, 209, 10 Fla. L. Weekly 85 (Fla. 1985)); Jackson v. Dugger, 580 So. 2d 161, 162, 16 Fla. L. Weekly 327 (Fla. Dist. Ct. App. 4th Dist. 1991) (granting petition for habeas corpus where counsel was determined to be defective due to his failure to raise an issue on appeal that counsel for relator's co-defendant raised, causing co-defendant's conviction to be reversed).

71. For more information on ineffective assistance of counsel claims, see Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

72. *See* Breedlove v. Singletary, 595 So. 2d 8, 10, 17 Fla. L. Weekly 67 (Fla. 1992) ("Claims of trial counsel's effectiveness are not cognizable in habeas corpus proceedings.").

73. *See* Groover v. Singletary, 656 So. 2d 424, 425, 20 Fla. L. Weekly S151 (noting that a petition for a writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel).

74. *See* McLin v. State, 827 So.2d 948, 948, 27 Fla. L. Weekly S743 (Fla. 2002) (analyzing Rule 3.850 motion stating that newly discovered evidence and incorporating an affidavit of an eyewitness to the murder stating that McLin did not commit the crime for which defendant was convicted).

75. DNA evidence may be such an example. See *JLM*, Chapter 11, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence."

76. *See* Jones v. State, 591 So. 2d 911, 915, 16 Fla. L. Weekly 745 (Fla. 1991) ("[T]he newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial."); *see also* Davis v. State, 736 So. 2d 1156, 1159, 24 Fla. L. Weekly 260, 260 (Fla. 1999) (denying post-conviction relief motion because petitioner's allegations regarding expert witness testimony were speculative and thus not newly discovered evidence); Williamson v. Dugger, 651 So. 2d 84, 89, 19 Fla. L. Weekly 582, 582 (Fla. 1994) (denying habeas corpus petition because new affidavits petitioner offered to impeach a witness' credibility were not likely to lead to an acquittal on retrial).

77. *See* Jones v. State, 591 So. 2d 911, 916, 16 Fla. L. Weekly 745, 745 (Fla. 1991) (holding newly discovered information must have been unknown at time of trial and could not have been discovered through reasonable diligence); *see also* Steinhorst v. State, 695 So. 2d 1245, 1247–48, 22 Fla. L. Weekly 335, 335 (Fla. 1997) (affirming the denial of defendant's habeas motion because due diligence could have uncovered files relating to the fact that defendant's judge recused himself on a co-defendant's case, which defendant attempted to offer as newly discovered evidence); Correll v. State, 698 So. 2d 522, 523–24, 22 Fla. L. Weekly 188 (Fla. 1997) (denying petitioner's post-conviction relief because the evidence on an expert witness' education offered to impeach the witness could have been discovered at trial).

78. *See* McLin v. State, 827 So.2d 948, 948, 27 Fla. L. Weekly S743 (Fla. 2002) ("Where no evidentiary hearing is

may also file for post-conviction relief if you can show that the prosecutor failed to turn over exculpatory evidence (evidence tending to support your innocence).[79] To establish a claim that the prosecutor failed to turn over such evidence, you must be able to show that:

(1) The state possessed evidence favorable to you;
(2) You did not possess nor could have obtained such evidence with reasonable effort;
(3) The prosecution suppressed (did not turn over) the evidence; and
(4) There is a reasonable probability the case would have come out differently if the evidence had been disclosed.[80]

(c) Probation or Parole

Florida courts have held that a Rule 3.850 motion, followed by a habeas petition if unsuccessful, is the correct procedure by which you can challenge errors in parole revocation proceedings and orders of the Florida Probation and Parole Commission.[81] You may also file a habeas petition to challenge the Parole Commission's determinations of presumptive parole release dates,[82] or if you are incarcerated after your presumptive release date.[83]

(d) Subject Matter Jurisdiction

In Florida, courts will ordinarily find that as long as an indictment or information does not completely fail to charge an offense, it provides the accused with enough information to construct a defense and protects him from future prosecution for the same act. Therefore, courts will not generally find such indictments or informations void or defective.[84]

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held on a claim for post-conviction relief, an appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record.").

79. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 421–22, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (applying *Brady* and reversing the denial of a habeas corpus petition because the state failed to disclose evidence favorable to the petitioner); Brown v. Wainwright, 785 F.2d 1457, 1458 (11th Cir. 1986) (reversing petitioner's conviction because the prosecution knowingly allowed false testimony to be introduced and exploited in its case).

80. Downs v. State, 740 So. 2d 506, 513–17, 24 Fla. L. Weekly 231 (Fla. 1999) (denying motion for post-conviction relief because appellant's contentions that appellee had, among other things, withheld exculpatory evidence and that appellant had received ineffective assistance of counsel were meritless); Mills v. State, 684 So. 2d 801, 806, 21 Fla. L. Weekly 527 (Fla. 1996) (denying motion for successive petition where defendant failed to produce statements or evidence to show that further proceedings would have changed court's conclusion of guilt); Scott v. State, 657 So. 2d 1129, 1132, 20 Fla. L. Weekly 133 (Fla. 1995) (reversing trial court's decision and remanding for evidentiary hearing on issue of possible *Brady* violations raised by defendant's motion, but denying habeas petition as procedurally barred); Hildwin v. Dugger, 654 So. 2d 107, 110–11, 20 Fla. L. Weekly 39 (Fla. 1995) (denying habeas petition but vacating and remanding for new sentencing before a jury because counsel's errors had deprived petitioner of a reliable penalty phase).

81. *See* State v. Sampson, 297 So. 2d 120, 121–22 (Fla. Dist. Ct. App. 4th Dist. 1974) (finding that habeas corpus is the proper method for challenging order of the Florida Parole and Probation Commission); State *ex rel.* Wainwright v. Holley, 234 So. 2d 409, 410 (Fla. Dist. Ct. App. 2d Dist. 1970) (holding that the proper way to challenge error in post-conviction proceedings such as parole revocation is through habeas corpus); Bush v. State, 945 So. 2d 1207 (Fla. 2006) (The proper remedy for a prisoner to pursue in challenging a sentence-reducing credit determination by the Department of Corrections, where the prisoner has exhausted administrative remedies and is alleging entitlement to immediate release, is a petition for writ of habeas corpus); *see also* Jackson v. Mayo, 73 So. 2d 881, 882–83 (Fla. 1954) (granting relief where no evidence was offered authorizing revocation of parole); Beal v. Mayo, 70 So. 2d 367, 369 (Fla. 1954) (affirming that where there is a complete absence of any adjudication at all, the judgment and sentence will be subject to being set aside on habeas corpus); Sellers v. Bridges, 15 So. 2d 293, 295, 153 Fla. 586, 590–91 (1943) (holding whether prisoner inexcusably violated conditions of pardon or parole was proper for habeas inquiry).

82. *See* Williams v. Florida Parole Comm'n, 625 So. 2d 926, 934, 18 Fla. L. Weekly 2258 (Fla. Dist. Ct. App. 1st Dist. 1993) (finding that the proper remedy to challenge presumptive release date is habeas corpus).

83. *See* Jenrette v. Wainwright, 410 So. 2d 575, 577–78 (Fla. Dist. Ct. App. 1982) (ruling that prisoner whose presumptive parole release date has passed is entitled to immediate release on habeas corpus).

84. *See* Sweat v. Pettis, 158 Fla. 104, 106 27 So. 2d 827, 828 (Fla. 1946) (holding where an information could not be said to wholly fail to state a violation of the law, a habeas petition was not the proper way to challenge it; petitioner should have brought a motion to quash); State *ex rel.* Miller v. Coleman, 130 Fla. 537, 544, 178 So. 157, 160 (Fla. 1938) (holding an information that "informs defendant of the nature of the accusation against him, which does not wholly fail to charge an offense and which enables defendant to prepare his defense and protects him from subsequent prosecution for the same offense, will not on habeas corpus be held so fatally defective as to render conviction and commitment … void."); Taylor v. Chapman, 173 So. 143, 146, 127 Fla. 401, 407–08 (1937) (refusing to grant a writ where the information

4. How to File a Habeas Petition

(a) When to File

First make sure you are not eligible to bring a Rule 3.850 motion. Florida courts will refuse to issue a writ of habeas corpus if you can pursue your claim through another action, like a Rule 3.850 motion.[85]

If you are facing the death penalty, your petition for a writ of habeas corpus must be filed at the same time as the initial brief filed on your behalf in the appeal of the circuit court's order on a motion to vacate, set aside, or correct a sentence.[86]

(b) Where to File

Where you file depends upon the stage of your criminal case. If you have not been convicted yet, or are filing a petition related to a probation violation, you must petition the circuit court judge presiding over your case.[87] But, if the Supreme Court has affirmed your conviction, you must file your petition with the Supreme Court.[88] If you originally file with the circuit court, and the circuit court denies your petition, then you may file another petition with the Supreme Court.[89] In general, you should file the petition in the jurisdiction in which you are incarcerated, but if you are raising an issue that should have been raised on direct appeal (like ineffective counsel), you should file in the court where the original sentence was imposed.[90]

(c) What to Include in Your Petition

Because the writ of habeas corpus is such a unique right, the courts in Florida may grant applications for writs that do not comply with (follow) statutory requirements. For example, an attorney may make a telephone call to a judge to apply for a writ,[91] or a judge may decide informal letters from a prisoner provide sufficient grounds for issuing the writ.[92] But, it is always better to comply with statutory requirements if you can, basing your argument on enough detailed, factual allegations to make a case that on its face shows you are entitled to be released.[93] The statutory requirements for your application for a writ include

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sufficiently claimed intent and overt acts that would have resulted in commission of the crime).

85. Fla. R. Crim. P. 3.850(b) (West 2009).

86. Fla. R. Crim. P. 3.851(d)(3) (West 2009).

87. Fla. Stat. Ann. § 79.01 (West 2009); *see also* Newkirk v. Jenne, 754 So. 2d 61, 62, 25 Fla. L. Weekly 518 (Fla. Dist. Ct. App. 2000) (finding that where petitioner was being detained in relation to a probation violation, the circuit court judge presiding over her case had full authority to order her release).

88. *See* Kinsey v. Davis, 19 So. 2d 323, 325 154 Fla. 889, 892 (1944) (holding that where the petitioner's conviction had been affirmed by the Supreme Court, his habeas petition should have been made to the Supreme Court because the circuit court could not grant a writ).

89. *See* Deeb v. Gandy, 148 So. 540, 541 110 Fla. 283, 284 (Fla. 1933) (holding that petitioner was entitled to bail after the circuit court held that he should be remanded without bail).

90. Fla. Stat. Ann. § 79.01 (West 2009); *see also* Collins v. State, 859 So. 2d 1244, 1245, 28 Fla. L. Weekly 2628, 2628 (Fla. 2003) (stating that when petitioner attacks the validity of conviction by raising issues relating to the trial or to the propriety of the plea, jurisdiction lies with the trial court that imposed the sentence); McLeroy v. State, 704 So. 2d 151, 152, 22 Fla. L. Weekly 2718, 2718 (Fla. Dist. Ct. App. 5th Dist. 1997) (denying a petition for writ of habeas corpus alleging ineffective assistance of counsel because the prisoner improperly filed in the jurisdiction where he was incarcerated rather than where the original sentence was imposed).

91. *See* Jamason v. State, 455 So. 2d 380, 381, 9 Fla. L. Weekly 330, 330 (Fla. 1983) (upholding an oral writ of habeas corpus which was issued in response to an oral application by the client's attorney over the telephone).

92. *See* Sneed v. Mayo, 66 So. 2d 865, 868 (Fla. 1953) (finding although the application for a writ was an informal letter not conforming to statutory requirements, the communication was sufficient); McKay v. Jenkins, 405 So. 2d 287, 288 (Fla. Dist. Ct. App. 1981) (construing appellant's informal letter to the court as a petition for a writ).

93. *See* Sims v. Dugger, 519 So. 2d 1080, 1082, 13 Fla. L. Weekly 292 (Fla. Dist. Ct. App. 1st Dist. 1988) (reversing dismissal of a petition for habeas corpus because the petition contained detailed factual allegations); Brown v. Wainwright, 498 So. 2d 679, 679 11 Fla. L. Weekly 2626 (Fla. Dist. Ct. App. 1st Dist. 1986) (denying a petition for habeas in part because the petition failed to include any arguments in support of the allegations); DeAngelo v. Strickland, 426 So. 2d 1264, 1264 (Fla. Dist. Ct. App. 1st Dist. 1983) (affirming the denial of a prisoner's petition for a writ of habeas corpus because the prisoner was not entitled to the relief he sought and he failed to make a prima facie case since he did not claim that he was illegally imprisoned); Bennington v. Thornton, 370 So. 2d 856, 857 (Fla. Dist. Ct. App. 4th Dist. 1979) (denying a prisoner's petition for a writ of habeas corpus because he failed to show that the trial court abused its discretion in denying him bail or failing to hold a hearing as soon as was possible); Bagley v. Brierton, 362 So. 2d 1048, 1049 (Fla. Dist. Ct. App. 1st Dist. 1978) (affirming the trial court's denial of a prisoner's habeas petition in which he claimed he was denied adequate medical care because even if the allegations were true, he would not be entitled to relief); Smith v. State, 176 So. 2d 383, 384 (Fla. Dist. Ct. App. 3d Dist. 1965) (affirming the trial court's denial of a prisoner's habeas petition because the petition did not contain factual allegations to support its conclusions); Sneed

(1) The facts upon which you rely for relief;
(2) A request for a writ of habeas corpus; and
(3) An optional argument in support of the petition with citations of authority.[94]

While you do not need to present all the evidence of your wrongful detention,[95] you should attach to your petition copies of the warrant, process, or proceeding that is causing you to be detained.[96] You should also state that you have exhausted all the administrative remedies available to you.[97]

(d) How to File

After you have created your petition for habeas corpus including all the items outlined in Part (B)(3)(c) above, "What to Include in Your Petition," you should send your petition and any supporting documents to the court specified above in Part (B)(3)(b), "Where to File."

5. Your Right to Counsel for Your Habeas Petition

The U.S. Supreme Court has held you have no federal constitutional right to counsel in state habeas corpus proceedings.[98] In Florida, you have no right to appointed counsel in a habeas proceeding.[99] A public defender may represent you, but there is no requirement that one be appointed to you.[100] But, if you are applying for a writ because you are about to be extradited, you are entitled to be provided with an attorney.[101]

6. What to Expect After You File

In Florida, the court must issue a writ of habeas corpus if your petition states allegations, which, if true, would entitle you to release.[102] When the court issues the writ, it establishes a date for the person who has you in custody to return you to the court.[103] The respondent (whoever has you in custody) may provide a response, also called a "return."[104] The response includes the respondent's arguments for keeping you in

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v. Mayo, 66 So. 2d 865, 869–70 (Fla. 1953) (stating that a habeas petition must contain at least "some good faith suggestion of illegal detention"); Sullivan v. State *ex rel.* McCrory, 49 So. 2d 794, 796 (Fla. 1951) (noting that a habeas petition should be dismissed if the petition does not make a case that on its face shows that the petitioner should be released from custody); Herring v. State, 132 Fla. 658, 659, 181 So. 892, 892 (1938) (denying a habeas petition since the prisoner did not claim unlawful detention).

94. Fla. R. Civ. P. 1.630.

95. *See* Johnson v. Lindsey, 89 Fla. 143, 148, 103 So. 419, 421 (1925) (stating that a habeas petition does not need to include all of the evidence necessary to establish that the detention is wrongful).

96. *See* Cooper v. Lipscomb, 122 So. 5, 5, 97 Fla. 668, 670 (1929) (stating a habeas petition should include a copy of the warrant where the petitioner was arrested and held by the sheriff pursuant to the warrant); Johnson v. Lindsey, 103 So. 419, 421, 89 Fla. 143, 148 (1925) (stating that if a petitioner claims that he is unlawfully detained because the processes or proceedings under which he is being held are invalid, then the habeas petition should include copies of such proceedings or processes); *see also* Simons v. State, 555 So. 2d 960, 961, 15 Fla. L. Weekly 253, 253 (Fla. Dist. Ct. App. 1st Dist. 1990) (denying a petition for writ of habeas corpus, in which the petitioner claimed he was being deprived of his right to a pretrial release due to his inability to afford bond, because the petition did not include a copy of the order or a transcript of the hearing from the lower court on bond reduction); McNamara v. Cook, 336 So. 2d 677, 679 (Fla. Dist. Ct. App. 4th Dist. 1976) (finding a habeas petition insufficient because it did not include documentary evidence).

97. Moore v. Dugger, 613 So. 2d 571, 572, 18 Fla. L. Weekly 499, 499 (Fla. 1st Dist. Ct. App. 1993) (finding a petition for writ insufficient because it did not allege petitioner had exhausted administrative remedies).

98. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) ("[T]he right to appointed counsel extends to the first appeal of right and no further.").

99. *See* Coffee v. Wainwright, 172 So. 2d 851, 853 (Fla. Dist. Ct. App. 1st Dist. 1965) (finding because post-conviction habeas corpus proceedings are civil, not criminal, "there is no absolute right to assistance of a lawyer").

100. *See* Fla. Parole & Probation Comm'n v. Alby, 400 So. 2d 864, 864 (Fl. Dist. Ct. App. 4th Dist. 1981) (denying motion to prevent public defender from representing an appellee in habeas corpus proceedings).

101. *See* Bentzel v. State, 585 So. 2d 1118, 1119–20, 16 Fla. L. Weekly 2410, 2410 (Fla. Dist. Ct. App. 1st Dist. 1991) (finding that a prisoner has a statutory right to counsel at a habeas corpus proceeding challenging extradition).

102. Guess v. Barton, 599 So. 2d 770, 771, 17 Fla. L. Weekly 1427, 1427 (Fla. Dist. Ct. App. 1st Dist. 1992) ("[F]or purposes of appellate review, [the court] must assume that the allegations of appellant's habeas petition are true."); Roy v. Dugger, 592 So. 2d 1235, 1236, 17 Fla. L. Weekly 386, 386 (Fla. Dist. Ct. App. 1st Dist. 1992) (reversing summary denial of the lower court on the ground that if the prisoner's allegations were true, they could establish that the department had failed to comply with due process, a failure that could establish a violation of due process or the protection against cruel and unusual punishment).

103. Fla. Stat. Ann. § 79.04(2) (West 2009).

104. Fla. R. App. P. 9.100(j).

custody. If the respondent does not return you to court by the scheduled date, he must pay you $300.[105] You have a right to provide a reply to a response within twenty days of receiving it.[106] If the return does not address a fact you allege in your petition, you do not need to prove that fact in your reply.[107] In your reply you may, if necessary, put forth other important, material facts not stated in your petition.[108]

The court may decide to hold a hearing to evaluate the facts you allege in your petition. This hearing is usually held after a return is filed, but the court may also decide to hold a hearing before issuing the writ.[109] You have the right to a hearing if your petition is "facially sufficient," which means that if everything on your petition were true, you would be entitled to a writ.[110] In Florida, hearings are informal, and if a witness is unable to attend, he may provide an affidavit instead.[111]

Once the hearing is completed, the court may release you, *remand* you to custody, or release you on bail.[112] Though there are no fees for applying for a writ, you may be ordered to pay the cost of the proceedings if the writ is not granted.[113]

7. Your Right to Appeal

You may appeal the denial of your application for a writ of habeas corpus to the state supreme court. Filing the petition in the appellate court will be treated as a notice of appeal as long as you raise the same issues you raised in circuit court.[114] However, you also should usually file a notice of appeal.

C. New York

This Part explains some of the basic rules for filing a habeas corpus petition in New York.

1. Requirements

The New York habeas corpus rules can be found in Article 70 of New York Civil Practice Law and Rules, also known as N.Y. C.P.L.R. 7001–7012 (McKinney 1998). The New York State Legislature has restricted the use of the writ of habeas corpus. For most post-conviction relief (challenges to your conviction or sentence), you must file an Article 440 motion, not a petition for a habeas corpus writ.[115]

(a) Custody

If you have been released on parole, on probation, on *conditional release*, ROR, or you are free on bail, a New York court cannot grant a writ of habeas corpus.[116]

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105. Fla. Stat. Ann. § 79.05(1) (West 2009).

106. Fla. R. App. P. 9.100(k).

107. *See* State *ex rel.* Libtz v. Coleman, 149 Fla. 28, 30, 5 So. 2d 60, 61 (Fla. 1941) (holding that undenied allegations in a petition for writ of habeas corpus are taken as true).

108. *See* Sneed v. Mayo, 66 So. 2d 865, 870 (Fla. 1953) (stating that, in his reply, petitioner "may allege facts not appearing in the petition"); *see also* Bard v. Wolson, 687 So. 2d 254, 255, 21 Fla. L. Weekly 2565, 2565 (Fla. Dist. Ct. App. 1st Dist. 1996) (reversing an order denying petition for writ because the appellant was not given opportunity to reply to response); Matera v. Buchanan, 192 So. 2d 18, 20 (Fla. Dist. Ct. App. 3d Dist. 1966) (finding after respondent has filed a return, petitioner may "allege facts not appearing in the petition or return that may be material in the case").

109. *See* Turiano v. Butterworth, 416 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 4th Dist. 1982) (finding that trial court did not err in holding an evidentiary hearing before issuing a writ of habeas corpus).

110. Seibert v. Dugger, 595 So. 2d 1083, 1084 17 Fla. L. Weekly 784, 784 (Fla. Dist. Ct. App. 1st Dist. 1992) (finding that dismissal of a petition for writ of habeas corpus without a hearing is error when the prisoner makes specific allegations which, if true, would establish that the department of corrections has failed to comply with its own rules).

111. Fla. Stat. Ann. § 79.07 (West 2009).

112. Fla. Stat. Ann. § 79.08 (West 2009).

113. *See* Beasley v. Cahoon, 109 Fla. 106, 126, 147 So. 288, 295 (1933) (finding a petitioner can be required to pay costs in a habeas case).

114. *See* Garner v. Wainwright, 454 So. 2d 28, 28 (Fla. Dist. Ct. App. 1st Dist. 1984) (treating filing of same habeas petition as a notice of appeal since filed with the appellate court within 30 days, as the appellate rules required).

115. See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," for more information on filing an Article 440 motion.

116. *See* People *ex rel.* Doty v. Kreuger, 26 N.Y.2d 881, 882, 258 N.E.2d 215, 215, 309 N.Y.S.2d 932, 932 (1970) (probation); People *ex rel.* Nunez v. New York State Bd. of Parole, 182 A.D.2d 998, 998, 585 N.Y.S.2d 716, 716 (3d Dept. 1992) (parole); People *ex rel.* Birt v. Grenis, 76 A.D.2d 872, 872, 428 N.Y.S.2d 494, 494 (2d Dept. 1980) (conditional release); People *ex rel.* Doyle v. Fischer, 159 A.D.2d 208, 208, 551 N.Y.S.2d 830, 830 (1st Dept. 1990) (ROR); Bayless v. Wandel, 119 Misc. 2d 82, 84, 462 N.Y.S.2d 396, 398 (Sup. Ct. Fulton County 1983) (free on bail).

(b) Immediate Release

You must be entitled to immediate release if your habeas petition is successful.[117]

(c) State Prisoner

You must be a prisoner in New York.

(d) No Other Options

A New York court will not grant your petition for a writ of habeas corpus if there are other procedures available, *unless* there are exceptional circumstances of "practicality and necessity."[118] In other words, you must have a very good reason for filing a petition for habeas corpus instead of appealing your conviction, filing an Article 78 petition, or filing an Article 440 motion, whichever would otherwise be appropriate.[119] See Section 2(b)(ii) below for more information about what might constitute exceptional circumstances of practicality and necessity. To find out more about how to challenge your conviction or sentence using Article 440, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," and, for a description of how to appeal administrative decisions using Article 78, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Laws and Rules."

2. What You Can Complain About in Your Habeas Petition

(a) Before Trial

(i) Extradition

You may be held in custody in New York for a maximum of ninety days before you are extradited. After the first thirty days of custody, New York may file an extension for sixty additional days of custody.[120] Therefore, you may be eligible for a writ of habeas corpus if you have been held in custody in New York for over ninety days or if you have been held for more than thirty days *and* the state of New York has not applied for an extension.

(ii) Bail

If, in denying or setting your bail, the court did not follow New York's statutory guidelines, violated constitutional provisions forbidding excessive bail (for example, bail was set too high), or denied bail arbitrarily (for example, the court did not give a reason for why bail was not set) you have grounds for a habeas petition.[121] New York Criminal Procedure Law § 510.30(2)(a) lists factors that a court must use to

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117. People ex rel. Goldberg v. Warden, 45 A.D.3d 356, 846 N.Y.S.2d 15 (1st Dept 2007) (finding habeas to be an inappropriate remedy as the prisoner was not entitled to immediate release).

118. People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 262, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 900 (1966) (ruling that habeas corpus is not the preferred means of vindicating fundamental constitutional or statutory rights and that departure from traditional orderly proceedings, such as appeal, should be permitted only when dictated by reason of "practicality and necessity").

119. *See* People *ex rel.* Wise v. Scully, 163 A.D.2d 444, 444, 570 N.Y.S.2d 1018, 1018 (2d Dept. 1990) (holding that the court cannot review errors already considered on a direct appeal); People *ex rel.* Sanchez v. Hoke, 132 A.D.2d 861, 862, 518 N.Y.S.2d 69, 70 (3d Dept. 1987) (declining to grant habeas relief where petitioner had direct appeal pending and had raised the same issues in an unsuccessful application for post-conviction relief under Article 440); People *ex rel.* Proctor v. Henderson, 74 A.D.2d 718, 719, 425 N.Y.S.2d 680, 680 (4th Dept. 1980) (holding that habeas corpus will not lie where the issue had already been decided in an earlier Article 440 motion, but suggesting that the prisoner could bring another Article 440 motion seeking the same relief).

120. *See* People *ex rel.* Linaris v. Weizenecker, 89 Misc. 2d 814,816, 392 N.Y.S.2d 813, 815 (Sup. Ct. Putnam County 1977) (granting writ of habeas corpus where petitioner had been held beyond 90-day period without warrant even though other charges were pending against him in New York); *see also* N.Y. Crim. Proc. Law §§ 570.36, 570.40 (McKinney 1995).

121. *See* People *ex rel.* Klein v. Krueger, 25 N.Y.2d 497, 499, 255 N.E.2d 552, 554, 307 N.Y.S.2d 207, 209–10 (1969) (holding that in a habeas corpus proceeding, the court can review a bail decision if the decision appears to be excessive or arbitrary according to constitutional or statutory standards); *see, e.g.*, People *ex rel.* Gutierrez v. Jacobson, 219 A.D.2d 740, 740, 632 N.Y.S.2d 466, 466 (2d Dept. 1995) (writ denied) (dismissing habeas petition on finding that lower court's determination was not an improvident exercise of discretion and did not violate constitutional or statutory standards); People *ex rel.* Hunt v. Warden of Rikers Island Corr. Facility, 161 A.D.2d 475, 476, 555 N.Y.S.2d 742, 742 (1st Dept. 1990) (writ denied) (dismissing habeas petition on basis that the lower court did not abuse discretion in denial of bail); *see also* N.Y. C.P.L.R. 7010(b) (McKinney 2009).

determine the amount, if any, of your bail.[122] If a court bases its bail determination on a factor not included in the statute, or ignores one or more of the factors, you may challenge the court's action by petitioning for habeas corpus.[123] Normally, when deciding a habeas corpus petition, the court can only review the record that was before the court that set bail. In other words, in making its decision about granting the writ of habeas corpus, the court can only look at the facts and evidence that were presented at the bail hearing itself.[124] If you can show that bail was set too high, the court can grant a writ of habeas corpus reducing the amount, but it will not release you.[125] If you have already been tried and convicted, the court will dismiss your habeas petition as moot or irrelevant because bail no longer matters once you have been convicted.[126]

(iii) Delay

If you were arrested without a warrant, have been detained for longer than twenty-four hours, and have not yet been arraigned, you may petition for a writ of habeas corpus.[127] At your arraignment, you should receive a *complaint*. If you are charged with a misdemeanor, the District Attorney's office has five days (not counting Sunday) to replace the complaint with an information.[128] If you have been arrested for a felony, the District Attorney's office has five or six days (depending on whether you were incarcerated over a weekend or during a holiday)[129] either to file an indictment against you by a grand jury vote or to file an information. However, even if these requirements are not followed, your application for habeas relief may be denied if: (1) the delay is a result of your own actions; (2) the District Attorney already filed a certification that an indictment has been voted; (3) a grand jury filed an indictment or a direction to file an information; or (4) a court finds good cause for the delay.[130]

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122. These factors are character, reputation, habits, and mental condition; employment and financial resources; ties to family and community and length of residence in community; criminal record; juvenile record; previous failure to show up in court; the likelihood of conviction or the merit of any pending appeal; and the sentence that may be imposed. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2009).

123. *See* People *ex rel.* Bryce v. Infante, 144 A.D.2d 898, 899, 535 N.Y.S.2d 215, 216 (3d Dept. 1988) (overturning denial of bail on basis of defendant's suicidal tendencies); People *ex rel.* Ryan v. Infante, 108 A.D.2d 987, 988, 485 N.Y.S.2d 852, 853B54 (3d Dept. 1985) (finding that the absence of a codefendant should not be a factor in setting bail unless a defendant has assisted the codefendent in bail jumping); People *ex rel.* Bauer v. McGreevy, 147 Misc. 2d 213, 216, 555 N.Y.S.2d 581, 583 (Sup. Ct. Rensselaer County 1990) (overturning denial of bail solely to protect the community from possible future criminal conduct by the defendant); Becher *ex rel.* Vadakin v. Dunston, 142 Misc. 2d 103, 104, 536 N.Y.S.2d 396, 397 (Sup. Ct. Rensselaer County 1988) (overturning denial of bail without conducting a hearing and on the ground that the defendant disobeyed a subpoena to testify before the grand jury); People *ex rel.* Glass v. McGreevy, 134 Misc. 2d 1085, 1086, 514 N.Y.S.2d 622, 623 (Sup. Ct. Rensselaer County 1987) (overturning imposition of negative AIDS test as a condition for release on bail).

124. *See* People *ex rel.* Rosenthal v. Wolfson, 48 N.Y.2d 230, 232–33, 397 N.E.2d 745, 422 N.Y.S.2d 55 (1979) (holding that, absent extraordinary circumstances, new evidence relevant to bail determination should be submitted to the bail-fixing court, not to a habeas court).

125. N.Y. C.P.L.R. 7010(b) (McKinney 2009) ("If the person detained has been admitted to bail but the amount fixed is so excessive as to constitute an abuse of discretion, and he is not ordered discharged, the court shall direct a final judgment reducing bail to a proper amount."). For example, if you were indicted for selling heroin on two different occasions for amounts totaling $19,000, and you have a wife and son with whom you had been living in the community, the court may find that bail set at $150,000 is excessive. People *ex rel.* Mordkofsky v. Stancari, 93 A.D.2d 826, 827, 460 N.Y.S.2d 830, 832 (2d Dept. 1983).

126. *See* Kassebaum v. al-Rahman, 212 A.D.2d 482, 483, 624 N.Y.S.2d 803, 803 (1st Dept. 1995) (denying habeas petition for failure to set reasonable bail, finding the decision moot because petitioner had been tried and convicted).

127. *See* People *ex rel.* Maxian v. Brown, 77 N.Y.2d 422, 426–27, 570 N.E.2d 223, 225, 568 N.Y.S.2d 575, 577 (1991) (granting habeas and holding a delay of arraignment of more than 24 hours is presumptively unnecessary and, without reason, violates N.Y. Crim. Proc. Law 140.20(1)); *see also* N.Y. Crim. Proc. Law § 140.20(1) (McKinney 2009).

128. *See* N.Y. Crim. Proc. Law § 170.70 (McKinney 2009); People *ex rel.* Alvarez v. Warden, Bronx House of Det., 178 Misc. 2d 254, 256, 680 N.Y.S.2d 153, 154–55 (Sup. Ct. Bronx County 1998) (granting the petition for a writ of habeas corpus and ordering the petitioner released because of the failure to file an information against the petitioner within five days); *see also* People *ex rel.* Neufeld v. McMickens, 70 N.Y.2d 763, 764–65, 514 N.E.2d 1368, 1368, 520 N.Y.S.2d 744, 744 (1987) (stating that five-day period includes first day of custody unless first day preceded arraignment or was a Sunday).

129. *See* People *ex rel.* Barna v. Malcolm, 85 A.D.2d 313, 316–17, 448 N.Y.S.2d 176, 178–79 (1st Dept. 1982) (finding 72-hour period may be extended if it expires upon a Saturday, Sunday, or public holiday, or if there is "good cause").

130. N.Y. Crim. Proc. Law § 180.80 (McKinney 2009).

You may also petition for a writ of habeas corpus if you are being denied your right to a speedy trial under subdivision (2) of New York's speedy trial statute.[131] This statute applies to individuals who are incarcerated and have an information or indictment filed against them but whose cases have not yet gone to trial.[132] If the court grants your petition, you will have the right to "be released on bail or on [your] own recognizance upon such conditions as may be just and reasonable."[133] If your trial has started, you can no longer bring a habeas corpus petition on this ground. Instead, you should raise the issue on direct appeal.[134]

(b) After Your Conviction

(i) Confinement Beyond Sentence

You may petition for habeas corpus relief if you have already served your sentence and are still being detained, whether due to clerical error, office delay, or miscalculation of jail or prison time, such that you are entitled to immediate release.[135]

Other than the administrative mistakes listed above, which, if corrected, would result in your release, you may not file for a writ of habeas corpus to contest your sentence. For example, if you are serving time for several convictions, you may not petition for a writ of habeas corpus to challenge only one of these convictions or sentences, since you will remain imprisoned under the other convictions, as explained in Part A(2)(b) of this Chapter. Also, if you were improperly given a consecutive sentence instead of a concurrent sentence or you were incorrectly sentenced as a *predicate* or *persistent felon* instead of a first-time offender, you cannot petition for a writ of habeas corpus to fix this mistake because it would not result in your immediate release.[136] Rather, you must raise such issues in a direct appeal or an Article 440 motion.

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131. N.Y. Crim. Proc. Law § 30.30 (McKinney 2009).

132. N.Y. Crim. Proc. Law. § 30.30 (McKinney 2009). You may only petition for a writ of habeas corpus to challenge a violation of subdivision (2), not subdivision (1), of § 30.30. Under subdivision (2), a defendant charged with a felony cannot be held in custody before going to trial for longer than 90 days; a defendant charged with a misdemeanor where the punishment for the misdemeanor is longer than three months of incarceration cannot be held in custody before going to trial for longer than 30 days; a defendant charged with a misdemeanor where the punishment for the misdemeanor is less than three months of incarceration cannot be held before going to trial for longer than 15 days; and a defendant charged with only a violation cannot be held in custody before going to trial for longer than five days. *See* People *ex rel.* Chakwin v. Warden, 63 N.Y.2d 120, 126, 470 N.E.2d 146, 149, 480 N.Y.S.2d 719, 722 (1984) (finding that delay of 91 days, after excluding delay due to defendant's motions, exceeds statutory limit of 90 days, and requires release of defendant). Note that you must file a motion for release in order to have a habeas claim to challenge the violation of your right to a speedy trial. People *ex rel.* Bullock v. Barry, 2002 N.Y. Slip. Op. 50463U, *3–4, 2002 N.Y. Misc. LEXIS 1525, **4–5 (Sup. Ct. N.Y. County 2002) (*unpublished*).

133. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2009).

134. *See* Kassebaum v. Al-Rahman, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (affirming denial of habeas petition on speedy trial grounds because petition was brought after trial had commenced); *see also* People *ex rel.* McDonald v. Warden, 34 N.Y.2d 554, 554, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974) (finding that once criminal action is brought to trial, habeas petition based on denial of right to speedy trial should be denied); People *ex rel.* Meurer v. Bentley, 202 A.D.2d 1042, 1043, 609 N.Y.S.2d 466, 467 (4th Dept. 1994) (finding that appeal from denial of habeas petition was rendered moot by commencement of trial).

135. *See* People *ex rel.* Henderson v. Casscles, 66 Misc. 2d 492, 495, 320 N.Y.S.2d 99, 104 (Sup. Ct. Westchester County 1971) (noting that although habeas petition would be appropriate where petitioner was entitled to immediate release, petitioner should use Article 78 motion if he seeks only to re-compute jail time).

136. *See* People *ex rel.* Sims v. Senkowski, 226 A.D.2d 800, 801, 640 N.Y.S.2d 820, 820–21 (3d Dept. 1996) (denying habeas petition and ruling that petitioner claiming that he should not have been sentenced as a persistent felon should raise this argument on direct appeal or file an Article 440 motion); People *ex rel.* McGourty v. Senkowski, 213 A.D.2d 954, 954, 624 N.Y.S.2d 308, 308 (3d Dept. 1995) (dismissing habeas petition where petitioner claimed that he was improperly sentenced as a persistent felon because, if successful, petitioner would be entitled to resentencing, not immediate release); People *ex rel.* Hampton v. Scully, 166 A.D.2d 734, 734–35, 561 N.Y.S.2d 482, 483 (2d Dept. 1990) (denial of habeas petitions because re-calculation of sentence would not result in immediate release; an Article 78 proceeding would be more appropriate to force a re-calculation of the sentence); People *ex rel.* World v. Jones, 88 A.D.2d 1096, 1096, 453 N.Y.S.2d 60, 61 (3d Dept. 1982) (ruling that appeal or Article 440 motion is appropriate proceeding where habeas relief would not affect an immediate release of petitioner from custody). *But see* People *ex rel.* Colan v. La Vallee, 14 N.Y.2d 83, 86–87, 198 N.E.2d 240, 241, 248 N.Y.S.2d 853, 855 (1964) (holding in a habeas corpus proceeding violating section 335-b of the Code of Criminal Procedure, as it read in 1960, which required the court to inform the defendant upon his arraignment and before acceptance of his plea that his previous conviction of a crime would enhance his punishment, renders his conviction invalid, and ordering the defendant's re-arraignment and re-pleading).

(ii) Fundamental Rights

Some cases suggest that New York courts will not require you to use other available procedures if you are claiming a violation of a fundamental constitutional or statutory right.[137] However, courts have been reluctant to hold that a violation of a fundamental right alone can serve as a basis for a writ of habeas corpus; generally, courts will only bypass traditional proceedings, such as appeal, where "practicality and necessity" require it.[138] Some cases go so far as to state that habeas corpus may not be used to collaterally attack a judgment on constitutional grounds.[139]

(iii) New or Void Law

You may also petition the court on the ground that the statute under which you were prosecuted is unconstitutional.[140] It is very rare for courts to declare a statute unconstitutional. If the statute you were prosecuted under is declared unconstitutional, you are entitled to immediate release on a petition for a writ of habeas corpus. New York may also grant writs of habeas corpus when the law has changed, and the law used to convict you has been declared void. Finally, a court may grant a writ of habeas corpus if your claim involves the "violation of a fundamental constitutional right, which was not clearly recognized nor fully articulated" by the Court of Appeals until after all appeals of your conviction have been completed.[141]

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137. *See* Roberts v. County Court of Wyoming County, 39 A.D.2d 246, 253, 333 N.Y.S.2d 882, 890 (4th Dept. 1972) ("[W]hile some form of alternative relief, such as *coram nobis* [codified in Article 440 of the C.P.L.R.], might also have been available to the relator in the present case, this should not foreclose the relator from proceeding by way of habeas corpus."); People *ex rel.* Rohrlich v. Follette, 20 N.Y.2d 297, 299–300, 229 N.E.2d 419, 420, 282 N.Y.S.2d 729, 730–731 (1967) (finding that habeas corpus is an appropriate proceeding to test the claim that the relator has been deprived of a fundamental constitutional or statutory right in a criminal prosecution, in this case, right to a trial by jury). Note that these are old cases and courts have become increasingly reluctant to review habeas corpus petitions if other procedures are available. For a list of constitutional and statutory rights in criminal cases, see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence." For more information on other forms of alternative relief, such as Article 440 motions and *coram nobis*, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

138. People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 262, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 900 (1966) (ruling that habeas corpus is not the preferred means of vindicating fundamental constitutional or statutory rights and that departure from traditional orderly proceedings, such as appeal, should be permitted only when dictated by reason of "practicality and necessity."); *see also* People *ex rel.* Murphy v. Leonardo, 179 A.D.2d 848, 848–49, 578 N.Y.S.2d 426, 427 (3d Dept. 1992) (holding that constitutional double jeopardy claim is not enough to support writ of habeas corpus when same claim is also pending on appeal); People *ex rel.* Hall v. LeFevre, 92 A.D.2d 956, 957, 460 N.Y.S.2d 640, 641 (3d Dept. 1983) (holding that the "facts of this case do not demonstrate a violation of petitioner's fundamental constitutional rights so egregious as to compel a departure from traditional orderly procedure."); People *ex rel.* Sales v. LeFevre, 93 A.D.2d 945, 946, 463 N.Y.S.2d 58, 59 (3d Dept. 1983) (habeas corpus may not be utilized to collaterally attack the judgment on constitutional grounds—in this case, the right of confrontation—and facts of case do not compel departure from traditional orderly procedure); People *ex rel.* Russell v. LeFevre, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (dismissing habeas corpus petition alleging violation of constitutional right because habeas is not proper remedy for attacking the judgment of conviction and noting the petitioner should have filed an Article 440 motion).

139. *See* People *ex rel.* Sales v. LeFevre, 93 A.D.2d 945, 946, 463 N.Y.S.2d 58, 59 (3d Dept. 1983) (holding that habeas corpus may not be utilized to collaterally attack the judgment on constitutional grounds—in this case, the right of confrontation—and facts of case do not compel departure from traditional orderly procedure); People *ex rel.* Russell v. LeFevre, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (dismissing habeas corpus petition alleging violation of constitutional right because habeas is not proper remedy for attacking the judgment of conviction and noting the petitioner should have filed an Article 440 motion).

140. *See* People *ex rel.* Haines v. Hunt, 242 N.Y.S. 105, 107–08, 229 A.D. 419, 420–22 (3d Dept. 1930) (holding that habeas corpus is proper remedy for relator convicted under unconstitutional statute).

141. *See* People *ex rel.* Rodriguez v. Harris, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981). In *Rodriguez*, the petitioner filed for a writ of habeas corpus alleging a violation of the petitioner's right to counsel based on a Court of Appeals decision, People v. Rogers, 48 N.Y.2d 167, 422 N.Y.S.2d 18, 397 N.E.2d 709 (1979). The *Rodriguez* court upheld the lower court's dismissal of the writ, ruling that the *Rogers* decision (prohibiting police interrogation of defendant, in absence of counsel, on matters related or unrelated to pending charges for which defendant is already represented by counsel) could not be given retroactive application to petitioner's criminal case. People *ex rel.* Rodriguez v. Harris, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981). Note that the court denied the petition in *Rodriguez* on narrow grounds. The Court of Appeals had previously held in People v. Pepper, 53 N.Y.2d 213, 221, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892 (1981), that in cases involving a defendant's right to counsel in pretrial encounters, retroactive application of a change in decisional law is limited to those cases still on direct review at the time the change in law occurred. *See also* People *ex rel.* Gallo v. Warden, 32 A.D.2d 1051, 1052, 303 N.Y.S.2d 752, 753 (2d Dept. 1969) (holding that habeas corpus proceeding was proper for reviewing propriety of imposition of consecutive sentence where the petition was based upon decisions rendered after petitioner's appeal).

(iv) Ineffective Counsel

In New York, you cannot use habeas corpus proceedings to claim ineffective assistance of counsel.[142] This is because the remedy would be a new trial and not release from custody and habeas petitions are for getting released from custody. Filing an Article 440.10 motion would be the appropriate cause of action.[143]

(v) New Evidence

In New York, if you wish to raise the issue of new evidence, you must file an Article 440 motion.[144] See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence" for more information on how to do this.

(vi) Unreasonable Delay

A court may grant a writ of habeas corpus if there has been an "unreasonable delay" in the disposition (settlement) of an Article 440 motion[145] or if your appeal has been pending for an unusually long time.[146]

In addition, you may petition for habeas corpus if waiting for the appeal of your conviction will cause you to face a longer prison term.[147] In one case, a prisoner petitioned for habeas corpus on the grounds that he was wrongfully imprisoned in New York. The prisoner's commitment order indicated that he should be imprisoned in Alabama, where he had earlier escaped from prison. The court granted the writ of habeas corpus even though an appeal that raised the issue of wrongful imprisonment was pending, because the appeal was not due to be heard by the court until later in the year, and none of the time that the prisoner served in New York would count against his Alabama sentence.[148]

(vii) Violations of the Conditions of Your Sentence (New York Only)

You may also petition for a writ of habeas corpus if the conditions of your imprisonment are worse than the conditions authorized by your judgment of conviction or by the New York and U.S. Constitutions.[149] For example, you may petition for habeas corpus on the grounds that:

(1) You are being denied the rehabilitation, care, or treatment required by your sentence;[150]

(2) You were arbitrarily and illegally transferred to an institution for the criminally insane;[151]

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142. For more information about ineffective assistance of counsel claims, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel." *See also* Application of Jones, 34 Misc. 2d 564, 565, 227 N.Y.S.2d 1002, 1004 (Sup. Ct. Special Term New York County 1962) (denying habeas petition because relator was represented by counsel and further adding habeas is "not the proper remedy for testing the requirements of due process or whether relator was properly represented by assigned counsel").

143. *See* People v. Martin, 52 A.D.2d 988, 989, 383 N.Y.S.2d 425, 428 (3d Dept. 1976) (holding that "in the absence of a record concerning adequacy of representation" an Article 440 proceeding is the correct place to bring a motion regarding ineffectiveness of counsel); People *ex rel.* Hall v. LeFevre, 460 N.Y.S. 2d 640, 641, 92 A.D.2d 956, 957 (3d Dept. 1983) (holding that issues of inadequacy of counsel must proceed using a 440 motion). For more information on filing Article 440.10 motions, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

144. *See* People v. Taylor, 246 A.D.2d 410, 411, 668 N.Y.S.2d 583, 584 (1st Dept. 1998) (holding that the power to set aside a verdict on the grounds of new evidence is derived from N.Y. Crim. Proc. Law § 440.10(1)(g) and listing the six criteria that new evidence must meet).

145. *See* People *ex rel.* Anderson v. Warden, New York City Corr. Inst. for Men, 68 Misc. 2d 463, 468, 325 N.Y.S.2d 829, 835 (Sup. Ct. Bronx County 1971) ("[I]f there is an unreasonable delay in the disposition of an article 440 motion, the defendant can, perhaps, properly bring a writ of habeas corpus.").

146. *See* People *ex rel.* Lee v. Smith, 58 A.D.2d 987, 987, 397 N.Y.S.2d 266, 267 (4th Dept. 1977) (granting a hearing on the merits of petitioner's habeas corpus petition, even though an appeal was pending, because the petitioner's appeal had been pending for more than four years).

147. *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 275, 428 N.Y.S.2d 152, 154–55 (Sup. Ct. Chemung County 1980) (finding the prisoner's current place of incarceration resulted in a longer term of imprisonment).

148. *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 275, 428 N.Y.S.2d 152, 154–55 (Sup. Ct. Chemung County 1980) (finding the prisoner's current place of incarceration resulted in a longer term of imprisonment).

149. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (1961) ("[I]t seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry.").

150. *See* People *ex rel.* Smith v. La Vallee, 29 A.D.2d 248, 250, 287 N.Y.S.2d 601, 604 (4th Dept. 1968) (petitioner with an indeterminate sentence is entitled to psychiatric treatment and examination).

151. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (1961) (holding that lower court wrongly refused to consider petition for habeas corpus that challenged the transfer of a convicted rapist from a prison to a mental hospital).

(3) You have been found not guilty because of mental illness[152] and are being held at an institution for the criminally insane, but you have not received a hearing or proceeding to evaluate your mental health as required by New York Criminal Procedure Law § 330.20;[153]
(4) You have been found not guilty because of mental illness and are being held at an institution for the criminally insane, but are no longer suffering from mental illness and are thus entitled to release, or are no longer dangerous and are thus entitled to transfer to a non-secure facility as required by New York Criminal Procedure Law § 330.20;[154]
(5) You are held in a different prison than the one on the sentencing court's commitment order;[155] or
(6) You were transferred to solitary confinement as a result of unconstitutional discrimination.[156]

Wardens and the Department of Correctional Services have wide discretion in determining the conditions of your incarceration, and few forms of punishment inside the prison violate your constitutional rights or the conditions of your sentence.[157]

(c) Probation or Parole

(i) Preliminary Revocation Hearings

When the Department of Correctional Services tries to revoke your parole, you are entitled to a hearing. You may petition for habeas corpus if your preliminary parole revocation hearing was not conducted in accordance with the law. You are entitled to the following:

(1) Notice in writing of the charges against you within three days of the execution of the warrant for your retaking and temporary detention, or within five days of the execution of the warrant if you are detained in another state and were not there through an out-of-state parolee supervision agreement;[158]

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152. This is also known as "not guilty by reason of insanity."

153. *See* People *ex rel.* Thorpe v. Von Holden, 63 N.Y.2d 546, 555, 473 N.E.2d 14, 18, 483 N.Y.S.2d 662, 666 (1984) (finding that a habeas petition is proper to test whether petitioner may remain in custody when Department of Mental Health Commissioner has failed to comply with time, notice, and hearing requirements for statutory retention order). If your petition is granted for this reason, the court will order your release or your transfer to a non-secure facility, unless there is evidence of a dangerous mental disorder. If the court has ordered your release, the State Commissioner of Mental Health or the Mental Retardation and Developmental Disabilities may, however, apply to the court to have you remain at the institution. This application may be granted if it is immediately filed and processed. *See* State *ex rel.* Henry L. v. Hawes, 174 Misc. 2d 929, 933, 667 N.Y.S.2d 212, 216 (N.Y. Cty. Ct. 1997) (granting petitioner's habeas writ and ordering petitioner immediately transferred to non-secure facility because order of confinement had expired and no application for order's extension had been made in violation of N.Y. Crim. Proc. Law § 330.20).

154. *See* McGraw v. Wack, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dept. 1995) (finding that writ of habeas corpus is proper proceeding for petitioner to seek transfer to non-secure facility or release); People *ex rel.* Schreiner v. Tekben, 160 Misc. 2d 724, 727, 611 N.Y.S.2d 734, 736 (Sup. Ct. Orange County 1994) (holding that the habeas corpus proceeding was an appropriate mechanism for transfer from a secure psychiatric facility to a non-secure facility), *aff'd sub nom.* People *ex rel.* Richard S. v. Tekben, 219 A.D.2d 609, 610, 631 N.Y.S.2d 524, 524 (2d Dept. 1995) (finding that habeas petition is proper mechanism to seek transfer from a secure to a non-secure facility).

155. *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 274, 428 N.Y.S.2d 152, 154 (N.Y. Sup. Ct. 1980) (holding that a prisoner was illegally imprisoned within New York State when he was held in a prison in New York rather than the Alabama prison that was specified on his commitment order by the sentencing court).

156. *See* People *ex rel.* Rockey v. Krueger, 62 Misc. 2d 135, 136, 306 N.Y.S.2d 359, 360 (Sup. Ct. Nassau County 1969) (finding placement of Muslim prisoner in solitary confinement because he would not shave his beard for religious reasons was unconstitutional discrimination, and ordered release of prisoner from solitary confinement); *see also JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings," and *JLM*, Chapter 27, "Religious Freedom in Prison."

157. *See*, *e.g.*, People *ex rel.* France v. Coughlin, 99 A.D.2d 599, 471 N.Y.S.2d 695 (3d Dept. 1984) (denying habeas petition because administrative segregation of prisoner was well within terms of confinement ordinarily contemplated by prison sentence, petitioner made no showing that confinement violated his constitutional rights, and petitioner failed to comply with statutory requirements); People *ex rel.* Jacobson v. Warden of Brooklyn House of Det., 77 A.D.2d 937, 431 N.Y.S.2d 114 (2d Dept. 1980) (upholding warden's denial of contact visits with person who allegedly helped in an earlier escape on grounds that such restriction is outside the scope of habeas corpus relief).

158. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2009). Even if you are not given notice of your parole violation within three days of your hearing, that is not reason enough to grant a petition for habeas corpus. You must also show that the lack of notice somehow hurt your ability to prepare for the hearing. *See* People *ex rel.* Williams v. Walsh, 241 A.D.2d 979, 661 N.Y.S.2d 371 (4th Dept. 1997) (finding defendant not entitled to restoration of parole or dismissal of parole violation warrant based on one day delay in serving statutory notice and failure to comply with three day notice rule where the preliminary hearing was held in a timely manner, defendant did not request adjournment to prepare for the hearing or contend that he lacked adequate notice of basis for parole violation, and did not contend that he was

(2) A hearing conducted within fifteen days after the warrant has been executed, as required by New York Executive Law Section 259-i(3)(c)(i);[159]
(3) Evidence introduced at your preliminary parole revocation hearing sufficient to provide probable cause[160] to believe that you had violated a condition of your parole;[161] and
(4) To appear and speak on your own behalf, present witnesses, or cross-examine witnesses (question the witnesses against you).[162]

Any denial of the above requirements may be grounds for a habeas petition in New York. Note that you are not entitled to a preliminary parole revocation hearing if you were convicted of a new crime.[163]

(ii) Final Parole Revocation Hearings

You may petition for habeas corpus if your final parole revocation hearing was not conducted in accordance with the law. You are entitled to the following:

(1) A hearing that was conducted within ninety days of the probable cause hearing; [164]

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prejudiced by the one day delay); *see also* People *ex rel.* Walker v. New York State Bd. of Parole, 98 A.D.2d 33, 33–34, 469 N.Y.S.2d 780, 781 (2d Dept. 1983) (finding judicial intervention not appropriate until final revocation hearing conducted, where final hearing has been scheduled within 90 day period).

159. N.Y. Exec. Law § 259-i(3)(c)(i) (McKinney 2009); *see also* People *ex rel.* Richman v. Warden, Bronx House of Det., 122 Misc. 2d 957, 958, 472 N.Y.S.2d 291, 292 (Sup. Ct. Bronx County 1984) (ruling that the only appropriate remedy for violation of parolee's due process rights by failing to afford him proper preliminary parole revocation hearing within 15 days of service of notice of parole violation is vacating the warrant and reinstatement to parole).

The court may, however, find that the delay is not the state's fault and dismiss the habeas corpus petition. *See* People *ex rel.* Hampton v. Warden, Rikers Island Corr. Facility, 211 A.D.2d 566, 621 N.Y.S.2d 580 (1st Dept. 1995) (dismissing habeas petition where timely hearing was postponed a few days due to closure of courthouse during snowstorm and then rescheduled to allow probationer to attend). In addition, the law does not require that the hearing be *completed* within 15 days.

Finally, a court may find that you have waived your right to a timely hearing. *See* People *ex rel.* Miller v. Walters, 60 N.Y.2d 899, 901, 458 N.E.2d 1251, 1252, 470 N.Y.S.2d 574, 575 (1983) (denying petition because petitioner waived preliminary hearing and thereby waived right to challenge board's failure to afford him a timely preliminary hearing). However, the waiver must be clearly made or else it will be invalid and parolee will be entitled to a timely hearing. *See* People *ex rel.* Melendez v. Warden of Rikers Island Corr. Facility, 214 A.D.2d 301, 302, 624 N.Y.S.2d 580, 581 (1st Dept. 1995) (ruling that the parolee does not waive his right to a timely hearing where the state does not prove that the waiver was clearly made, and ordering that petitioner be reinstated to parole).

160. "Probable cause" in this case means reasonable cause, or reasonable grounds for believing, based on existing facts, that you have violated your parole.

161. N.Y. Exec. Law § 259-i(3)(c)(vi) (McKinney 2009); *see also* People *ex rel.* Davis v. New York State Div. of Parole, 149 Misc. 2d 741, 744, 566 N.Y.S.2d 469, 471 (Sup. Ct. Westchester County 1991) (ruling that there was not probable cause to believe that the parolee violated a condition of his parole in an important respect where the parolee failed, during 50 minute lunch break, to notify parole officer of arrest that occurred 95 hours earlier despite requirement that officer be notified immediately); People *ex rel.* Glenn v. Bantum, 132 Misc. 2d 676, 678, 505 N.Y.S.2d 359, 361 (Sup. Ct. Bronx County 1986) (holding that there was no legal evidence presented at preliminary hearing to support probable cause that relator was in possession of drugs where sole evidence was hearsay testimony of parole officer's conversations with arresting officer, and parole officer was unable to testify that substances in question were recovered from relator).

162. *See* People *ex rel.* Deyver by Weinstein v. Travis, 172 Misc. 2d 83, 85, 657 N.Y.S.2d 306 (Sup. Ct. Erie County 1997) (granting petitioner's habeas petition and finding that, to preserve petitioner's statutory right to effective cross-examination, petitioner was entitled to production of parole officer's notes, upon which parole officer had relied in testifying at hearing,).

163. *See* N.Y. Exec. Law § 259-i(3)(c)(i) (McKinney 2009); People *ex rel.* Felder v. Warden of Queens House of Det. for Men, 173 Misc. 2d 1029, 1030, 662 N.Y.S.2d 729, 731 (Sup. Ct. Queens County 1997) (ruling that parolee was not entitled to preliminary parole hearing on his violation where he had been convicted of a felony while released on parole).

164. N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney 2009); *see* People *ex rel.* Ford v. LaPaglia, 176 Misc. 2d 912, 914, 674 N.Y.S.2d 565, 566 (County Ct. Ulster County 1998) (ruling that statutory "90-day time limit must be adhered to strictly, absent any of the statutory exceptions"); People *ex rel.* Brown v. New York State Div. of Parole, 70 N.Y.2d 391, 402, 516 N.E.2d 194, 200, 521 N.Y.S.2d 657, 663 (1987) (vacating parole violation warrant and dismissing parole violation proceeding where revocation hearing was not held within 90 days).

However, the court may find that the hearing was timely if the delay was due to the parolee. *See* People *ex rel.* McAllister v. Leonardo, 182 A.D.2d 1031, 1033, 583 N.Y.S.2d 540, 542 (3d Dept. 1992) (ruling final parole revocation hearing was timely, even though held more than 90 days after probable cause determination, since delay resulted when no attorney was present for petitioner at timely scheduled date and petitioner requested representation, and additional delay was at request of petitioner's counsel). If you were incarcerated out of state, the court may also find that your hearing was timely even if it was held after 90 days from the probable cause determination. *See* N.Y. Exec. Law § 259-i(3)(a)(iv) (McKinney 2005) ("Where the alleged violator is detained in another state … the warrant will not be deemed to be executed until the alleged violator is detained exclusively on the … [parole] warrant."); People *ex rel.* Johnson v.

(2) Representation by a lawyer at the hearing;[165]
(3) Written notice of the date, place, and time of the hearing given to you and your attorney at least fourteen days prior to the scheduled hearing date;[166]
(4) An opportunity to confront and cross-examine witnesses against you, unless there was good cause for witnesses not to attend the hearing (as determined by the hearing officer);[167] and
(5) Proof of your parole violation by a *preponderance* of the evidence.[168]

Any denial of the above requirements may be grounds for a habeas petition. You may also petition if: (1) you were denied your fundamental constitutional right to be present at the hearing;[169] or (2) you requested a local parole revocation hearing, and your request was denied.[170]

Warden, Manhattan House of Det., 178 A.D.2d 331, 579 N.Y.S.2d 1 (1st Dept. 1991) (ruling defendant's final revocation hearing was not untimely, particularly as he was never detained "exclusively" on basis of parole revocation warrant).

165. N.Y. Exec. Law, § 259-i(3)(f)(v) (McKinney 2009); *see also* People *ex rel.* Brown v. Smith, 115 A.D.2d. 255, 496 N.Y.S.2d 123 (4th Dept. 1985) (holding that a parolee has the right to counsel upon a final parole revocation hearing). You can waive (give up) this right if you state that you do not want or need counsel. *See* People *ex rel.* Martinez v. Walters, 99 A.D.2d 476, 470 N.Y.S.2d 56 (2d Dept. 1984) (finding that prisoner had waived his right to counsel at his revocation hearing because the decision was knowing, intelligent, and voluntary; finding that the right to counsel may be waived in the absence of counsel); People *ex rel.* Perez v. Warden, 139 A.D.2d 477, 478, 527 N.Y.S.2d 233, 234 (1st Dept. 1988) (holding parolee's waiver of counsel ineffective as the hearing officer failed to conduct sufficient inquiry to reasonably assure that parolee appreciated dangers and disadvantages of waiving right to counsel).

166. N.Y. Exec. Law, § 259-i(3)(f)(iii) (McKinney 2009); *see also* People *ex rel.* Rivera v. New York State Div. of Parole, 83 A.D.2d 918, 919, 442 N.Y.S.2d 511 (3d Dept. 1981) (granting petitioner new final parole revocation hearing because notice of time and date of hearing was mailed five days before the hearing in violation of state law, which requires 14 days' notice). Note that an adjournment [postponement] of the final parole revocation hearing does not require a new 14-day notice to parolee. *See* People *ex rel.* Crooks v. New York State Bd. of Parole, 194 A.D.2d 376, 598 N.Y.S.2d 263 (1st Dept. 1993).

167. N.Y. Exec. Law § 259-i(3)(f)(iv)B(v) (McKinney 2009); s*ee also* People *ex rel.* McGee v. Walters, 62 N.Y.2d 317, 319, 465 N.E.2d 342, 343, 476 N.Y.S.2d 803, 804 (1984) (ruling that a parolee's right to confront adverse witnesses at parole revocation hearings should not be "underestimated or ignored," but that "a hearing examiner may, nevertheless, upon a specific finding of good cause, permit the introduction of adverse hearsay statements without affording the parolee an opportunity to confront the declarant"); *see also* People *ex rel.* Martin v. Warden, Ossining Corr. Facility, 133 A.D.2d 134, 135, 518 N.Y.S.2d 669, 670 (2d Dept. 1987) (ruling that good cause existed for dispensing with production of New Jersey parole officer who was supervising petitioner's parole and not allowing confrontation at parole hearing where state of New Jersey had an established and firm policy of refusing to allow its supervising parole officers to travel to other states for parole revocation hearings, and petitioner refused to submit interrogatories to New Jersey officer).

168. N.Y. Exec. Law § 259-i(3)(f)(viii) (McKinney 2009)*; see also* People *ex rel.* Saafir v. Mantello, 163 A.D.2d 824, 825, 558 N.Y.S.2d 356, 357 (4th Dept. 1990) (ruling that uncertified report of parolee's drug tests was insufficient to demonstrate violation of parole by a preponderance of the evidence). You will waive this ground if you do not raise it in your habeas petition. In other words, if you do not state in your habeas petition that your parole violation was unproven, you cannot complain about it at a later time. People *ex rel.* McWhinney v. Smith, 219 A.D.2d 879, 632 N.Y.S.2d 40 (4th Dept. 1995). Also remember that even if you do not think that there is enough evidence for your parole to be revoked, you must wait until after the final revocation hearing before you file your habeas petition. *See* People *ex rel.* Wallace v. New York State Bd. of Parole, 111 A.D.2d 940, 941, 491 N.Y.S.2d 50, 51 (2d Dept. 1985) (dismissing the petition because it was filed before the final revocation hearing).

169. *See* People *ex rel.* Johnson v. New York State Bd. of Parole, 98 A.D.2d 949, 470 N.Y.S.2d 62 (4th Dept. 1983) (reinstating petition for habeas alleging that final parole revocation hearing was held without petitioner present); *In re* Schwartz v. Warden, New York State Corr. Facility at Ossining, 82 A.D.2d 870, 871, 440 N.Y.S.2d 270, 272 (2d Dept. 1981) (finding that parolee, who invoked his right to counsel and who refused to attend revocation hearing due to inability of his attorney to attend the hearing, did not waive his right to appear; thus, it was error for hearing officer to conduct the hearing without parolee). Note, however, that a court may find that you have waived this right. If you are called to a hearing you must appear even if you have applied for an adjournment, otherwise you have waived your appearance. *See, e.g.*, People *ex rel.* Rodriguez v. Warden, 163 A.D.2d 206, 207, 558 N.Y.S.2d 59 (1st Dept. 1990) (holding that prisoner knowingly and intelligently waived his right to be present at final parole revocation hearing by persistently refusing to appear despite repeated efforts by Division of Parole to produce him); People *ex rel.* McFadden v. New York State Div. of Parole, 79 A.D.2d 952, 955, 435 N.Y.S.2d 589, 592 (1st Dept. 1981) (petitioner who failed to appear on three occasions at a parole revocation hearing waived the right to be present).

170. N.Y. Exec. Law § 259-i(3)(e)(i) (McKinney 2009) ("If the alleged violator requests a local revocation hearing, he shall be given a revocation hearing reasonably near the place of the alleged violation or arrest if he has not been convicted of a crime committed while under supervision."); s*ee* People *ex rel.* Campolito v. Portuondo, 248 A.D.2d 768, 769, 669 N.Y.S.2d 726, 727 (3d Dept. 1998) (finding that where a prisoner had not requested a local parole revocation hearing, he was not entitled to one); People *ex rel.* Madison v. Sullivan, 142 A.D.2d 621, 530 N.Y.S.2d 43 (2d Dept. 1988) (finding that where neither prisoner nor his counsel had requested a local parole revocation hearing, the New York State Board of Parole was not required to arrange one for him).

Note that you are not entitled to a final parole revocation hearing if your parole was revoked because of a new felony conviction.[171] You may not petition for a writ of habeas corpus for the above reasons if you would remain imprisoned for other convictions.[172]

(d) Subject Matter Jurisdiction

In New York, supreme and county courts have jurisdiction to try felonies.[173] District, city, town, and village courts have jurisdiction over misdemeanors.[174] If you are convicted by a court that does not have authority to try your offense, you may petition for habeas corpus.[175] As stated above, a court may also lack subject matter jurisdiction if the allegations made in your indictment are in some way insufficient.

This issue should normally be raised on appeal or in an Article 440 motion; but, provided that you give a compelling reason why the court should depart from regular procedure, you may petition for habeas corpus if:

(1) An indictment or information was not filed against you;[176]
(2) Your indictment failed to state facts that made up every necessary element, or part, of your crime, and the court was entirely stripped of jurisdiction as a result;[177] or

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171. *See* N.Y. Exec. Law § 259-i(3)(d)(iii) (McKinney 2009); s*ee also* People *ex rel.* Ward v. Russi, 219 A.D.2d 862, 632 N.Y.S.2d 45 (4th Dept. 1995) (holding that the relator is not entitled to parole revocation hearing where violation was due to a new felony conviction); O'Quinn v. New York State Bd. of Parole, 132 Misc. 2d 92, 94, 503 N.Y.S.2d 483, 485 (Sup. Ct. N.Y. County 1986) (noting statute barring right to final revocation hearing where parolee has been convicted of felony while on parole does not violate due process).

172. *See* People *ex rel.* Cook v. Mantello, 136 A.D.2d 891, 525 N.Y.S.2d 79 (4th Dept. 1988) (dismissing habeas petition challenging the timeliness of petitioner's parole revocation hearing because the petitioner was incarcerated as the result of an unrelated conviction and would not be eligible for immediate release from custody should he have succeeded on merits of habeas proceeding); People *ex rel.* Linares v. Dalsheim, 107 A.D.2d 728, 728, 484 N.Y.S.2d 89, 90 (2d Dept. 1985) (noting that habeas corpus was not available since petitioner was incarcerated due to a subsequent felony conviction and would not have been entitled to immediate release).
You may, however, bring an Article 78 proceeding to challenge Parole Board decisions even if you will remain incarcerated for other convictions. *See* People *ex rel.* Mack v. Reid, 113 A.D.2d 962, 963, 494 N.Y.S.2d 25, 26–27 (2d Dept. 1985) (stating that petitioner who had raised the issue of untimeliness before Parole Board should bring Article 78 proceeding after Board decides against him). Be aware that a four-month statute of limitations applies to Article 78 petitions. *See, e.g.*, Soto v. N.Y. State Bd. of Parole, 107 A.D.2d 693, 694, 484 N.Y.S.2d 49, 50 (2d Dept. 1985) (dismissing Article 78 petition filed three years after the parole revocation hearing because it violated four-month statute of limitations for Article 78 proceedings). See Chapter 22 of the *JLM* for a discussion of Article 78 proceedings.

173. Felonies are offenses that are punishable by a prison term of more than one year. N.Y. Penal Law § 10.00(5) (McKinney 2009).

174. Misdemeanors are offenses punishable by fine and/or a brief jail sentence of more than 15 days, but less than a year. N.Y. Penal Law § 10.00(4) (McKinney 2009).

175. *See* Clifford v. Krueger, 59 Misc. 2d 87, 93, 297 N.Y.S.2d 990, 997 (Sup. Ct. Nassau County 1969) (granting petitioner's writ of habeas corpus, finding the conviction illegal because the crime of which he was convicted was an offense over which Family Court had exclusive original jurisdiction, and transferring the matter to Family Court).

176. *See* People *ex rel.* Battista v. Christian, 249 N.Y. 314, 321, 164 N.E. 111, 113 (1928) (granting habeas corpus petition because there was no presentment or indictment of a grand jury). Note that an indictment no longer has to be filed for every crime; the prosecutor may file an information instead. In November 1973, the New York Constitution was amended to provide an exception to the indictment requirement where the accused is charged with an offense that is not punishable by death or life imprisonment. N.Y. Const. art. I, § 6. This amendment is explained in People v. Trueluck, 88 N.Y.2d 546, 548, 670 N.E.2d 977, 978, 647 N.Y.S.2d 476, 477 (1996) (noting that a defendant may waive an indictment and consent to be prosecuted by a superior court information where: (1) the local criminal court has held the defendant for the action of a Grand Jury; (2) the defendant is not charged with a class A felony, and (3) the District Attorney consents to the waiver of indictment) (quoting N.Y. Crim. Proc. Law § 195.10(1) (McKinney 2007).

177. For example, if your indictment for 1st degree murder fails to describe acts that showed that you intended to kill another person, the court does not have jurisdiction to convict you of 1st degree murder, because intent to kill is a necessary element of 1st degree murder. However, the court does have jurisdiction to convict you of 2nd degree murder, since intent is not a necessary element of 2nd degree murder. Therefore, in this case, you can challenge your conviction of 1st degree murder, but you cannot challenge your conviction of 2nd degree murder in a petition for habeas corpus. *See* People *ex rel.* Williams v. La Vallee, 30 A.D.2d 1034, 294 N.Y.S.2d 824 (4th Dept. 1968) (noting that indictment did not allege the 1st degree murder elements of premeditation or depraved mind, but this did not strip the court of jurisdiction because the allegations were sufficient to support a charge of 2nd degree murder); People *ex rel.* Wysokowski v. Conboy, 19 A.D.2d 663, 664, 241 N.Y.S.2d 245, 236 (3d Dept. 1963) (denying habeas corpus petition because simplified form of indictment that omitted certain facts did not deprive court of jurisdiction).

(3) The court convicted you of a crime not included in the indictment (this does not include lesser included offenses of the offenses[178] charged in your indictment). You may waive this claim, however, if you fail to object to the submission of the offense at your trial.[179]

In New York, you may also petition for a writ of habeas corpus to challenge the court's subject matter jurisdiction with respect to the validity of your conviction. A court will review your petition regardless of whether you raised it on appeal only if the issue is very important and will invalidate your conviction if the habeas petition is decided in your favor.[180] In one case, for example, a prisoner petitioned for habeas corpus on the ground that attempted escape could not serve as the basis for a felony murder conviction because attempted escape was only classified as a misdemeanor, not a felony.[181] Though the prisoner had not raised this issue in a second appeal from his conviction (he did raise it in his first appeal), the court granted a writ of habeas corpus because of the importance of the issue and its impact upon the validity of the conviction and sentence for murder. The court believed that the issue needed to be resolved and noted that it would have to reverse the prisoner's murder conviction if the court resolved the issue in the prisoner's favor.[182]

3. How to File Your Petition

(a) When to File

In New York, before you file your petition, make sure you cannot bring any of these proceedings:

(1) Appeal (refer to *JLM*, Chapter 9, "Appealing Your Conviction or Sentence");
(2) Article 440 (refer to *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence"); or
(3) Article 78 (refer to *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules").

(b) Where to File

In New York, you may petition any of the following courts or judges for a writ of habeas corpus:

(1) The supreme court in the judicial district in which you are imprisoned;
(2) The appellate division of the department in which you are imprisoned;
(3) Any justice of the supreme court; or
(4) A county judge within the county in which you are imprisoned, or a county judge from an adjoining county, if no judge within the county can or will issue a writ.[183]

(c) What to Include in Your Petition

The habeas corpus petition you submit should include the following information:

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178. See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for an explanation of lesser included offense.

179. For example, if your indictment charged you with murder, but the judge announced that he or she also would consider whether you were guilty of robbery (which is not a lesser included offense within the crime of murder), and you were subsequently convicted of robbery, you may challenge your conviction only if you objected at your trial to the judge's intention to consider robbery. *See* People *ex rel.* Tanner v. Vincent, 44 A.D.2d 170, 173–74, 354 N.Y.S.2d 145, 148 (2d Dept. 1974) (denying habeas petition where petitioner failed to raise objection on appeal to robbery conviction where petitioner had been indicted for common law murder, felony murder, and possession of a weapon, but convicted of robbery, which is not a lesser included offense within the crime of felony murder).

180. *See* People *ex rel.* Culhane v. Sullivan, 139 A.D.2d 315, 317–18, 531 N.Y.S.2d 287, 288 (2d Dept. 1988) (refusing to grant a writ of habeas corpus where the information included sufficient showings of intent and overt acts which would have resulted in the commission of the crime under state law).

181. Felony murder is a rule of criminal law which holds a defendant responsible for any killing that occurred during the commission of a felony.

182. *See* People *ex rel.* Culhane v. Sullivan, 139 A.D.2d 315, 317, 531 N.Y.S.2d 287, 288 (2d Dept. 1988) (refusing to grant a writ of habeas corpus where the information included sufficient showings of intent and overt acts which would have resulted in the commission of the crime under state law); People *ex rel.* Bartlam v. Murphy, 9 N.Y.2d 550, 553–54, 175 N.E.2d 336, 337–38, 215 N.Y.S.2d 753, 755B56 (1961) (ruling in favor of relator in habeas corpus petition and ordering hearing on whether relator was denied right to be present when jury received further instructions, which is an issue essential to the court's jurisdiction to proceed with trial). *But see* People *ex rel.* Lupo v. Fay, 13 N.Y.2d 253, 257, 196 N.E.2d 56, 58–59, 246 N.Y.S.2d 399, 402 (1963) (denying writ of habeas corpus and holding that the defendant's absence when counsel made a motion to discharge jury did not affect any substantial rights).

183. N.Y. C.P.L.R. 7002(b)(1)B(5) (McKinney 2009). Note that if you are being held in a New York City detention center, you may also file with any justice of the supreme court of the county in which your charge is pending, in addition to the above-listed options. For example, an inmate being held on Rikers Island in the Bronx may file a writ of habeas corpus with a justice of the Supreme Court in New York County (Manhattan) if he has a charge pending there.

(1) The name of your prison and of the warden or official imprisoning you, if you know their names;
(2) A copy of the mandate by which you are detained or an explanation of why you could not obtain a copy of the mandate;[184]
(3) The reason you are imprisoned, to the best of your knowledge;
(4) An explanation of why your imprisonment is illegal;[185]
(5) The result of any appeal from the trial court's judgment, or a statement that you did not take an appeal, if that is the case;
(6) The date, result, and name of the court or judge to whom you previously petitioned for a writ, plus a statement of any new facts in your current petition that you did not raise in earlier petitions. If you have not petitioned for a writ of habeas corpus before, state this fact in your petition;[186] and
(7) The facts that authorize the judge to act, if the petition is made to a county judge outside of the county where you are detained.

This is not a complete list. You should consult New York Civil Practice Law and Rules 7002(c) for other information that you must include in your habeas corpus petition. If you do not include the required information, a court will dismiss your petition, unless you can show some convincing reason why you could not include the required information.[187] One reason, for example, might be that you were deprived of legal material and writing instruments.[188]

You do not have to enclose a copy of a writ of habeas corpus with your petition. However, you may want to include a copy of the writ, because this may allow the court to issue the writ sooner. If you do enclose a writ, fill in whatever information you can provide.

(d) How to File

Write out and then type a petition and a writ. Sign the petition in the presence of a *notary public*, who will put his seal on the papers. By "notarizing" the petition, you are swearing that all statements in the document are true.[189] Send the documents to the court specified above in Section 2, "Where to File." Appendix II of the *JLM* provides the addresses for New York courts.

4. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held you have no federal constitutional right to counsel in state habeas corpus proceedings.[190] But, New York state law may provide you the right to counsel. If you are indigent and incapable of obtaining your own lawyer, you often have a right to a court-appointed lawyer for a hearing on your habeas petition, provided you request that the court appoint a lawyer.[191] To do so, you must complete

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184. A mandate is a written order of the court directing the warden to enforce the sentence against you. N.Y. Gen. Constr. Law § 28-a (McKinney 2009). Under N.Y. Pub. Off. Law § 89 (McKinney 2009), the superintendent or warden of your prison should make the mandate available to you upon your written request.

185. You should support your claim that your imprisonment is illegal with as many facts as possible. If you merely state that your imprisonment is illegal without detailing why, a court will probably dismiss your petition. *See* People *ex rel.* Boyd v. LeFevre, 92 A.D.2d 1042, 1042, 461 N.Y.S.2d 667, 667 (3d Dept. 1983) (upholding dismissal of habeas corpus petition where the petition contained only bare, conclusory assertions that defendant's rights were violated without any facts alleged to support such claims.)

186. If you fail to detail prior applications for a writ of habeas corpus, the court may dismiss your petition. *See* People *ex rel.* Christianson v. Berry, 165 A.D.2d 961, 962, 561 N.Y.S.2d 848, 849 (3d Dept. 1990) (denying petitioner's application for writ of habeas corpus because it was fatally defective where, among other things, it failed to indicate petitioner's previous applications for habeas corpus relief). If you have already petitioned for habeas corpus unsuccessfully and your current petition does not contain any new grounds for relief, a court will only issue a writ in the extremely rare circumstances when the "ends of justice" require it. N.Y. C.P.L.R. 7003(b) (McKinney 1998); s*ee* People *ex rel.* Taylor v. Jones, 171 A.D.2d 906, 906, 566 N.Y.S.2d 779, 780 (3d Dept. 1991) (denying petitioner's application for writ of habeas corpus because it failed to indicate his previous applications for such relief).

187. *See* Matter of Tullis v. Kelly, 154 A.D.2d 926, 926, 547 N.Y.S.2d 259, 259 (4th Dept. 1989) (dismissing habeas petition because it failed to comply with procedural requirements of N.Y. C.P.L.R. 7002(c)); People *ex rel.* Kagan v. La Vallee, 49 A.D.2d 986, 986, 374 N.Y.S.2d 408, 408 (3d Dept. 1975) (affirming dismissal of habeas petition where application did not comply with provisions of N.Y. C.P.L.R. 7002(c) and was therefore insufficient on its face).

188. *See* People *ex rel.* La Rocca v. Conboy, 40 A.D.2d 736, 736, 336 N.Y.S.2d 724, 725 (3d Dept. 1972) (noting that "deficiencies in the petition might be overlooked where compelling reasons appeared from the papers," such as deprivation of legal material and writing material).

189. Notarizing your petition satisfies the "verification" requirement. N.Y. C.P.L.R. 7002(c) (McKinney 2009).

190. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) ("[T]he right to appointed counsel extends to the first appeal of right and no further.").

191. *See* People *ex rel.* Brock v. La Vallee, 42 A.D.2d 629, 629–30, 344 N.Y.S.2d 513, 515 (3d Dept. 1973) (holding

"poor person's papers" (known as proceeding *in forma pauperis*). *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," contains sample poor person's papers in its Appendix A for use in obtaining a lawyer for an Article 78 proceeding. You may use the same forms to obtain a lawyer for a habeas corpus proceeding if you: (1) substitute "Article 70" wherever the forms say "Article 78;" (2) delete any references to the Attorney General; and (3) substitute "writ of habeas corpus" wherever the papers read "order to show cause" or "verified petition."

You may also use poor person's papers to request a reduction or waiver of the filing fees. You should read Part D of *JLM*, Chapter 22, on Article 78 for a detailed description of filing fees. It explains that sentenced prisoners likely must pay at least a portion of the filing fees to proceed with their claims.[192]

If you have not been sentenced (for example, are filing a habeas petition to challenge excessive bail), you should still be able to receive a full filing fee waiver if you are indigent under New York law.[193] To request a waiver of filing fees, you should replace all references to N.Y. C.P.L.R. 1101(f) in the poor person's papers with N.Y. C.P.L.R. 1101(d) and make sure the papers request a waiver, not a reduction, of the filing fees.

5. What to Expect After You File

A court will not issue a writ of habeas corpus if (1) it appears from your petition that your claim is plainly without merit[194] or (2) your petition does not contain any claim that was not already decided against you in a previous petition.[195] However, if the court believes that your claim may have some merit, the court will issue you a writ.[196]

After the court issues the writ, you must *serve* (deliver) the writ and a copy of your petition upon the warden.[197] Upon being served with the writ and your petition, the warden must respond to the claims made in your petition within twenty-four hours.[198] The warden's response is known as the "return of the writ."[199] The warden must provide you with a copy of the return.[200] You have the right to make a reply to the return in order to deny any statements in the return or to state additional facts that support your claim.[201]

The writ may specify a time and place for a hearing to which the warden must take you to determine whether you are being imprisoned illegally. If the writ orders a hearing, you must inform the District Attorney of both the county in which you are imprisoned and the county in which you were convicted of the date and time of the hearing, in writing, at least eight days prior to the hearing.[202] Appendix III of the *JLM* provides the addresses of all of the District Attorneys in New York. At the hearing, the court will consider your petition, the return, and your reply to the return. You will be allowed to produce evidence to support your claim and to cross-examine any witnesses against you.[203]

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that at any hearing in connection with a habeas petition filed by an indigent prisoner seeking to be released from custody, the prisoner shall be entitled, upon request, to the assignment of counsel to represent him at such hearing); *see also* People *ex rel.* Ferguson v. Campbell, 186 A.D.2d 319, 587 N.Y.S.2d 798, 799 (3d Dept. 1992) (noting court did not abuse discretion by not appointing counsel because petitioner indicated that he did not want legal representation).

192. N.Y. C.P.L.R. 1101(f) (McKinney 2009).

193. N.Y. C.P.L.R. 1101(d) (McKinney 2009).

194. Your petition must state one of the valid grounds for relief supported by factual allegations. If your petition does not contain both the grounds for relief and supporting facts, then it will be dismissed.

195. N.Y. C.P.L.R. 7003(a)B(b) (McKinney 2009). *See also* People *ex rel.* Sanchez v. Hoke, 132 A.D.2d 861, 518 N.Y.S.2d 69 (3d Dept. 1987) (dismissing habeas petition without a hearing where the petition raised no new matter that had not already been raised and resolved against the petitioner).

196. N.Y. C P.L.R. 7003(a) (McKinney 2009).

197. N.Y. C.P.L.R. 7005 (McKinney 2009).

198. N.Y. C.P.L.R. 7006(a); N.Y. C.P.L.R. 7008(a) (McKinney 2009).

199. N.Y. C.P.L.R. 7008(a) (McKinney 2009).

200. *See* Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 7008 (McKinney 2009).

201. N.Y. C.P.L.R. 7009(b) (McKinney 2009).

202. N.Y. C.P.L.R. 7009(a)(3) (McKinney 2009). If you file a poor person's papers, which is also known as proceeding *in forma pauperis*, a court officer will inform the District Attorney for you.

203. *See* People *ex rel.* Cole v. Johnston, 22 A.D.2d 893, 255 N.Y.S.2d 388 (2d Dept. 1964) (finding reversible error where petitioner was not allowed to produce evidence on his behalf or to cross-examine the only witness against him).

6. Your Right to Appeal

If the judge hands down a judgment refusing to issue a writ of habeas corpus or denying your claim after a hearing or return of the writ, you may appeal the judgment to an intermediate appellate court.[204] In New York, this court is called the Appellate Division and is divided into four different Departments.[205]

D. Michigan

This part explains some of the basic rules for filing a habeas corpus petition in Michigan.

1. Requirements

The Michigan writ of habeas corpus rules can be found in Chapter 43 of the Revised Judicature Act[206] and in state law 600.4301–4379.[207]

(a) Custody

If you have been released from prison, a Michigan court cannot grant a writ of habeas corpus.[208] However, if you are in prison because of an alleged parole violation, you are eligible for habeas corpus.[209] You are also eligible for habeas corpus if you are being civilly confined in a mental institution.[210]

(b) Immediate Release

You are entitled to immediate release if your habeas petition is successful. However, Michigan courts may grant you a conditional writ of habeas corpus that will require your release from prison only if new proceedings are not commenced by the state within the prescribed time period.[211] If this time period passes, Michigan is still allowed to arrest you again for the same crime.[212]

(c) State Prisoner

You must be a prisoner in Michigan.

(d) No Other Options

A Michigan court will not grant your petition for a writ of habeas corpus if there are other procedures available.[213] A writ of habeas corpus cannot be used when a writ of error or a writ of *certiorari* would be more appropriate.[214] The writ of habeas corpus is only used to raise defects so radical that will they render the conviction absolutely void and allow you to be released from prison.

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204. N.Y. C.P.L.R. 7011 (McKinney 2009). The rules that govern civil appeals, rather than criminal appeals, govern habeas corpus proceedings because habeas corpus is considered a civil remedy.

205. See *JLM*, Chapter 2, "An Introduction to Legal Research," for a description of New York courts.

206. Revised Judicature Act of 1961.

207. Mich. Comp. Laws Ann. § 600.4301–4379 (West 2010).

208. Mich. Comp. Laws § 600.4322 (West 2010).

209. *See* Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 865, 142 Mich. App. 774, 779 (Mich. Ct. App. 1985) ("[R]eview of a parole revocation decision is permissible upon a complaint for habeas corpus.").

210. *See* Mich. Comp. Laws § 600.4322 (West 2010); *see also* Silvers v. People, 176 N.W.2d 702, 703, 22 Mich. App. 1, 3 (Mich. Ct. App. 1970) (holding that the Michigan circuit court is an appropriate venue to adjudicate the question of whether not receiving adequate treatment at a mental health facility is a violation of habeas corpus).

211. *See* People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (finding that the conditional writ of habeas corpus granted to the defendant, stating that he be retried in 90 days or released, was legitimate, but that the state does not lose its right to reprosecute if it does not retry within the allotted time).

212. *See* People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (stating that in a "typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, 'the state is not precluded from rearresting [the] petitioner and retrying him under the same indictment" unless the state's delay "prejudices the petitioner's ability to defend himself").

213. *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 704 (Mich. 1934) (finding that the court could not hear the petitioner's writ for habeas corpus since he could have filed a writ of error or *certiorari* instead) .

214. *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 704 (Mich. 1934) ("[H]abeas corpus may not be employed to serve in any instance where review could and should have been had by writ of error or certiorari.").

2. What You Can Complain About in Your Habeas Petition

(a) Before Trial

(i) Extradition

In Michigan, you have the right to challenge your extradition through the writ of habeas corpus.[215] The court will only engage in a very limited review in these cases.[216] The court will take the Governor's warrant and supporting papers as *prima facie* evidence supporting your extradition.[217] The court will therefore only look at whether the papers are in order, whether you have been charged with a crime in the demanding state, whether you are the person named in the request for extradition, and whether you are a fugitive.[218] Once you are outside of Michigan, you have no right to habeas review in a Michigan court.[219]

(ii) Bail

You may ask for habeas relief on the ground that you were denied bail or that the bail you were granted is excessive.[220] The court will be reluctant to second guess the judge that denied bail, and the petition will only be granted if the judge acted in an arbitrary, unjust, or oppressive manner, or if the judge was clearly wrong.[221]

(b) After Your Conviction

(i) Confinement Beyond Sentence

You may petition for habeas corpus relief if you have already served your sentence and are still being detained.[222] As explained in Part A(2)(b) of this Chapter, you must be eligible for immediate release if your petition is granted. If you believe that the sentence imposed on you was incorrect or excessive, you are not entitled to habeas review, but you may challenge the sentence on appeal or in a writ of error.[223]

(ii) Fundamental Rights

Michigan courts do not use the language of fundamental rights. Instead, the courts refer to "radical defects rendering a judgment or proceeding absolutely void."[224] If the court finds that your fundamental rights have been violated in your trial or sentencing, they may find that the judgment or proceeding is void and grant your habeas petition. For example, when a defendant was not given an opportunity to present his case, the court found that habeas corpus was the proper remedy to inquire into the reason of the detention.[225]

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215. Mich. Comp. Laws. Ann. § 780.9 (West 1998 & Supp. 2009).

216. People v. Wend 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (holding that petitions for habeas corpus are to be "liberally construed" when they deal with extradition).

217. People v. Wend 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981).

218. People v. Wend 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (quoting Michigan v. Doran, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521 (1978)).

219. *See* Trayer v. Kent County Sheriff, 304 N.W.2d 11, 12, 104 Mich. App. 32, 35 (Mich. Ct. App. 1981) (finding that even though petitioner had been granted a writ of habeas corpus, the writ was rendered moot as the petitioner had been moved out of Michigan and into Pennsylvania and was therefore subject to Pennsylvania's jurisdiction).

220. *See In re* Peoples, 14 N.W. 112, 47 Mich. 626 (Mich. 1882) (finding that a defendant denied bail warranted, under these circumstances, granting the writ of habeas corpus).

221. *In re* Tubbs, 102 N.W. 626, 627, 139 Mich. 102, 103 (Mich 1905).

222. *See* Cross v. Dept. of Corr., 303 N.W.2d 218, 220–21, 103 Mich. App. 409 415 (finding that a plaintiff whose state sentence was to run concurrently with his federal sentence, upon being released from federal prison, should not have been re-incarcerated in Michigan prison).

223. *See In re* Franks, 297 N.W. 521, 522, 297 Mich. 353, 355 (Mich. 1941) (holding that a petitioner challenging the length of his sentence and the method of sentencing should have appealed instead of having filed a writ of habeas corpus). *See also Ex parte* Wall, 47 N.W.2d 682, 330 Mich. 430 (Mich. 1951) (finding that a petitioner who wanted to challenge his sentence could successfully do so on appeal and not through filing a writ of habeas corpus).

224. Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780 (Mich. Ct. App. 1985).

225. *Ex parte* Bobowski, 21 N.W.2d 838, 839, 313 Mich. 521, 522 (Mich. 1946).

(iii) Ineffective Counsel

You may petition the court for habeas relief on the ground that your lawyer was ineffective.[226] Proving a claim of ineffective assistance of counsel is very difficult. The court will only grant relief when "the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretence, or without adequate opportunity for conference and preparation."[227]

(iv) New Evidence

In Michigan, if you wish to raise the issue of new evidence, you must file a motion for a new trial. Habeas relief will not be granted because of new evidence.

(c) Probation or Parole

Michigan courts have held that habeas corpus is the correct procedure by which you can challenge errors in parole revocation proceedings.[228] However, if you are accused of a parole violation and a fact-finding hearing (a process similar to a trial) on the charge is not held within forty-five days as required by law, habeas corpus is not available to you.[229] Instead, you should apply for a writ of *mandamus* to force the government to give you your hearing.[230]

(d) Subject Matter Jurisdiction

Habeas corpus is available when "the convicting court was without jurisdiction to try the defendant for the crime in question."[231] This defect must be "radical" such that it would render a conviction void.[232] However, if you have been convicted of a crime by a court which has acquired jurisdiction and has not abused its power, habeas corpus is not available to you.[233]

3. How to File Your Petition

(a) When to File

In Michigan, before you file your petition, be sure that you cannot appeal your conviction or apply for administrative relief. If there are other options for redress, the court will not consider your habeas corpus petition.[234]

(b) Where to File

In Michigan, you may petition any of the following courts or judges for a writ of habeas corpus:

(1) The supreme court, or a justice thereof;
(2) The courts of appeals, or a judge thereof;
(3) The circuit courts, or a judge thereof;
(4) The municipal courts of record, including but not limited to the recorder's court of the city of Detroit, common pleas court, or a judge thereof; or

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226. *See* People v. Wynn, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968).

227. *See* People v. Wynn, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968).

228. Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 866, 142 Mich.App. 774, 779 (Mich. Ct. App. 1985) (holding that "review of a parole revocation decision is permissible upon a complaint for habeas corpus").

229. Jones v. Dept. of Corr., 664 N.W.2d 717, 720, 468 Mich. 646, 651 (Mich. 2003) (holding that the appropriate procedure is to file a writ of mandamus in a situation where a fact-finding hearing failed to occur within the allotted 45 days).

230. Jones v. Dept. of Corr., 664 N.W.2d 717, 724, 468 Mich. 646, 658 (Mich. 2003).

231. People v. Price, 179 N.W.2d 177, 180, 23 Mich. App. 663, 670 (Mich. Ct. App. 1970).

232. People v. Price, 179 N.W.2d 177, 181, 23 Mich. App. 663, 671 (Mich. Ct. App. 1970) (defining a "radical defect in jurisdiction" as "an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission").

233. *See* Krause v. Weideman, 80 N.W.2d 481, 483, 347 Mich. 567, 572 (Mich. 1957) ("[Habeas] is not available to one convicted of a crime and committed by a court which has acquired jurisdiction and has not abused its power.").

234. *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 704 (Mich. 1934) (finding that the court could not hear the petitioner's writ for habeas corpus since he could have filed a writ of error or *certiorari* instead); *see also* Walls v. Dir. of Institutional Services Maxie Boy's Training School, 269 N.W.2d 599, 601, 84 Mich. App. 355, 357 (Mich. Ct. App. 1978) (finding that though there were other avenues the juvenile could have taken to seek redress, there was a "radical defect" and so filing a habeas petition was warranted).

(5) The district courts, or a judge thereof.[235]

You should file with the judge or court in the county where you are detained.[236] However, if there is no judge in that county capable of issuing the writ, or if the judge has refused to issue the writ, you can apply for habeas corpus at the court of appeals.[237] You may file with either the judge or the court, but if you file with a judge you must later file the petition with the court.[238]

(c) What to Include in Your Petition

The petition for habeas corpus, also known as the complaint, must state:
(1) that you (the prisoner) are restrained of your liberty;
(2) your name, or if the petition is being written on the behalf of someone else and his name is not known, you can provide a description of the prisoner;
(3) the name, if known, or the description of the officer or person by whom the prisoner is restrained;
(4) the place of restraint, if known;
(5) that the action for habeas corpus by you or on your behalf is not prohibited;
(6) the cause or pretense of the restraint, according to your best knowledge and belief; and
(7) why the restraint is illegal.[239]

(d) How to File

After you have created your petition for habeas corpus including all the items in Part (B)(3)(c) of this Chapter, "What to Include in Your Petition," you should send your petition and any supporting documents to the court specified above in Part (B)(3)(b) of this Chapter, "Where to File." You can file the petition yourself, or someone may file the petition on your behalf.[240]

4. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that you have no federal constitutional right to be provided counsel in state habeas corpus proceedings.[241] However, in Michigan you are entitled to counsel at your habeas corpus hearing.[242] Also, if you are applying for relief because you are about to be extradited, you do have a limited right to counsel.[243]

5. What to Expect After You File

In Michigan, the court may issue a writ of habeas corpus (or an order to show cause) if your petition states allegations, which, if true, would entitle you to release.[244]

After the court issues the writ, you must serve (deliver) the writ and a copy of your petition upon the person who has you in custody.[245] Upon being served the writ and the petition, the person who has you in custody must follow the writ unless you are too sick to be moved.[246] If you are too sick to be moved, the person who has you in custody should state that in the answer to your complaint.[247] The judge will then rule on your petition based on the record.[248]

The person who has you in custody may file an answer to the writ, in which he will tell the judge why he thinks you should be in custody.[249] You may respond to the answer, either in a reply brief or in the hearing on your petition.[250]

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235. Mich. Comp. Laws Ann. § 600.4304 (West 2010).
236. Mich. Court Rules of 1985, Rule 3.303(A)(2).
237. Mich. Court Rules of 1985, Rule 3.303(A)(2).
238. Mich. Court Rules of 1985, Rule 3.303(F)(3).
239. Mich. Ct. Rules of 1985, Rule 3.303(C).
240. Mich. Ct. Rules of 1985, Rule 3.303(B).
241. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539 (1987) ("[T]he right to appointed counsel extends to the first appeal of right and no further.").
242. Mich. Ct. Rules of 1985, Rule 3.303(Q)(3).
243. *See* People v. Donaldson, 302 N.W.2d 592, 595, 103 Mich. App. 42, 48–49 (Mich Ct. App. 1981) (holding that the defendant had a right to counsel for the limited purpose of challenging his arrest through habeas corpus).
244. Mich. Comp. Laws § 600.4316 (West 2010).
245. Mich. Ct. Rules of 1985, Rule 3.303(I)(1).
246. Mich. Comp. Laws § 600.4325 (West 2010).
247. Mich. Comp. Laws § 600.4328 (West 2010).
248. Mich. Comp. Laws § 600.4328 (West 2010).
249. Mich. Ct. Rules of 1985, Rule 3.303(K).

When the court issues the preliminary writ (or an order to show cause), it may establish a date and place where the person who has you in custody must take you to determine whether you are being imprisoned illegally. At the hearing the court will consider your petition, the return, and your reply to the return. You will be allowed to produce evidence to support your claim.[251]

6. Your Right to Appeal

In Michigan you may appeal the denial of your writ of habeas corpus.[252] If you do so, you must make sure that the writ has been properly filed with the court where you originally brought the petition. You may also bring a new petition for habeas corpus to an appellate court or the Supreme Court of Michigan.

E. Conclusion

You must meet certain elements in your petition for a writ of habeas corpus to be granted. These include custody (confinement by the state), entitlement to immediate release, imprisonment by the state, and lack of other available procedures, including administrative and grievance procedures. Your petition can complain about a variety of issues post-conviction, parole or probation revocation, or jurisdiction. Remember that the details of this process vary from state to state. You should research the rules in the state where you are imprisoned before petitioning for a writ of state habeas corpus.

250. Mich. Ct. Rules of 1985, Rule 3.303(O).

251. Michigan Ct. Rules of 1985, Rule 3.303(Q)(2)(b).

252. *See* People v. Wendt, 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (finding that the denial of the writ of habeas corpus is reviewable though the scope of review is limited).

A JAILHOUSE LAWYER'S MANUAL

Chapter 22:
How To Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules

Columbia Human Rights Law Review

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CHAPTER 22

HOW TO CHALLENGE ADMINISTRATIVE DECISIONS USING ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES*

A. Introduction

This Chapter is about a New York State law that provides a procedure for you to challenge decisions that were made by a New York State official or administrative body. It is called Article 78 because it can be found starting at Section 7801 of the New York Civil Practice Law and Rules.[1] This Chapter explains when and how to bring an Article 78 proceeding. There are very strict rules and time limits when bringing an Article 78 proceeding, so read the requirements carefully.

Part B of this Chapter explains what you can complain about in an Article 78 petition. Part C describes when you can obtain relief under Article 78. Part D explains the procedure for filing an Article 78 petition. Part E describes how to bring an Article 78 proceeding, and the Appendix has a sample Article 78 petition and supporting papers.

Article 78 is New York State law, and does not apply in other states. Some other states have similar laws to review decisions of officials and administrative agencies. But, if you are in another state, you will have to research what your state's law is and how it differs from New York's Article 78.

1. What is an Article 78 Proceeding?

In an Article 78 proceeding, you ask a state court to review a decision or action of a New York State official or administrative agency, such as a prison official or the Board of Parole, which you believe was unlawful. You can use Article 78, for example, to attack the state's calculation of your good time, a decision to place you in solitary confinement, or a decision to deny you parole. In addition to claiming a violation of a law or regulation in an Article 78 petition, you must also explain in what way the action or inaction you are challenging caused you injury. For example, if you have been denied parole, your injury would be that you were suffering a longer incarceration. If you were not given a fair disciplinary hearing, your injury would be the punishment you received and the record of your alleged violation. If you were wrongfully denied medication, your injury would be pain or sickness.

But, you cannot challenge your conviction and sentence in an Article 78 proceeding because those are judicial decisions (made by a judge or court), as opposed to administrative decisions.[2] For information on challenging convictions and sentences, see *JLM*, Chapter 9 ("Appealing Your Conviction or Sentence"); *JLM*, Chapter 20 ("Using Article 440 of the New York Criminal Procedure to Attack Your Unfair Conviction or Illegal Sentence"); *JLM*, Chapter 13 ("Federal Habeas Corpus"); and *JLM*, Chapter 21 ("State Habeas Corpus").

You start an Article 78 proceeding by filing a petition. Therefore, throughout the proceeding you are referred to as the *petitioner*. Your petition will name the agency or official whose decision you are

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1. N.Y. C.P.L.R. 7801 (McKinney 1994 & Supp. 2006). The standard way of citing this statute, which you may use when you are writing a legal paper and do not want to write "New York Civil Practice Law and Rules," is: N.Y. C.P.L.R. 7801 (the number indicates the section or Rule to which you are referring). Article 78 can be found in 7801 to 7806 of the N.Y. C.P.L.R. You should also look at 401–11 of the N.Y. C.P.L.R., which describe some of the rules for "special proceedings," because Article 78 is a type of special proceeding.

2. N.Y. C.P.L.R. 7801(2) (McKinney 1994 & Supp. 2007). Article 78 may also be used to prevent a judge from hearing a case if he or she has no authority to hear it. *See* Schumer v. Holtzman, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (holding that a request for prohibition under Article 78 is only appropriate if you are asking the court to prevent an official to act beyond their authority).

challenging as the *respondent* (you can name more than one respondent), and will state why you are complaining about the decision and what you would like the court to do about it. After the agency or official files its *answer* responding to the claims you make in your petition, you can file another document called the *reply*.[3]

2. Who Hears Article 78 Proceedings?

Article 78 petitions are heard by New York Supreme Courts,[4] which are the trial courts in New York.[5] Some Article 78 cases that begin in a supreme court will eventually be transferred by that court to the appellate division (the next highest court) if they involve a question of "substantial evidence."[6] Generally, a question of substantial evidence means that the original decision you are asking the court to review was not supported by enough evidence. This will be explained in greater detail in Part B(3).

After the judge reads the papers that you and the administrative agency have submitted, he will make a decision.[7] Although Article 78 permits the judge to hold a hearing, this is extremely rare. As a result, prisoners who file Article 78 actions almost never actually appear in court. It is very likely that the judge will make his decision based upon the papers that you and the respondent (government agency or official) file.

You should note that the law gives agencies a great deal of discretion (freedom to use their own judgment). This means a judge needs a very good reason to overturn an administrative decision, and that you (as the person challenging the administrative action) will lose when it is a close call.

3. What Can You Ask the Court to Do in an Article 78 Proceeding?

When you prepare your Article 78 petition, you may ask the court to grant the following kinds of relief (relief is what the court does for you or what it gives to you):

(1) Order the state official or agency to perform a duty that is required by law;
(2) Order the state official or agency not to act beyond its authority or violate the law; or
(3) Overrule a decision made by the officer or agency, or order it to reconsider the decision because (a) the decision was obviously incorrect or unreasonable; (b) it was based upon an error of law; or (c) it was based upon insufficient evidence.[8]

You should be aware that in Article 78 proceedings, money *damages* generally will not be awarded. The law states that money damages will only be awarded in Article 78 proceedings if they are *incidental* (related) to the main claim.[9] Courts will only grant a *stay* (delay of the proceeding) in unusual circumstances.[10]

There are some kinds of relief you can ask the court to give you even before it hears your Article 78 petition. You may ask the court to stay the official or agency from taking further action until your Article 78 petition has been heard and decided by the court.[11] For example, if you are challenging a decision that would result in you being placed in maximum security or being transferred to another institution, the court might order the official or agency to leave you where you are until the court has made its decision.

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3. N.Y. C.P.L.R. 7804(c) (McKinney 1994 & Supp. 2007).
4. N.Y. C.P.L.R. 7804(b) (McKinney 1994 & Supp. 2007).
5. For a list of the addresses of the supreme courts in each county, see Appendix II at the end of the *JLM*.
6. N.Y. C.P.L.R. 7804(g) (McKinney 1994 & Supp. 2007).
7. N.Y. C.P.L.R. 7806 (McKinney 1994 & Supp. 2007).
8. N.Y. C.P.L.R. 7803 (McKinney 1994 & Supp. 2007).
9. N.Y. C.P.L.R. 7806 (McKinney 1994 & Supp. 2007). This states that "any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner." N.Y. C.P.L.R. 7806 (McKinney 1994 & Supp. 2003). *See* Gross v. Perales, 72 N.Y.2d 231, 236, 527 N.E.2d 1205, 1207, 532 N.Y.S.2d 68, 70–71 (1988) (holding claim for damages was incidental where damages are required under a statute once petitioner won his or her Article 78 claim; "[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in the particular case"); David D. Siegel, New York Practice 984–85 (4th ed. West 2005); N.Y. C.P.L.R. 7806, Practice Commentaries (McKinney 1994 & Supp. 2007).
10. You have to show that you will suffer immediate and serious harm if the stay is not granted. The court will only grant a stay if it decides that the harm you face is greater than the cost of granting the stay. *See* N.Y. C.P.L.R. 7805, Practice Commentaries (McKinney 1994 & Supp. 2007).
11. N.Y. C.P.L.R. 7805 (McKinney 1994 & Supp. 2007).

B. What You Can Complain About Under Article 78

In an Article 78 proceeding, you can raise only certain specific complaints about the state agency or official's action or failure to act. They can include the following:

(1) Whether the agency or official failed to do something the law requires;[12]
(2) Whether the agency or official has done something, is doing something, or is about to do something that is beyond its lawful authority (jurisdiction);[13]
(3) Whether the agency or official made a decision that was unreasonable and irrational or violated lawful procedure;[14] or
(4) Whether the agency or official made a decision at a hearing not based on substantial evidence.[15]

The examples provided above are only meant to give you an idea of what an Article 78 action can be used to challenge; other possibilities exist. Remember, Article 78 may be used to complain about any administrative decision, as long as the requirements for Article 78 review are met. You can also make more than one claim. If you make more than one claim in the same Article 78 proceeding, you may want to distinguish procedural claims from other types of claims. If you can show an agency has failed to follow its own procedures, you may be successful in your Article 78 proceeding. You might challenge a parole decision or sentence calculation, or the action of a Work Assignment Committee or Time Allowance Committee. It may also be helpful to read N.Y. Civil Practice Law and Rules 7803 (to see what the law says you can use Article 78 to challenge), and the annotated version of New York Civil Practice Law and Rules 7803 in McKinney's,[16] which lists the decisions of Article 78 cases, including prisoners' cases.[17]

In the documents you file with the court, you do not need to identify which type of claim or claims (also called "action" or "actions") you are filing. You simply need to state that it is an Article 78 action.[18] Of course, the more detailed your petition is, the easier it will be for the court to understand the reasons you seek legal relief. The following Sections address the different types of claims that are allowed in Article 78 proceedings.

1. Compel Required Action (*Mandamus* to Compel)

The first type of action you can bring occurs when an official has failed to do something that is required by law. This action is called a "*mandamus* to compel." When you bring this type of action, you are basically asking the court to make the official perform an act that is his duty to perform.[19] In this type of action, the duty to be performed must be required by the law and must not be *discretionary* (left to the judgment or decision of the official).[20] This type of Article 78 proceeding is very important because it can force officials to follow the regulations that protect your rights in prison. For example, you can bring an Article 78 proceeding to challenge improper restrictions on your mail,[21] to correct inaccurate disciplinary records,[22] or to make the

12. N.Y. C.P.L.R. 7803(1) (McKinney 1994 & Supp. 2007).
13. N.Y. C.P.L.R. 7803(2) (McKinney 1994 & Supp. 2007).
14. N.Y. C.P.L.R. 7803(3) (McKinney 1994 & Supp. 2007).
15. N.Y. C.P.L.R. 7803(4) (McKinney 1994 & Supp. 2007).
16. See *JLM*, Chapter 2, "Introduction to Legal Research," Part (C)(2)(c)(4), for an explanation of McKinney's.
17. N.Y. C.P.L.R. 7803 (McKinney 1994 & Supp. 2007).
18. David D. Siegel, New York Practice 956 (4th ed. West 2005).
19. *See* Gore v. Corwin, 185 Misc. 2d 825, 826, 714 N.Y.S.2d 427, 428 (Sup. Ct. Ulster County 2000) ("Mandamus is a proceeding to compel a public body or officer to act in accordance with the law.").
20. *See* Citywide Factors, Inc. v. N.Y. City Sch. Const. Auth., 228 A.D.2d. 499, 500, 644 N.Y.S.2d 62, 63 (2d Dept. 1996) ("Mandamus relief is appropriate only where the right to relief is clear, and the duty sought to be compelled is the performance of an act which is required by law and involves no exercise of discretion.").
21. *See* Hicks v. Russi, 219 A.D.2d 851, 851, 632 N.Y.S.2d 341, 342–43 (4th Dept. 1995) (reversing lower court's dismissal of prisoner's Article 78 petition and holding that prison officials could not prevent prisoner from advertising or selling his book to other prisoners by mail and replying to mail orders). *But see* Raqiyb v. Goord, 28 A.D.3d 892, 893, 813 N.Y.S.2d 251, 253 (3d Dept. 2006) (refusing prisoner's claim that regulation of his correspondence with his incarcerated nephew and opening of prisoner's outbound mail with insufficient postage was improper).
22. *See* Hilton v. Dalsheim, 81 A.D.2d 887, 887–88, 439 N.Y.S.2d 157, 157–59 (2d Dept. 1981) (granting prisoner's Article 78 motion to compel the removal from his disciplinary record an alleged disciplinary infraction where he was not provided assistance in investigating the claim made against him and the hearing officer did not interview witnesses, both required by regulations, and because he was not given a written statement from the hearing officer outlining the evidence she relied upon and the reason for the actions she took, which violated the prisoner's due process rights). For an example mixed petition for mandamus to review and to compel, *see* McDermott v. Coughlin, 135 Misc. 2d 659, 661, 664, 516 N.Y.S.2d 834, 836, 838 (Sup. Ct. Chenung County 1987) (granting Article 78 to void decision that a prisoner had

State Board of Parole act on your application for parole when the Board has ignored it and is required to act on it.[23] You also can bring an Article 78 proceeding to make the Board of Parole give you the reasons why your parole was denied.[24] Note that in this last type of proceeding, the remedy provided by the court would be to order the Board of Parole to decide your parole application,[25] or to make the Board give you the reasons for denying your parole.[26] The court would not order a certain result or decision, since this would be up to the discretion of the Board.[27] (To challenge a discretionary decision, see the second and third types of proceedings described below.) Another example of this type of proceeding would be claiming that you are entitled to credit against the length of your sentence for time you spent in custody.[28] In such a case you would be asking the court to order the agency (if you are in a New York State prison, this would be the Department of Correctional Services) to recalculate your sentence.[29]

When you bring this type of proceeding, if possible, you should state in your petition the law, regulation, or case you believe states the official's duty. If you seek relief because the agency did not follow proper procedures, you should try to connect the mistakes to the agency's decision(s). If you do not show this connection, the court might rule the failure to follow appropriate procedures was only *harmless error* (meaning the agency decision would have been the same even if it had followed proper procedures).

2. Review of Discretionary Administrative Decision—"Arbitrary and Capricious" Standard (*Mandamus* to Review)

A second type of action under Article 78 is a claim that asks the court to review a discretionary administrative decision or action (as opposed to the failure of an official to do something required by law, explained above in Part B(1)) because you claim it was unlawfully made without a reason. The law calls such decisions and actions "arbitrary and capricious."[30] An arbitrary and capricious decision or action is one taken "without sound basis in reason and ... without regard to the facts."[31]

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violated disciplinary rules when those rules were not yet filed at the time of the underlying incident, restoring petitioner's privileges and good behavior allowances, and expunging references to the disciplinary action from his record).

23. *See* Hines v. State Bd. of Parole, 267 A.D. 99, 101, 44 N.Y.S.2d 655, 656–57 (3d Dept. 1943) (noting that an application for a *mandamus* to compel was the proper remedy to force the State Board of Parole to take action on prisoner's application for parole); *see also* Utica Cheese v. Barber, 49 N.Y.2d 1028, 1030, 406 N.E.2d 1342, 1343, 429 N.Y.S.2d 405, 406 (1980) (granting an Article 78 claim to force an agency to hold a hearing, as required by law, to decide petitioner's application for a license); *see also* Vulpis v. Dept. of Corr., 154 Misc. 2d 625, 625–29, 585 N.Y.S.2d 954, 954–56 (Sup. Ct. Kings County 1992) (granting prisoner's *mandamus* to compel Department of Corrections to process his application for parole and ensure his release where Department did not follow applicable New York Correction Law).

24. *See* Van Luven v. Henderson, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 899 (4th Dept. 1976) (noting that an Article 78 proceeding is the proper remedy when the Board of Parole fails to comply with its duty to give prisoners notice of reasons for denial of parole); *see also* People *ex rel.* Cender v. Henderson, 51 A.D.2d 683, 683, 378 N.Y.S.2d 205, 206 (4th Dept. 1976) (holding that an Article 78 proceeding is the proper remedy to force the Board of Parole to provide a prisoner with the reasons why his parole was denied).

25. *See* Vulpis v. Dept. of Corr., 154 Misc. 2d 625, 629, 585 N.Y.S.2d 954, 956 (Sup. Ct. Kings County 1992) (ordering Department of Correction to release prisoner who had been denied parole after approving his temporary release or to process his application with "all due speed" if additional approvals were needed for his release).

26. *See* Van Luven v. Henderson, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 898–99 (4th Dept. 1976) (ordering Board to notify prisoner of reasons for denying him parole).

27. Hines v. State Bd. of Parole, 181 Misc. 280, 282, 46 N.Y.S.2d 569, 570–71 (Sup. Ct. Westchester County 1943) *aff'd*, 267 A.D. 881, 46 N.Y.S.2d 572 (2d Dept. 1944) ("[T]he authority to release on parole has been confined to the Board of Parole and not to the courts. Parole cannot be compelled by a mandatory order.").

28. *See* People v. Pugh, 51 A.D.2d 1047, 1048, 381 N.Y.S.2d 417, 419 (2d Dept. 1976) (noting that an Article 78 proceeding is the proper course by which a defendant can obtain credit against his sentence for time spent in custody prior to sentencing); *see also* People v. Searor, 163 A.D.2d 824, 824, 559 N.Y.S.2d 840, 840–41 (4th Dept. 1990) (noting that an Article 78 proceeding is the proper way to challenge the prison authorities' calculation of jail time credit); People v. Blake, 39 A.D.2d 587, 587, 331 N.Y.S.2d 851, 852 (2d Dept. 1972) (noting that if the Department of Correctional Services miscalculated defendant's jail term, his proper remedy would be an Article 78 proceeding); People v. Person, 256 A.D.2d 1232, 1233, 685 N.Y.S.2d 367, 368 (4th Dept. 1998) (noting that an Article 78 proceeding to review the prison authorities' calculation of defendant's jail time credit is the appropriate procedural vehicle for raising that contention).

29. *See*, *e.g.*, Maccio v. Goord, 194 Misc. 2d 805, 808, 756 N.Y.S.2d 412, 414–15 (Sup. Ct. Albany County 2003) (granting in part prisoner's Article 78 petition and directing the Department of Correctional Services to credit him with jail time served); Grier v. Flood, 84 Misc. 2d 4, 8, 375 N.Y.S.2d 506, 509 (Sup. Ct. Nassau County 1975) (granting prisoner's Article 78 petition and directing the Department of Correctional Services to credit him with jail time served).

30. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (discussing

The arbitrary and capricious standard can be used to challenge decisions made by agency officials. It can be used, for example, to challenge a disciplinary decision that was made without following the procedures required by law.[32] If an agency harmed you by violating its own legally-required procedures in making an administrative decision, you can argue that such an action is arbitrary and capricious.[33]

Keep in mind that generally courts believe that administrative officials are in the best position to make decisions regarding prisoners. Thus, it is very difficult to prove that an agency or official acted arbitrarily or capriciously in making a decision that is left up to their judgment. The court will not substitute its own judgment for that of the official,[34] unless you can show that the decision was so irrational as to require that it be overturned.

Examples of decisions that could be challenged as arbitrary under this type of Article 78 proceeding would include most day-to-day prison decisions, such as decisions regarding furlough and temporary release,[35] appearances at disciplinary proceedings,[36] access to evidence,[37] visitation rights, mail access, and transfers. As to this last example, the opportunity to review transfers is very limited, because the Commissioner of Corrections is given "almost unbridled authority to transfer inmates from one facility to another."[38] Challenges to transfers, however, have been upheld where: (1) a prisoner's request for an appropriate transfer for medical reasons is unreasonably denied;[39] (2) a prisoner requires rehabilitative

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standards of judicial review of administrative agencies).

31. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974).

32. *See* Proctor v. Goord, 10 Misc. 3d 229, 232–33, 801 N.Y.S.2d 517, 519–20 (Sup. Ct. Albany County 2005) (holding that the Department of Corrections' failure to eliminate from a prisoner's inmate record an "unusual incident report" for an alleged violation that the prisoner was later found not to have committed was "arbitrary and capricious").

33. *See* People *ex rel.* Furde v. N.Y. City Dept. of Corr., 9 Misc. 3d 268, 274, 796 N.Y.S.2d 891, 896 (Sup. Ct. Bronx County 2005) ("Where an agency promulgates rules and extends greater due process rights than may be required by the Federal Constitution, it is without question that state law mandates that the agency follow its own rules … To do otherwise is to act arbitrarily and capriciously."); *see*, *e.g.*, Liner v. Miles, 133 A.D.2d 962, 520 N.Y.S.2d 470 (3d Dept. 1987) (granting Article 78 petition to review Commissioner of Correctional Services determination that prisoner violated disciplinary rule and finding that determination was not supported by substantial evidence); Nesbitt v. Goord, 12 Misc. 3d 702, 705–06, 813 N.Y.S.2d 897, 900 (Sup. Ct. Albany County 2006) (requiring the Department of Correctional Services to follow its own rules in reviewing requests to award Temporary Work Release after prisoner filed Article 78 petition); People *ex rel.* Furde v. N.Y. City Dept. of Corr., 9 Misc.3d 268, 273–74, 796 N.Y.S.2d 891, 895 (Sup. Ct. Bronx County 2005) (holding that the Department of Corrections acted arbitrarily and capriciously in confining a pretrial detainee to his cell for 23 hours a day, and ordering that detainee be released into general prison population); Martinez v. Baker, 180 Misc. 2d 334, 336, 688 N.Y.S.2d 877, 987 (Sup. Ct. Albany County 1999) (finding that the Department of Correctional Services acted arbitrarily and capriciously in denying Spanish-speaking prisoner participation in a family reunion program where he failed to participate in an alcohol and substance abuse program because he did not have access to a bilingual program or a translator for the existing program).

34. *See* Bd. of Visitors-Marcy Psychiatric Ctr. v. Coughlin, 60 N.Y.2d 14, 20, 453 N.E.2d 1085, 1088, 466 N.Y.S.2d 668, 671 (1983) (noting that the standard of judicial review of a determination by Commissioner of Department of Correctional Services is not whether the court would come to the same determination itself but instead whether the determination was irrational, arbitrary, or capricious).

35. *See* Lopez v. Coughlin, 139 Misc. 2d 851, 853, 529 N.Y.S.2d 247, 249 (Sup. Ct. Albany County 1988) (holding that the Department of Correctional Services' decision to disapprove an application of prisoner with AIDS for participation in a temporary release program was not rationally related to Department's interest in prisoner's health).

36. *See* Boodro v. Coughlin, 142 A.D.2d 820, 822, 530 N.Y.S.2d 337, 340 (3d Dept. 1988) (holding that the Hearing Officer acted arbitrarily and capriciously in excluding prisoner from his disciplinary hearing). *But see* Grant v. Senkowski, 146 A.D.2d 948, 950, 537 N.Y.S.2d 323, 325 (3d Dept. 1989) (holding that the Article 78 petition was properly dismissed, as ejecting the prisoner from a disciplinary hearing was not arbitrary or capricious since the ejection was due to prisoner's misbehavior and occurred only after warnings).

37. *See* Coleman v. Coombe, 65 N.Y.2d 777, 780, 482 N.E.2d 562, 562, 492 N.Y.S.2d 944, 944 (1985) (holding that where prison regulations allowed prisoner to call witnesses on his behalf in disciplinary proceedings, and calling witness did not jeopardize safety or correction goals, prisoner was entitled to call his brother as a witness to give testimony in mitigation of penalty to be imposed); *see also* Wilson v. Coughlin, 186 A.D.2d 1090, 1090–91, 590 N.Y.S.2d 798, 798 (4th Dept. 1992) (granting a prisoner's request to annul an official's determination in a disciplinary hearing because the prisoner had not been allowed to offer evidence of mitigating circumstances, which is a relevant factor in prison disciplinary hearings).

38. Johnson v. Ward, 64 A.D.2d 186, 188, 409 N.Y.S.2d 670, 672 (3d Dept. 1978); *see also* N.Y. Correct. Law § 23 (McKinney 2003). *But see* Salahuddin v. Coughlin, 202 A.D.2d 835, 836, 609 N.Y.S.2d 105, 106 (3d Dept. 1994) (noting that the broad authority to transfer does not permit transfers that are made for the purpose of denying a prisoner a constitutional right or in retaliation for the exercise of such a right).

39. *See* Barnett v. Metz, 55 A.D.2d 997, 997–98, 390 N.Y.S.2d 701, 701–02 (3d Dept. 1977) (holding that while

treatment that has been completely withheld;[40] and (3) a member of an inmate grievance committee, who represents other prisoners and abides by the rules of the institution, is transferred without a hearing or compelling emergency.[41]

Challenges based on a claim that the administrative agency abused its discretion by giving a punishment that is too severe can also be made by filing an Article 78 petition because such punishments are usually the result of administrative hearings. These petitions, which claim an "abuse of discretion ... as to the measure or mode of penalty or discipline imposed," must meet a very high legal standard.[42] Thus, such actions are very rarely successful. The court will only set aside an administrative agency's punishment or disciplinary measures if they are "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness."[43]

You should also remember the "arbitrary and capricious" standard applies to the reasons that the agency or official gave at the time it made its decision. If the agency's original reasons are arbitrary and capricious, the court may reject other new justifications later offered by the agency in the Article 78 proceeding.[44]

3. Review of Hearing Board Decision—"Substantial Evidence Test" (*Certiorari* to Review)

A third type of Article 78 proceeding is a claim stating that the court should review a decision made by a hearing board because the determination made at the hearing was not supported by substantial evidence. In these cases, you challenge decisions that were made in hearings or in other formal, court-like settings. If you believe the evidence produced at the hearing was inadequate to support the decision, you can use an Article 78 proceeding to ask a court to review the decision. A court can review the record (an official written report) from the hearing to see whether it supports the decision. Any sort of disciplinary hearing or parole board decision that is based on submission of evidence and a record can be challenged in this type of action if the evidence produced was inadequate to support the decision.[45] By bringing this type of claim, you are asking the court to review the record on which the agency or official based the decision.

The standard used by the court in reviewing Article 78 challenges to administrative decisions made after administrative hearings is the "substantial evidence test." This means that the court will look to see if there was enough evidence in the record for the administrative official to decide as he did. It does not mean that the court will ask whether the official made the right decision.

Once again, the court will not substitute its judgment for that of the agency, but if there were mistakes or errors in the evidence against you, the court may overturn the decision. "Substantial" means there must be enough evidence so that a reasonable person could make the same decision the agency made. It does not mean most of the evidence supports the decision made by the administrative agency.

For example, some prisoners have successfully challenged disciplinary decisions where the correctional officer's misbehavior reports relied on at the hearing were based on *hearsay*, which means that they did not

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decisions about transfers between institutions are generally left to the administration, where a prisoner could show that the prison arbitrarily abused this discretion by failing to consider medical evidence, the decision could be challenged through Article 78).

40. *See* People *ex rel.* Ceschini v. Warden, 30 A.D.2d 649, 649, 291 N.Y.S.2d 200, 201–02 (1st Dept. 1968) (holding that where a person sentenced to an institution for rehabilitation claims that he is being deprived of any rehabilitative treatment, the court should inquire into that allegation).

41. *See* Johnson v. Ward, 64 A.D.2d 186, 189–90, 409 N.Y.S.2d 670, 673 (3d Dept. 1978) (holding that an prisoner-member of the Inmate Grievance Resolution Committee may not be transferred to another facility without a prior hearing unless the member's presence or conduct creates an emergency and transfer is immediately necessary to protect the facility or its personnel, in which event, the hearing on his transfer shall be held as soon as practicable at the receiving facility).

42. *See*, *e.g.*, Regan v. Coughlin, 86 A.D.2d 913, 913, 448 N.Y.S.2d 258, 259 (3d Dept. 1982) (concluding that punishment of 60 days of keeplock, loss of commissary privileges and 30 days of good time, and 80 days of restricted visits was not disproportionate for prisoner who threw a handkerchief to a visitor in the visiting room, because the penalty was not so disproportionate as to be "shocking to [the court's] sense of fairness").

43. Pell v. Bd. of Educ., 34 N.Y.2d 222, 233, 313 N.E.2d 321, 326, 356 N.Y.S.2d 833, 841 (1974) (quoting Stoltz v. Bd. of Regents, 4 A.D.2d 361, 364, 165 N.Y.S.2d 179, 182 (3d Dept. 1957)).

44. *See* Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv., 77 N.Y.2d 753, 759, 573 N.E.2d 562, 565, 570 N.Y.S.2d 474, 479 (1991) (holding that the reasons the agency later offered for dismissal of employee could not be used because its original dismissal was arbitrary and capricious).

45. See *JLM*, Chapter 18 for an explanation of disciplinary proceedings, and *JLM*, Chapter 36 for an explanation of parole.

contain first-hand knowledge.[46] If the only evidence against you is based on reports of people who were not present or did not actually see you, the court may find this hearsay evidence insufficient to support a finding of misconduct.

Many prisoners also try to challenge disciplinary decisions that are based on reports by informants. Courts recognize the importance of protecting the confidentiality of informants, and will uphold determinations even where the prisoner has not been allowed to see or to cross-examine the informants. In a decision by the highest court of New York, a prisoner tried to challenge a disciplinary hearing decision by arguing that the hearing officer should be required to interview the informants personally in order to determine their credibility.[47] The court held that although a hearing officer must determine the informants' credibility, a face-to-face interview is not necessary to make this determination.[48] Recently, prisoners have successfully challenged hearing decisions by arguing that the reports written by corrections officers of informants' statements were not detailed enough for the hearing officer to determine the credibility of the informants.[49]

Another example of prisoners' challenges of hearing decisions is in the area of drug violations.[50] Article 78 proceedings challenging the reliability or accuracy of evidence relied on in drug tests have occasionally been successful.[51]

Also, in at least one case, a prisoner successfully challenged a determination that he had been in possession of a weapon by pointing out that the evidence on the record was insufficient to support the decision.[52] In that case, the court ruled that there was not enough evidence to show that a weapon found in a cell belonged to a prisoner who had just been transferred to that cell.[53]

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46. *See* Rodriguez v. Coughlin, 176 A.D.2d 1234, 1234, 577 N.Y.S.2d 190, 191 (4th Dept. 1991) (finding that misbehavior reports did not provide substantial evidence to support findings that prisoner was guilty because they did not show that correctional officers who signed them had personal knowledge of facts recited therein); *see also* Deresky v. Scully, 156 A.D.2d 362, 363, 548 N.Y.S.2d 318, 319 (2d Dept. 1989) (finding that the prison's conclusion that the prisoner started the fire in the cell of another prisoner was not sufficiently supported by evidence where the only evidence of guilt was hearsay testimony of officer who was not present, and the prisoner offered credible testimony that contradicted such hearsay).

47. Abdur-Raheem v. Mann, 85 N.Y.2d 113, 118, 647 N.E.2d 1266, 1269, 623 N.Y.S.2d 758, 761 (1995).

48. Abdur-Raheem v. Mann, 85 N.Y.2d 113, 121, 647 N.E.2d 1266, 1271, 623 N.Y.S.2d 758, 763 (1995).

49. Milland v. Goord, 264 A.D.2d 846, 846–47, 698 N.Y.S.2d 245, 246 (2d Dept. 1999) ("[T]estimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to enable the Hearing Officer to independently assess the credibility and reliability of the informants."). *See also* Agosto v. Goord, 264 A.D.2d 840, 698 N.Y.S.2d 244 (2d Dept. 1999) (holding that a determination must be annulled because "testimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to enable the Hearing Officer to independently assess the credibility and the reliability of the informants"). *But see* Medina v. Goord, 253 A.D.2d 973, 973, 678 N.Y.S.2d 919, 919 (3d Dept. 1998) (upholding the hearing officer's determination as supported "by sufficiently detailed information from which [the hearing officer] could independently assess [the informants'] reliability"); Valentin v. Goord, 259 A.D.2d 911, 912, 687 N.Y.S.2d 208 (3d Dept. 1999) (same holding as *Medina*).

50. *See* Venegas v. Irvin, 249 A.D.2d 982, 982, 672 N.Y.S.2d 200, 201 (4th Dept. 1998) (holding that misbehavior report that stated that the correction officer saw the prisoner throw a marijuana cigarette on the floor, and the fact that the cigarette later tested positive for marijuana, were substantial evidence of drug possession by the prisoner despite there being an issue as to when the cigarette was tested); *see also* Rollison v. Scully, 181 A.D.2d 734, 735, 580 N.Y.S.2d 480, 480 (2d Dept. 1992) (holding that the Department of Corrections failed to produce substantial evidence that prisoner's wife had brought cocaine to the correctional facility because the Department had not introduced documents into evidence as required by regulations).

51. *See* Wisniewski v. Smith, 133 A.D.2d 541, 541, 519 N.Y.S.2d 908, 909 (4th Dept. 1987) (holding that correctional facility superintendent's determination that individual violated institutional rule by using marijuana was not supported by substantial evidence where reliability of tests upon which the finding was based was not established on the record); *see also* Kalish v. Keane, 256 A.D.2d 343, 344, 681 N.Y.S.2d 336, 337 (2d Dept. 1998) (finding that there was no substantial evidence for drug violation by prisoner where prisoner produced evidence that he was on prescription medication that could produce false positive drug tests, hearing officer consulted with a representative of manufacturer of a different urine test than the one used by the prison, and representative did not know whether the medication at issue could cause a false positive test result); Kincaide v. Coughlin, 86 A.D.2d 893, 893, 447 N.Y.S.2d 521, 522 (2d Dept. 1982) (finding that the decision in superintendent's proceeding regarding prisoner's possession of marijuana was not supported by substantial evidence where test evidence was received without laying a foundation to show the nature of the test and the procedures utilized). *But see* Holmes v. Coughlin, 182 A.D.2d 1121, 1121–22, 583 N.Y.S.2d 703, 704 (4th Dept. 1992) (upholding superintendent's determination that the prisoner used illegal drugs as sufficiently supported by two positive Syva EMIT Drug Detection System Tests, and commenting on the tests' scientific reliability and validity).

52. Varela v. Coughlin, 203 A.D.2d 630, 631–32, 610 N.Y.S.2d 103, 104 (3d Dept. 1994). *But see* Patterson v.

If you bring a substantial evidence claim, the state supreme court will first try to see if the case can be resolved on any other grounds, such as failure to comply with the statute of limitations (the time limit after the event occurred in which you must bring your claim; see discussion below in Part C(3)). If the case cannot be resolved on these other grounds, then the court will refer it to the appellate court (called the appellate division).[54] One result of this is that it will take longer before your case is decided.

4. Challenge Legal Authority for State Action (Prohibition)

The fourth type of Article 78 proceeding arises when you challenge the state's action as having gone beyond its lawful authority. In this type of proceeding you are asking the court to stop an official from acting beyond his authority or jurisdiction. This type of case is difficult to prove, and rarely successful in court. Nevertheless, if you feel that an official is going to act in a way that will injure you, and the official is not allowed by law to act in that way, this type of Article 78 proceeding is the way to prevent the action.[55]

C. When You Can Obtain Relief Under Article 78

There are three important limitations on the use of Article 78 with which you must be familiar, or your case may be dismissed. They are described below.

1. You May Only Challenge Administrative Decisions

Article 78 may only be used to challenge administrative determinations of a New York state officer or agency. It generally cannot be used to challenge the decisions of a judge or court, such as criminal convictions or criminal sentences. However, it can be used to challenge several types of other actions by judges. Article 78 may be used to challenge a punishment a court gives for contempt of court.[56] It can also be used where the judge has made a decision that exceeded his authority (this is called prohibition—see Part B(4)), or to challenge a judge's failure to act (called *mandamus*—see Part B(1)).

2. You Must Exhaust All Administrative Remedies

The administrative determination you challenge must be final.[57] This means that a decision-maker must have come to a definitive decision that has caused you an actual injury of some sort. There have been many cases dealing with the question of what decisions are considered final. If possible, you should read the Practice Commentary and Notes of Decisions of Section 217 of N.Y. C.P.L.R. to see how courts have decided the issue.

In addition to being final, there must be no way for you to appeal the decision any further within the administrative agency.[58] If it is possible for you to appeal the decision to a higher state officer, you must do

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Senkowski, 204 A.D.2d 831, 832–33, 612 N.Y.S.2d 84, 85 (3d Dept. 1994) (finding that written misbehavior report by officer who searched prisoner's clothes was sufficient evidence to support finding by superintendent that the prisoner possessed weapon, and that the prisoner's claim that the jacket was not his merely created issue of credibility for the hearing officer); Swindell v. Coughlin, 215 A.D.2d 855, 855, 626 N.Y.S.2d 329, 329 (3d Dept. 1995) (concluding that evidence of six ball bearings discovered in prisoner's cell hidden in a dental floss container substantially supported determination that prisoner was guilty of possessing contraband classified as a weapon; prisoner's claim that he found the ball bearings during his work detail and was waiting to turn them over to his supervisor was not supported by the supervisor, and was not enough to raise a doubt as to the sufficiency of the evidence supporting the decision).

53. Varela v. Coughlin, 203 A.D.2d 630, 631, 610 N.Y.S.2d 103, 103–04 (3d Dept. 1994). *But see* Torres v. Coughlin, 213 A.D.2d 861, 861, 624 N.Y.S.2d 67, 68 (3d Dept. 1995) (distinguishing *Varela* and holding that there was sufficient evidence that a prisoner possessed a weapon when the prisoner had been in the facility for 20 days and had been in the living area where the weapon was found for eight days).

54. N.Y. C.P.L.R. 7804(g) (McKinney 1994).

55. *See* Schumer v. Holtzman, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (holding that a request for prohibition under Article 78 is only appropriate if you are asking the court to prevent an official from acting beyond his or her authority).

56. *See* Loeber v. Teresi, 256 A.D.2d 747, 748–49, 681 N.Y.S.2d 416, 418 (3d Dept. 1998) (holding that an Article 78 petition can be used to challenge a judge's summary contempt order). A summary contempt order is one in which there is "no right to an evidentiary hearing, the right to counsel, or the opportunity for adjournment to prepare a defense," and may only be given when the actions giving rise to the contempt order take place in the "immediate view and presence" of the judge and the action disrupts the court proceeding. Williams v. Cornelius, 76 N.Y.2d 542, 546, 563, N.E.2d 15, 17, 561 N.Y.S.2d 701, 703 (1990).

57. N.Y. C.P.L.R. 7801(1) (McKinney 1994).

58. *See* Essex County v. Zagata, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998) (holding

so before seeking Article 78 relief. In other words, you must go through every normally available step in the administrative process. This is called "exhaustion of remedies." If you have failed to follow the normal administrative procedure to the fullest extent possible, the court may refuse to hear your Article 78 petition.[59] This means that it is important to be aware of the ways in which you can challenge or appeal the decisions of prison officials within the prison or corrections system.[60] You should be aware that many administrative appeals require you to act quickly. A Superintendent's Hearing decision, for example, must be appealed to the Commissioner within thirty days.[61] If you fail to meet this deadline, you may be prevented from bringing an Article 78 petition on the same claim. There are time limits at each level of administrative appeal. If you do not receive a response by the time limit, you can proceed to the next level of appeal.[62] For more information on Inmate Grievance Procedures, see *JLM*, Chapter 15.

There are a few exceptions to the general rule requiring exhaustion of administrative remedies, but keep in mind that these exceptions are rarely invoked by the court and normally should not be relied upon. The first exception is in cases where an appeal would have no chance of success. In *Martin v. Ambach*,[63] the court observed that the finality requirement of N.Y. C.P.L.R. 7801(1) may be disregarded if the pursuit of an administrative remedy "reasonably appears to be futile."[64] Note that courts will almost never find that an appeal "reasonably appears to be futile."[65]

A second exception to the exhaustion requirement, also pointed out by the court in *Martin v. Ambach*, may arise when a non-final order will result in irreparable harm in the absence of judicial intervention.[66] Thus, if a decision will take effect before you can appeal it, you can file a motion under Article 78 to ask the court to intervene to prevent the harm. This could include a transfer out of your facility or a decision of a disciplinary hearing board, which might take effect before you have a chance to appeal. Additionally, in a case that was not brought by a prisoner, a court has ruled that exhaustion is not required if someone is seeking medical benefits to which he is entitled under state and federal law because it "creates an unnecessary hardship" on "poor, needy individuals."[67]

The third exception is in cases where the agency's action is challenged as beyond its powers. In *Dineen v. Borghard*,[68] the court held that the exhaustion rule "need not be followed when an agency's action is alleged to be unconstitutional or wholly beyond its powers."[69] This means that if your Article 78 petition claims that

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under New York Civil Practice Law and Rules 7801 that an agency determination is final when: (1) the agency's position is definitive; (2) the position inflicts actual injury; and (3) no further agency action can remove or lessen the injury).

59. *See* Alamin v. N.Y. State Dept. of Corr. Services, 241 A.D.2d 586, 587, 660 N.Y.S.2d 746, 747 (3d Dept. 1997) (requiring petitioner to exhaust administrative remedies before initiating an Article 78 petition); McCloud v. Coughlin, 102 A.D.2d 854, 854, 476 N.Y.S.2d 630, 631 (2d Dept. 1984) (dismissing Article 78 petition because petitioner had not appealed superintendent's disciplinary ruling to the Commissioner of the Department of Correctional Services).

60. *See* Farinaro v. Leonardo, 143 A.D.2d 492, 492–93, 532 N.Y.S.2d 601, 602 (3d Dept. 1988) (holding that a prisoner who was informed of the proper administrative procedure to challenge decision of prison officials to withhold martial arts catalog from him and did not follow them had failed to exhaust administrative remedies, and could not obtain judicial relief).

61. N.Y. Comp. Codes R & Regs. tit. 7, § 254.8 (2007).

62. *See*, *e.g.*, State of New York, Department of Correctional Services, Directive No. 4040 § VI(G) (Aug. 22, 2003); N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(c) (2003) (if you appeal a parole decision and the appeal unit does not issue its findings within four months of receiving your appeal, you are considered to have exhausted your administrative remedies and may bring your appeal to the courts).

63. Martin v. Ambach, 85 A.D.2d 869, 446 N.Y.S.2d 468 (3d Dept. 1981), *aff'd*, 57 N.Y.2d 1001, 443, N.E.2d 953, 457 N.Y.S.2d 478 (1982).

64. Martin v. Ambach, 85 A.D.2d 869, 870, 446 N.Y.S.2d 468, 470 (3d Dept. 1981) (noting that the lower court had relied upon such reasoning) (noting that the lower court had relied upon such reasoning).

65. *See* Martin v. Ambach, 85 A.D.2d 869, 871, 446 N.Y.S.2d 468, 470 (3d Dept. 1981) (stating that this should be the exception rather than the rule, occurring only when necessary to avoid irreparable harm. *See also* Practice Commentary to N.Y. C.P.L.R. 7801(7) (McKinney 1994) (stating that the three exceptions lie in the court's discretion and "are rarely invoked in the context of Article 78 review").

66. Martin v. Ambach, 85 A.D.2d 869, 871, 446 N.Y.S.2d 468, 470 (3d Dept. 1981).

67. *See* Lutsky v. Shuart, 74 Misc. 2d 436, 438, 342 N.Y.S.2d 709, 712 (Sup. Ct. Nassau County 1973), *aff'd*, 43 A.D.2d 1016, 351 N.Y.S.2d 946 (2d Dept. 1974) (holding that welfare recipient seeking medical benefits does not have to exhaust administrative remedies before bringing an Article 78 petition); *see also* Valdes v. Kirby, 92 Misc. 2d 367, 371, 399 N.Y.S.2d 972, 974–75 (Sup. Ct. Suffolk County 1977) (holding exhaustion not required for petitioner seeking housing shelter allowance and facing possible eviction).

68. Dineen v. Borghard, 100 A.D.2d 547, 473 N.Y.S.2d 247 (2d Dept. 1984).

69. Dineen v. Borghard, 100 A.D.2d 547, 548–49, 473 N.Y.S.2d 247, 248–49 (2d Dept. 1984) (holding plaintiff was

a prison official acted unconstitutionally in depriving you of some protected right, it is possible that a court may find that you do not need to have first exhausted all of your administrative appeals. This exception is a limited one and, as one court has pointed out, "[t]he mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the requested relief."[70] For example, in *Levine v. Board of Education*, a court rejected a teacher's claim that the exhaustion requirement did not apply due to constitutional violations. The court held that the exception to the exhaustion requirement did not apply when the claims were based on factual issues that the agency could review because the necessary factual record first had to be established.[71]

Thus, it is possible that a court will allow an Article 78 motion to proceed without exhaustion of all the administrative remedies when petitioner can demonstrate: (1) futility of the administrative remedy, (2) irreparable harm in absence of prompt judicial intervention, or (3) unconstitutional action. Remember that these exceptions are rarely recognized, and it is safest to pursue all possible appeals within the agency or prison system before filing an Article 78 proceeding in court.

3. Your Article 78 Petition Must Be Filed Within Four Months After the Administrative Decision Becomes Final

Your Article 78 petition must be filed with the court within four months of the date that the administrative determination that you want to challenge becomes final.[72] This four-month period is called the statute of limitations. As soon as you have exhausted your administrative appeals, you should get to work on writing and filing your petition. Remember, you must file the petition before the four-month time limit is up. If you wait longer than four months from the time when the decision you are challenging became final and binding upon you, the court will dismiss your petition. Part D(8) explains how you can file and serve your petition.

To find out the deadline for filing your papers, you must first determine when the decision you are complaining about became final. A decision becomes final when it has an actual impact upon you. Thus, the statute of limitations will usually run from the date when you receive *notice* of the determination that you are challenging. Keep in mind that you must exhaust your administrative remedies (as discussed above in Part C(2)). This means that if you receive notice of a determination, which you then appeal to the next administrative level, the statute of limitations will not begin to run until you receive final notice from the highest possible administrative authority. Sometimes the authority may not notify you; if the designated time has passed, you can assume your appeal has been denied.[73]

If you apply for a rehearing (rather than another appeal) by the highest agency or prison board, the courts will not extend the statute of limitations period to cover this rehearing application period unless the law entitles you to a rehearing.[74] Thus, unless a rehearing is required by law, you should treat the notice of the final appeal decision as the time when the four-month statute of limitations period begins. The law on statutes of limitations is complicated. If you are confused about when you need to file your papers, it is a

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not required to pursue an administrative remedy since he was alleging violations of his statutory and constitutional rights).

70. Levine v. Bd. of Educ. of N.Y., 186 A.D.2d 743, 744, 589 N.Y.S.2d 181, 183 (2d Dept. 1992).

71. Levine v. Bd. of Educ. of N.Y., 186 A.D.2d 743, 744, 589 N.Y.S.2d 181, 183 (2d Dept. 1992); *see also* Timber Ridge Homes v. State, 223 A.D.2d. 635, 636, 637 N.Y.S.2d 179, 180 (2d Dept. 1996) (holding that constitutional challenge that depends on the facts cannot be brought until the factual record is developed by the agency).

72. N.Y. C.P.L.R. 217(1) (McKinney 2003).

73. *See*, *e.g.*, N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(c) (2006) (holding that an appeal of a parole decision that does not result in the appeal unit issuing its findings within four months of receiving the appeal, leads to the exhaustion of administrative remedies and an appeal may be brought to the courts).

74. *See* De Milio v. Borghard, 55 N.Y.2d 216, 220, 433 N.E.2d 506, 507–08, 448 N.Y.S.2d 441, 442–43 (1982) (holding that the four-month statute of limitations in an Article 78 action brought by a government employee to challenge his discharge (firing) from work begins to run on the termination date of his employment and not on the later date when his request for reconsideration of discharge was denied); *see also* Loughlin v. Ross, 208 A.D.2d 631, 631, 618 N.Y.S.2d 231, 232 (2d Dept. 1994) (finding that in an Article 78 proceeding to review Commissioner's determination following disciplinary hearing, the statute of limitations began to run when the determination sustaining the disciplinary charges against the prisoner was affirmed on administrative appeal; the attempt by the petitioner to secure a reconsideration of the determination did not extend the statute of limitations).

good idea to plan on filing them within four months of the date you receive the order or decision about which you are complaining.[75]

Following *service*, be sure to send *proof of service* to the court clerk. Proof of service should include an affidavit of service, which states that the papers were served on the Attorney General, the Attorney General's Office, and the respondents.

D. Procedures for Filing an Article 78 Petition

In the past few years, New York State has changed its civil procedure law (the law that tells you when, where, and how to file claims). Even though the new rules are similar to the Federal Rules of Civil Procedure, there are significant differences. Even if you are familiar with the Federal Rules, you should still review New York's rules carefully.[76]

The Appendix of this Chapter contains examples of the legal papers that you must file with the court in order to use Article 78. This Chapter provides the essential information that you will need to use these examples. *Do not tear the papers out of the book*. Copy the printed language on your own paper, fill in the blanks, and replace any italicized words with the facts that apply to your case. The court might reject your papers if you tear them out of this book.

Under the current law, you need to send *an original and one copy* of each of the following (explained below) to the county supreme court clerk, the respondents, and the Attorney General:

(1) A Notice of Petition or an Order to Show Cause;
(2) A Verified Petition;
(3) All exhibits and supporting affidavits attached to the petition;
(4) Either the full filing fee or a reduced fee with an affidavit that supports your claim that you are too poor to pay the full filing fee.[77] The full filing fee is $190.[78] Caution: If you fail to enclose either the fee, or the poor person's motion and affidavit, you will *not* get an index number. Without the index number, you cannot proceed with your claim;
(5) A "Request for Judicial Intervention" ("RJI");[79] and
(6) A "Request for an Index Number."

If possible, you should try to keep a copy of all papers that you file during the Article 78 proceeding.

1. Starting the Proceeding

You begin an Article 78 proceeding by filing either a Notice of Petition or an Order to Show Cause, supporting affidavit(s), a Verified Petition, the filing fee, the Request for Judicial Intervention, and the Request for an Index Number.[80] The following sections will explain how to do each of these things.

"Filing" in an Article 78 proceeding means delivery of the Verified Petition to the court clerk with the required fee.[81]

You should file your Article 78 petition in the supreme court for the county in which the administrative decision you are challenging was made, the county where the administrative appeal was decided, or the county in which the respondent has his main office (usually Albany County).[82] This rule applies even if you have been transferred or released. See Appendix II at the end of the *JLM* for a list of the addresses of the supreme courts for the various counties.

By filing, you begin the proceeding and *interpose* the claim for statute of limitations purposes. This means that if you filed within the statute of limitations, the respondent cannot later get the action dismissed

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75. N.Y. C.P.L.R. 7801: 7 Practice Commentary (McKinney 1994).

76. If you are going to look through the procedure code yourself, remember the rules for actions are made applicable to special proceedings such as Article 78 proceedings through the definitional section of N.Y. C.P.L.R. 105(b), unless another section provides otherwise.

77. N.Y. C.P.L.R. 1101 (McKinney 1997 & Supp. 2007); N.Y. C.P.L.R. 8018 (McKinney Supp. 2007).

78. N.Y. C.P.L.R. 8018 (McKinney 2003 & Supp. 2007).

79. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.6 (2006). See Appendix A of this Chapter for a sample of a Request for Judicial Intervention.

80. N.Y. C.P.L.R. 203(c) (McKinney 2003), 304 (McKinney 2001 and Supp. 2004), 8018 (McKinney 1981 and Supp. 2007).

81. N.Y. C.P.L.R. 304 (McKinney 2001 and Supp. 2007).

82. N.Y. C.P.L.R. 506(b) (McKinney 2006).

on the grounds that it took too long for you to file successfully. You must file within four months of the time the decision that you are challenging becomes final.

However, the real benefits of this initial filing are not great. Your case can still be dismissed unless service is completed and proof of service is filed within four months and fifteen days after you receive the challenged decision. Do not be lulled into a false sense of security because you have filed within the statute of limitations. There are still strict time limits that require you to complete the entire process very quickly. However, filing your petition will get you an index number.

2. Order to Show Cause or Notice of Petition

Since you are in prison, unless you can get someone else (like a friend, relative, or a private service) to assist you with service, you should commence the proceedings with an Order to Show Cause. An Order to Show Cause is an order signed by the judge directing that a petition be heard immediately or sooner than the twenty days that is normally the minimum time. It is used in situations where there is a need for an immediate hearing instead of a Notice of Petition. Often an Order to Show Cause not only requires an expedited hearing but stays (pauses) the threatened official action until the claim is heard.

In the Order to Show Cause, you should ask the court to allow you to serve the respondents and the Attorney General by mail. Be sure to specifically include a request to the judge to allow service by mail. In the affidavit attached to your Order to Show Cause, you should explain why you need an Order to Show Cause. The reasons can be because you are in prison and cannot carry out *personal service*, meaning that you cannot physically deliver your petition directly to the respondent. Another reason you could have for needing an Order to Show Cause is that the situation that your Article 78 petition is trying to prevent is likely to happen in the next twenty days. For example, if you are scheduled to be removed from a work release program in less than twenty days, you may want to use an Order to Show Cause to try to prevent this from happening. See the example of an "Order to Show Cause" in Appendix A of this Chapter.

Alternatively, you can file a Notice of Petition. The Notice of Petition includes the name of the respondents, the nature of your claim, and the date and place of the hearing where you want your petition heard. A Notice of Petition must be personally served on the respondents, and the Attorney General's Office or the case may be dismissed. Unlike an Order to Show Cause, if you file a Notice of Petition, you must serve it at least twenty days before the date you name as the date of the hearing.[83] Note that if you must serve by mail, you must file an Order to Show Cause, not a Notice of Petition.

You should attach a copy of your petition to the Order to Show Cause or Notice of Petition. The petition should contain a written statement explaining the facts and your reasons for requesting the relief you seek. See the example of a "Notice of Petition" in Appendix A to this Chapter.

(a) The Return Date

If you file an Order to Show Cause, the court will set the *return date*. This is the date on which the case will be heard by the court. The return date will be on the signed order, which the court will mail to you.

An Order to Show Cause can speed up the hearing date so that it may occur in a few days, rather than the usual twenty days for a Notice of Petition. You can pick a date for the hearing in the order that you send to the court. You should pick a date that will be a week or two from the date on which you think the court will receive your papers. If the court cannot schedule a hearing on that day, the court clerk will cross out the date that you selected and write another one on the order. The clerk will let you know if this has occurred.

In your Order to Show Cause, you must indicate the date by which you will mail or deliver ("serve") copies of the papers to the respondent, and the appropriate Attorney General's office. You should give the respondent two to three weeks between the date on which he receives the papers and the date that you set for the court appearance. You should take into account the time that it will take for the papers to go through the mail after you send them out.

If you file a Notice of Petition, you must specify the return date. Under the N.Y. Civil Practice Law and Rules, the return date must be at least twenty days after the date on which the respondent has been served.[84] Thus, you should choose a date that is more than twenty days from the date by which you will have

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83. N.Y. C.P.L.R. 7804(c) (McKinney 1994). You should send your papers to the Attorney General by sending it to the address of the assistant attorney general in the county in which the court sits. Your prison library should have the address; otherwise, you should write to the Court Clerk.

84. N.Y. C.P.L.R. 7804(c) (McKinney 1994).

served the respondents. If the court wants to hear your Article 78 action on another day, it can change the date. The court should notify you if it changes the return date. Your Notice of Petition can be dismissed if you do not provide a return date.[85]

(b) The Respondents

You should name as the respondent the official or agency whose action or inaction you are challenging. In addition to the official's name, you should also include his or her official title. By including the title, you can prevent your case from being dismissed if the official who committed the violation changes jobs. Otherwise, you would need to substitute the name of the new official.[86] If your case involves prison records, you may want to name the Commissioner of the Department of Correctional Services ("DOCS") as a respondent.

The more people whom you list as respondents, the more people there are who you have to serve with the documents. Thus, it is generally wise only to list the officials immediately involved and the Commissioner of the Department of Correctional Services. For example, in disciplinary cases, it is usually enough to name the Commissioner of the Department of Correctional Services, the superintendent of the facility where the hearing was held, or the state director of disciplinary programs (the person responsible for reviewing administrative appeals).

(c) Stay

If you request and the judge grants a stay against the respondent, the official or agency's decision does not take effect until after your petition has been heard.[87] For example, if you are challenging a decision to place you in solitary confinement, you might ask the judge for an order that you not be placed there while you are waiting for a decision on your petition. Without a stay, your time in solitary might be up before the judge decides your petition, and the only thing you could then accomplish would be to have the decision *expunged* (removed) from your records. If you want a stay, you must ask for it in the Order to Show Cause that you send to the court, like the sample order at the end of this Chapter.

3. Article 78 Petition

The heart of your Article 78 papers is the petition. The petition identifies the parties, explains the basis for *venue* in a particular county, and states the facts of your case, your legal claims, and the relief you are asking the court to give you. Relief simply means what you are asking the judge to do. You should submit an affidavit (a sworn statement by you or another person) to support the facts in the petition. You can also attach copies of documents relating to your case.

Be sure that you think carefully in advance and make the strongest arguments possible when you draft your petition. For example, if the Board of Parole has done something illegal or irregular in your case, emphasize that the action is illegal, or that it is unfair for the Board to treat you differently from the other prisoners. Also, if there are standard procedures or regulations that you know were not followed in your case, you should point this out. If you claim that the agency did not follow its procedures, you should also claim that the decision it reached may be wrong because of this.

4. Verification of Petition

Your petition must also include a *verification*—a short statement in which you swear to the truth of the statements in your petition. It must include the statement that what is alleged in your petition "is true … except as to those matters alleged on information and belief and that as to those matters [insert your name] believes them to be true."[88] You should use this exact language and sign your petition in front of a notary. You can find a sample verification in the Appendix at the end of this Chapter.

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85. *See* Vetrone v. Mackin, 216 A.D.2d 839, 840–41, 628 N.Y.S.2d 866, 867 (3d Dept. 1995) (holding that the Notice of Petition is null and void if it does not specify a return date at the time of filing and at the time of service on the respondent); Grover v. Wing, 246 A.D.2d 813, 814, 667 N.Y.S.2d 785, 786 (3d Dept. 1998) (determining that a petition was an Article 78 claim, and that failure to serve defendants with a notice of petition or order to show cause without a proper return date merited dismissal).

86. N.Y. C.P.L.R. 1019 (McKinney 1997).

87. N.Y. C.P.L.R. 7805 (McKinney 1994). Section 7805 states: "On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review …."

88. N.Y. C.P.L.R. 3020(a) (McKinney 1991).

5. Discovery—Use of the "Notice to Admit"

An Article 78 proceeding usually does not involve discovery. Formal discovery tools, such as *depositions* (interviews of people) and *interrogatories* (written questions submitted to people who may have relevant information), can only be used if the court gives you permission. If the court finds there are issues of fact to be resolved, it may grant you permission to carry out discovery. An example of an issue of fact is a dispute over whether someone was present at the administrative hearing. See *JLM*, Chapter 8, "Obtaining Information to Prepare Your Case: The Process of Discovery," for more information on discovery.

The one form of discovery that you can use without first seeking permission from the court is the "Notice to Admit." This can be used only if the respondent is an individual, not the state. You can use a Notice to Admit to ask the respondent to admit:

(1) The genuineness of any paper or document;
(2) The correctness or accuracy of a photograph; or
(3) The truth of any matters of fact about which you believe there can be no dispute and which are within the knowledge of the respondent or can easily be found by him on reasonable inquiry.[89]

The Notice to Admit is particularly useful in cases where you are making factual allegations, or where no transcript of the administrative proceedings exists. The Notice to Admit should be a separate document. This document should be a list of questions. Each question should be divided into short parts answerable with yes or no. Do not write long questions with many parts because then the respondent could say no, even though most or part of the question was true. Also, be sure to list and number your questions. You should send these questions to the respondent, the Attorney General's Office, and the court with your petition.

6. Fees

Before December 1999, prisoners could file for poor person status (*in forma pauperis*) in New York State courts and, if eligible, did not have to pay filing fees for claims made in state court. In 1999 the State Legislature made changes to the New York Civil Practice Law and Rules requiring that prisoners pay filing fees whenever they bring claims in state courts.[90] The only exception is for prisoners bringing Article 78 petitions in relation to jail time credit. If you are filing this kind of Article 78 petition, you do not have to pay a filing fee.[91] Thus, even if you or someone you know has previously filed an Article 78 proceeding without paying a filing fee, or if you have looked at a prior edition of the *JLM* that reflects the old law, *you now will most likely be required to pay a filing fee in order to begin your Article 78 proceeding and receive your index number*.[92]

Prisoners are eligible for a reduced filing fee, which may be between fifteen and fifty dollars[93] (the full filing fee is $190).[94] In order to get the reduced filing fee, you must submit an affidavit to the court stating why you cannot afford the full filing fee and ask for a reduced filing fee.[95] Since this is a new law, it is not yet clear how the courts will decide when a prisoner qualifies for a lower fee. Thus, if you are unable to pay the full filing fee, you should include in your affidavit for the reduced filing fee as much detailed information as possible about your financial situation. For example, you should tell the court in your affidavit if you cannot work because you are medically or mentally ill, because you are in protective custody due to danger, or because no jobs are offered. Also, explain any outstanding obligations you have, especially court-ordered obligations such as child support or restitution. See Appendix A for a sample affidavit to request a reduced

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89. N.Y. C.P.L.R. 3123 (a) (McKinney 2005) (the notice to admit may be served at any time after service of the answer, but not later than 20 days before trial).

90. The new fee requirements can be found in N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2006).

91. N.Y. C.P.L.R. § 1101(f)(5) (McKinney 1997 & Supp. 2006).

92. Gomez v. Evangelista, 290 A.D.2d 351, 352, 736 N.Y.S.2d 365, 366 (1st Dept. 2002) (holding that the requirement that prisoners pay a non-waivable fee of at least $15, while other non-prisoners can get their fees completely waived, does not violate the Equal Protection Clause of the 14th Amendment, and is therefore constitutional). *See also* Berrian v. Selsky, 306 A.D.2d 771, 772, 763 N.Y.S.2d 111, 114 (3d Dept. 2003) (holding that the fee requirement for an Article 78 challenge "is rationally related to the legitimate governmental interest of deterring frivolous prisoner litigation"); Bonez v. McGinnis, 305 A.D.2d 814, 815, 758 N.Y.S.2d 543, 544 (3d Dept. 2003) (holding the same).

93. N.Y. C.P.L.R. 1101(f)(2) (McKinney 1997 & Supp. 2006).

94. N.Y. C.P.L.R. 8018(a) (McKinney 1981 & Supp. 2006). In addition, $125 may be charged if a trial or inquest (hearing) is scheduled. This is called a "Request for Judicial Intervention" fee. N.Y. C.P.L.R. 8020 (a) (McKinney 1981 & Supp. 2006).

95. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2006), 1999 N.Y. Laws 412 Pt. D. § 1 (McKinney 2000).

filing fee. If the court denies your request for the reduced filing fee, it will notify you. You will then have 120 days to pay the full fee ($190), or else your case will be dismissed.[96] Please note that if you win your case, the court will refund any filing fee that you have paid.

In the affidavit, you must provide the name and mailing address of the facility where you are currently confined as well as all other facilities in which you have been confined during the last six months.[97] The court will then get a copy of your inmate trust fund account statement for the six months before you filed the affidavit.[98] If the court decides that you cannot afford to pay the full filing fee, it may allow you to pay a reduced filing fee that is no less than fifteen and no more than fifty dollars.[99] The court will then require you to pay an initial part of the reduced filing fee that you can reasonably afford.[100] Only in exceptional circumstances may the court decide that you do not have to pay this initial filing fee.[101] The rest of the reduced filing fee (the difference between the total amount of the reduced filing fee and the amount paid as the initial part of the filing fee) will be collected by your facility.[102] This means that if you are a state prisoner, DOCS will collect a portion of your weekly wages and outside receipts until the reduced filing fee is fully paid.

7. The Index Number and Filing Date

The court will tell you your index number after you file the documents listed in Part E(2) below. Once the court tells you the index number, you must write it on the top of all documents that you serve to the respondent or submit to the court.[103] If you serve your Notice of Petition or Order to Show Cause and Verified Petition without an index number or filing date (for example, because filing has not occurred), the paper has no legal weight. The court will act as if you never did anything. However, the court might allow you to amend your petition if you purchased the index number but forgot to put it on your other documents.[104] On the other hand, the court might dismiss the entire proceeding. You could still refile, but only after obtaining a new index number by either filing a new poor person's motion or paying the fee again. If you must refile, you should be aware of statute of limitations concerns. See Part C(3) above for a discussion of statute of limitations.

8. Serving the Respondents and the Attorney General

"Serving" means giving the respondents and the Attorney General's Office a copy of every document and exhibit that you sent to the court clerk. *Remember that for Article 78 proceedings, you must serve both the official (person or people) or agency you have named AND the correct office of the New York State Attorney General.* Unless the court directs otherwise, the Attorney General must be served by personal service and the official or agency by personal service or certified mail, return receipt requested, with "URGENT LEGAL MAIL" written on the front of the envelope in capital letters.

You may not serve the respondents until you receive an index number from the court. You must write the index number and the court's designated date of filing (which you can find in the information that the clerk sends you) on the first page of every item that you send to the respondents. You must also tell the Attorney General the name of the judge and the date of the hearing if available. You should include the date

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96. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2006).

97. N.Y. C.P.L.R. 1101(f)(1) (McKinney 1997 & Supp. 2006).

98. If you have been incarcerated in the same facility for six months before you filed the affidavit, the court will get a copy of your inmate trust fund account from the prison superintendent of your facility. If you have been confined for less than six months at that facility at the time your file your affidavit, the court will either (1) get an inmate trust fund account statement for the last six months from the Central Office of DOCS in Albany if you are a state prisoner who was transferred from another state correctional facility; or (2) get an inmate trust fund statement from a federal or local correctional facility if you were transferred from such a facility. N.Y. C.P.L.R. 1101(f)(1) (McKinney 1997 & Supp. 2006).

99. N.Y. C.P.L.R. 1101(f)(2) (McKinney 1997 & Supp. 2006).

100. N.Y. C.P.L.R. 1101(f)(2) (McKinney 1997 & Supp. 2006).

101. However, please note that the statute states that "in no event shall an inmate be prohibited from proceeding for the reason that the inmate has no assets and no means by which to pay the initial partial filing fee." N.Y. C.P.L.R. 1101(f)(2)(ii) (McKinney 1997 & Supp. 2006).

102. N.Y. C.P.L.R. 1101(f)(2) (McKinney 1997 & Supp. 2006).

103. N.Y. C.P.L.R. 2101(c) (McKinney 1997 & Supp. 2006).

104. N.Y. C.P.L.R. 305(c) (McKinney 2001).

of the hearing and the name of the judge on every paper that you send to the respondent if the court clerk sends you this information.

You must be careful to serve your petition to the official or agency you have named as respondent and to the New York State Attorney General.[105] (The Attorney General will represent the state in the proceeding.)

If you are using an Order to Show Cause, the respondents must receive these items before the time specified by the court in the Order to Show Cause. If you are using a Notice of Petition, the respondents must receive these items at least twenty days before the court date.[106] A Verified Petition, supporting affidavits, and either an Order to Show Cause or a Notice of Petition must be served within four months and fifteen days after you receive the decision.[107] It is important to serve papers far enough ahead so that there is time to complete the proof of service requirement, which also must be completed in four months and fifteen days.[108] You must serve the Attorney General by personal service unless you get special permission to do otherwise.[109] You can get this special permission by making a request for it in your Order to Show Cause. If you are serving a state agency, you can serve either the chief executive officer or a person assigned by him to receive service, by personal service or by sending the documents by certified mail, return receipt requested, with "URGENT LEGAL MAIL" written on the front in capital letters.[110] Service is not complete until the certified mail is received by the agency to which it is sent.

As a prisoner, you may have a great deal of trouble accomplishing service. The two most common means of service are personal service and mail.[111] Each poses problems for prisoners.

(a) Personal Service

Personal service means someone (the "server") actually approaches, identifies, and personally hands a person the paperwork. The server then describes and swears in an affidavit to exactly what she did, and this affidavit is turned over to the court to demonstrate proof of service. A prisoner could serve the agency personally either by asking someone on the outside to hand over the paperwork, or by employing a professional service agency (which can be expensive).

(b) Service by Mail

Service by mail is permitted in many situations, but not when dealing with the government. One such case is serving the Attorney General, and if you are not able to personally serve the Attorney General, you should include an Order to Show Cause requesting authorization to serve by mail in the material that you originally send the court.[112] If you cannot serve the state agency by registered mail, return receipt requested, you should also include an Order to Show Cause asking to serve the state agency in an alternative manner. In the Order to Show Cause, you should specifically explain the process you must go through at your institution to mail the documents so that the court will authorize that particular process. If there are any other difficulties in serving process that make it very difficult or impossible to accomplish in the prescribed time, tell the court now and ask for additional time.[113] In the past, courts have allowed prisoners to use the

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105. N.Y. C.P.L.R. 7804(c) (McKinney 1994).

106. N.Y. C.P.L.R. 7804(c) (McKinney 1994).

107. N.Y. C.P.L.R. 306-b (McKinney 2001 & Supp. 2006) (effectively sets time limit for service); N.Y. C.P.L.R. 7804(c) (McKinney 1994) (stating that Notice of Petition, petition, and supporting affidavits all need to be served); *see* Long Island Citizens Campaign, Inc. v. County of Nassau, 165 A.D.2d 52, 55, 565 N.Y.S.2d 852, 855 (2d Dept. 1991) (holding that the petition must be served along with the Notice of Petition or Order to Show Cause).

108. N.Y. C.P.L.R. 306-b (McKinney 2001 & Supp. 2004 & Supp. 2006).

109. N.Y. C.P.L.R. 307(1) (McKinney 2001); *see* Lowrance v. Coughlin, 190 A.D.2d 915, 915, 593 N.Y.S.2d 597, 598 (3d Dept. 1993) (holding that without a court order, personal jurisdiction may not be obtained over an Attorney General by serving him or her via mail).

110. N.Y. C.P.L.R. 307(2) (McKinney 2001 & Supp. 2006).

111. Electronic means and overnight delivery service have also become possibilities in some circumstances. *See* N.Y. C.P.L.R. 2103(b) (McKinney 1997 & Supp. 2006).

112. Onorato v. Scully, 170 A.D.2d 803, 803, 566 N.Y.S.2d 408, 409 (3d Dept. 1991) (noting that "service by mail, absent issuance of an order to show cause authorizing service by mail in lieu of personal service, is jurisdictionally defective" (quoting *In re* Dello v. Selsky, 135 A.D.2d 994, 995, 522 N.Y.S.2d 716, 717 (3d Dept. 1987))). See Appendix A at the end of this Chapter for a general example of an Order to Show Cause. Model your request on the example.

113. The main problem is that "mailing" has a specific legal definition under New York's Civil Practice Law and Rules:

"Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address

mail services available to them. In fact, they sometimes give prisoners special permission to use the mail to serve the Attorney General, who normally must be served by personal service.[114] It is absolutely imperative that you ask the court clerk about serving process, and describe the process for mailing at your institution. Write a note that asks the clerk to provide specific instructions on exactly what you have to do to serve.

(c) Service by Filing

A final possibility is to ask if you can serve by filing pursuant to N.Y. Civil Practice Law and Rules 2103(d).[115] This rule is basically a catchall provision that says if no other means are available, service can be fulfilled by filing the documents you need to serve as if the service documents were papers that needed to be filed. This means that you would mail them to the court clerk. Just being in prison is not enough to trigger this provision. You would have to state a compelling reason why you could not serve in any other manner.

9. Proof of Service

Proof of Service is evidence for the court that you have notified respondents that you are suing them. It is a form that you send the court stating that you served process. If someone else has served personally for you, that person must provide you with an "affidavit of service," which is an affidavit explaining the time, date and circumstances surrounding the event. Some professionals may have a certificate that they send to you. If you serve by mail, you may have to sign an affidavit saying that you mailed it, or you may have to include a copy of the receipt from certified mail. Another possibility, if you are allowed to use regular mail, is to send the court a receipt signed by the respondent, indicating that respondent received the package. This is called an acknowledgment. Whatever proof of service you have, you should submit it to the court.

10. The "Answer" by the Government and Your "Reply"

The document that the administrative official or agency files with the court in opposition to your petition is called the answer. The answer is a document that replies to each point in your petition by admitting, denying, or claiming lack of knowledge about it. With the answer, the respondent can also submit any affidavits or other documents to the court. The respondent is required to serve you with a copy of his answer as well as all attached documentary evidence no later than five days before the hearing date.[116]

When you receive the answer, you should read it carefully to see what arguments the government is making in response to your claim. Usually, the Attorney General's Office, rather than the respondent(s), writes the answer. If the respondent fails to file an answer within the allowed time, you can ask the court to rule in your favor. If the respondent has added allegations that were not included in your petition, if you want to challenge the accuracy of the transcript or other documents submitted by the respondent, or if the respondent has made a claim against you (a *counterclaim*), then you can submit an additional document to the court. Your response to the answer is called a *reply*. If you do not submit a reply to new facts alleged by the respondent in his answer, the court can view those facts as if you have admitted they are true.[117] You must serve the respondent with your reply at least one day before the hearing.

If you are seeking review of a discretionary decision made by an official or agency after a hearing, the respondent is required to submit a copy of the transcript of the hearing to the court with its answer. While the respondent is not required to serve you with a copy of the transcript, several courts have ruled against respondents who failed to provide the courts with administrative hearings transcripts.[118]

> designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository *under the exclusive care and custody of the United States Postal Service* within the state ....

N.Y. C.P.L.R. 2103(f)(1) (McKinney 1997 & Supp. 2007) (emphasis added). A prisoner generally does not have access to a depository under the exclusive care of the United States Postal Service and, therefore, cannot "mail" within the meaning of the statute. However, as noted above, courts commonly allow prisoners to serve by mail.

114. *See* Onorato v. Scully, 170 A.D.2d 803, 805, 566 N.Y.S.2d 408, 409 (3d Dept. 1991) (finding, in certain circumstances, a court may treat a prisoner's letter as an application to permit alternative service even where there is no order to show cause authorizing service by mail); *In re* Hanson, 103 A.D.2d 949, 949, 479 N.Y.S.2d 767, 768 (3d Dept. 1984) (interpreting prisoner's attempt to mail petition as an application for an order permitting alternative service, and remitting the case to the trial court such that the prisoner could submit an order to show cause).

115. N.Y. C.P.L.R. 2103(d) (McKinney 1997 & Supp. 2007).

116. N.Y. C.P.L.R. 7804(c), (e) (McKinney 1994 & Supp. 2007).

117. N.Y. C.P.L.R. 3018(a) (McKinney 1991 & Supp. 2007).

118. *See* Gittens v. Sullivan, 151 A.D.2d 481, 481, 542 N.Y.S.2d 272, 273 (2d Dept. 1989) (ordering respondent to

E. How to Bring an Article 78 Proceeding

To bring an Article 78 proceeding, you must complete the following steps before the deadlines:

(1) File the items listed below with the clerk of the court in which you are bringing the proceeding;
(2) Serve the respondent and the Attorney General's Office; and
(3) File proof of service with the court during the appropriate time period.

1. Deadlines

Four-month deadline for filing in court (step 1 above): You must file with the court within the statute of limitations period. If you do not, you will automatically lose your case. Remember, you cannot serve the respondent (step 2) until you receive an index number, which the court sends you after you have completed step 1. Plan your time accordingly.

Deadline for service and filing proof of service (steps 2 and 3 above): You must serve both the respondent(s) and the Attorney General and file "proof of service" with the appropriate court within four months and fifteen days after you receive the decision you are challenging. It will take some time to file proof of service, so remember to leave enough time after service to get this accomplished.

Example: If you receive a decision on December 1, 2011, you must file your appeal with the appropriate court before April 1, 2012. You must serve the respondents and the Attorney General's Office and file proof of service with the court before April 15, 2012.

2. Procedure

(a) Filing with the Court

As mentioned above, you need to send to the county supreme court clerk *one original and one copy* of each of the following:

(1) A Notice of Petition or an Order to Show Cause;
(2) A Verified Petition;
(3) All exhibits and supporting affidavits attached to the petition;
(4) Either the full filing fee or an affidavit that supports your claim that you cannot afford to pay the full filing fee. See discussion in Part D(6) above. If the court approves your request, it will charge you between fifteen and fifty dollars;
(5) **Caution**: If you fail to enclose either the full fee, or the reduced fee and the poor person's motion and affidavit, you will not get an index number. Without the index number, you cannot proceed with your claim.
(6) A "Request for Judicial Intervention" ("RJI"). Different courts apply different rules on these, so check with your court clerk to make sure you have complied with the RJI rules for your court;[119] and
(7) A "Request for an Index Number."

Mail these items to the correct court clerk and wait for an index number. After you receive the number, serve the respondents and Attorney General with the proper paperwork. You can make the copies by hand.

(b) Serving the Respondents and the Attorney General's Office

If you are using an Order to Show Cause, the respondents must receive these items before the time specified in the Order. If you are using a Notice of Petition, the respondents must receive the items at least twenty days before the court date. NOTE: if you are permitted to serve papers by mail, you must add five days to the deadline. So, you would mail your papers at least twenty-five days before the court date.[120]

(c) Proof of Service

It is important that proof of service on each respondent and the Attorney General be filed on time. Without a timely filing, the court will dismiss your case.

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produce transcript of disciplinary hearing; if no transcript existed, agency's determination had to be voided and a new administrative hearing conducted); Arnot-Ogden Memorial Hosp. v. Axelrod, 95 A.D.2d 947, 949, 463 N.Y.S.2d 927, 930 (3d Dept. 1983) (holding that default judgment was proper, as respondent had repeatedly failed to produce transcript as ordered by the court).

119. N.Y. Comp. Codes. R. & Regs. tit. 22, § 202.6 (2000).

120. *See* N.Y. C.P.L.R. 2103 (b)(2) (McKinney 1997 & Supp. 2006).

(d) Refiling Your Petition

If your case is dismissed because you did not file proof of service on time, you have fifteen days from the date of dismissal to refile your petition and serve the respondents and the Attorney General. Be aware that not only will you have to pay the filing fee again, but you will also have to repeat the entire process.

3. How To Get Help From a Lawyer

Courts have the power, under Section 1102(a) of the N.Y. Civil Practice Law and Rules, to appoint a lawyer for you, but they do not have to.[121] Include a request for a court-appointed attorney in your request for a fee reduction or waiver. You can also contact the agencies in *JLM*, Appendix IV to see if they know a lawyer who will represent you for free. You should also read *JLM*, Chapter 4, "How to Find a Lawyer."

4. The Judgment

The court's decision about your Article 78 petition is called a judgment. The court has the power to render any judgment that it feels is appropriate. It can modify the decision of the administrative body, cancel it, make an entirely different decision, or send the case back to the administrative agency for a new hearing or decision (this is called a *remand* to the administrative agency).[122]

F. How to Appeal Your Article 78 Decision

If you lose your Article 78 proceeding and wish to appeal to the Appellate Division of the New York Supreme Court, professional legal help is important.[123] You can request that the appellate division assign you an attorney. Appealing an Article 78 decision is much more complicated than filing a petition in supreme court.[124] If you are thinking of appealing, you must serve a "Notice of Appeal" upon the New York State Attorney General and file the Notice with the court *within thirty days* of the entry of judgment denying your Article 78 petition.[125] Note that you must file the Notice of Appeal with the supreme court that decided your case, not with the appellate division. You should serve the Notice of Appeal first, and then file the Notice with proof of service. If you do not serve and file the notice of appeal within thirty days of the denial of your petition, the denial will be final and you will not be allowed to appeal it with or without a lawyer.

If you win in supreme court on your own, and the respondent files an appeal to the appellate division, you should petition the appellate division as soon as possible to appoint a lawyer for you on appeal. See the sample requests at the end of this Chapter. The respondent can get an automatic stay of the decision pending the outcome of the appeal.[126] This means the supreme court decision in your favor will not go into effect until the appeal has been decided. You can then move to have the court vacate (dismiss) the stay.

1. Where to Appeal

The Appellate Division of the New York Supreme Court has four departments. Each of these departments covers a different portion of New York State. Your appeal will take place in the department of the Appellate Division that contains the county where your Article 78 petition was decided against you.[127] Each of the four departments can have specific rules about the time limits and process of filing and

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121. *See* N.Y. C.P.L.R. 1102(a) (McKinney 1997 & Supp. 2007).

122. N.Y. C.P.L.R. 7806 (McKinney 1994 & Supp. 2007).

123. See *JLM*, Chapter 4 and Appendix IV of the *JLM* for information on finding help from a lawyer.

124. *See*, *e.g.*, N.Y. C.P.L.R. 5513, 5515, 5516, 5519, 5525, 5528 and 5701(b)(c) (McKinney 1995 & Supp. 2007).

125. N.Y. C.P.L.R. 5513, 5515 (McKinney 1995 & Supp. 2006). The notice of appeal is a simple form that is easy to prepare yourself. You can adapt the sample criminal notice of appeal found in *JLM*, Chapter 9; simply include your own case caption, your name and the respondent's name, the proper party titles (for example, "petitioner" and "respondent"), and state that the notice of appeal is filed pursuant to N.Y. C.P.L.R. 5513 (McKinney 1995 & Supp. 2007).

126. N.Y. C.P.L.R. 5519(a)(1) (McKinney 1995 & Supp. 2007).

127. The four departments are as follows: 1st Department—Bronx, New York (Manhattan); 2nd Department—Brooklyn, Dutchess, Kings (Brooklyn), Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester; 3rd Department—Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington; 4th Department—Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, Yates.

proceeding on an Article 78 appeal, so you must be sure to find out what, if any, specific documents or actions are required by your department for each step of your appeals process.[128]

2. Filing a Notice of Appeal ("Taking the Appeal")

Your first step in appealing an Article 78 decision is serving a Notice of Appeal on the Attorney General and filing the Notice of Appeal with the Clerk of the county where your judgment was decided, with proof of service upon the Attorney General.

In your notice, you must explain five important things:

(1) The decision that you are appealing;
(2) Which judge made the decision;
(3) The date on which the decision was made;
(4) What date the judgment was filed with the County Clerk; and
(5) What parts of the decision you want to appeal (you can appeal part of or the whole decision).

A filing fee of $315 may be required to file your notice, but you can request a reduced fee if you are unable to pay in full.[129] (You may serve your Notice of Appeal to the court and the Attorney General by mail; see Part D(8) above for information on serving documents.) Remember, you must serve and file the notice of appeal within thirty days of your petition's denial, or the decision will be final and you cannot appeal.[130]

3. Putting Together Your Record

In order for your appeal to go forward, you will need a record of your case so far. The record will include all of the information that has been filed in your case, except for any briefs that were filed. A record will likely have your original Article 78 petition, the answer from the Attorney General, your reply, if any, the exhibits for both parties, and all decisions and judgments made by the court that heard your case. It may also contain the transcript of the proceedings. You will also need to add a statement including the following information: (1) the index number of your case; (2) the full names of the original parties and any change in parties; (3) the court and county in which the proceeding began; (4) the date the proceeding started and the dates when you served your pleadings; (5) a brief description of what you are trying to do (appeal the decision in your case) and why; (6) whether the appeal is from a judgment, an order, or both, the dates of whatever judgments or orders you are appealing from, and the name of the judge who made the decision; and (7) a statement about which method of appeal you are using, either a full-record appeal or an original record appeal (which means you will not have to put together the record for your case yourself).[131]

Each of the four departments has different rules about what needs to be in the record for an appeal.[132] Generally, you should follow these two steps. First, assemble all documents listed above. Then, request the Appellate Court to subpoena your record from the lower court. (Though not all appellate courts are willing simply to obtain original records from the lower court, a court will usually do this for a *pro se* prisoner with poor person status.) Otherwise, you can read and follow the court rules for the department you are in.

4. Writing Your Brief

To proceed with your appeal you will also have to write a *brief*, a document including all the legal reasons the court should not have decided against you in your Article 78 petition. You must be as specific as possible about your reasons, and should cite the statutes, regulations and cases supporting your decision. You must also be specific about why the judge made the wrong decision in your case. Your brief will likely

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128. You can find this information by looking up your court and department rules in McKinney's New York Rules of Court (2007). The relevant parts of the rules are as follows: N.Y. Ct. Rules Part 600 (1st Department); Part 670 (2nd Department); Part 800 (3rd Department); Part 1000 (4th Department).

129. N.Y. C.P.L.R. 8022(b) (McKinney 1981 & Supp. 2007). See N.Y. C.P.L.R. 1101(f) (McKinney 1997 & Supp. 2007) and Part D(6) of this chapter (above) for more information about requesting a reduced filing fee. The rules are different for each department. For example, the 4th Department has an entire section on Poor Persons. N.Y. Ct. Rules § 1000.14 (McKinney 2007).

130. N.Y. C.P.L.R. 5513, 5515 (McKinney 1995 & Supp. 2007).

131. N.Y. C.P.L.R. 5531 (McKinney 1995 & Supp. 2007).

132. See McKinney's New York Rules of Court for each department's particular rules: N.Y. Ct. Rules § 600.10 (McKinney 2007) (1st Department rules on the required form and content of your record), N.Y. Ct. Rules §§ 670.9, 670.10.1 (McKinney 2007) (2nd Department rules on records), N.Y. Ct. Rules § 800.5 (McKinney 2006) (3rd Department rules on records), and N.Y. Ct. Rules § 1000.4 (McKinney 2006) (4th Department rules on records).

need to contain a cover page with information about your case (such as the case name, docket number, lower court, and appellate court) as well as your name and address.[133] You will need to send the same number of copies of this brief to the court and the Attorney General as you are required to send of the record.

5. "Perfecting the Appeal": Submitting All Necessary Documents

To proceed in your appeal, you must do what is called "perfecting the appeal," which means submitting every document required by the court in which you are appealing, including record and brief, and any other document your department requires. Each department has a time limit within which to complete this.[134]

6. The Reply to Your Appeal

Once your brief is filed, the court will tell you when your case will be heard. When the court requires the Attorney General to file a brief on your case, you may file a reply brief, usually within a few days of receiving the Attorney General's brief.[135] You only need to file a reply brief if there are any issues raised by the Attorney General's brief that your first brief did not cover, or to show why the arguments and cases used by the Attorney General are weaker than your own. You do not need to restate the points you raised in your original brief. Some weeks after you have filed your reply brief, the court will inform you of its decision.

G. Conclusion

Article 78 is available to appeal decisions by state officials or agencies, but not courts, and only when you have exhausted other remedies. Since Article 78 petitions are your last chance to challenge administrative decisions, pay attention to Part A's requirements and Part D's procedures for filing or appealing a petition. Remember, you can only challenge decisions or actions you think are illegal, not just unfair. If you are unsure what type of petition is available, read Part B's possible complaints and actions, and Part C's limits on what you can challenge. Appendix A's sample forms and instructions will help you prepare a petition.

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133. For information and requirements for your brief, see McKinney's New York Rules of Court for each department: N.Y. Ct. Rules § 600.10 (McKinney 2007) (1st Dept.); N.Y. Ct. Rules §§ 670.10, 670.10.3 (McKinney 2007) (2d Dept.); N.Y. Ct. Rules § 800.8 (McKinney 2006) (3d Dept.); N.Y. Ct. Rules § 1000.4 (McKinney 2007) (4th Dept.).

134. For example, in the 1st Department, you must have all documents filed within nine months of the date of your notice of appeal. N.Y. Ct. Rules § 600.11(a)(3) McKinney 2007). In the 2nd Department, the time limit is six months. N.Y. Ct. Rules § 670.8(e) (McKinney 2007). Both the 3rd and 4th Departments have a 60-day time limit. N.Y. Ct. Rules § 800.14(b) (McKinney 2006) and N.Y. Ct. Rules § 1000.12(a) (McKinney 2006).

135. In the 1st Department, you have nine days to reply from the day you are served with the Attorney General's brief. N.Y. Ct. Rules § 600.11(c) (McKinney 2006). In the 2nd, 3rd, and 4th Departments, you have 10 days from when the Attorney General serves the brief to reply. N.Y. Ct. Rules §§ 670.8(c)(3), 800.9 (c), 1000.2(e) (McKinney 2006).

APPENDIX A

SAMPLE ARTICLE 78 PETITIONS AND SUPPORTING PAPERS

This appendix contains the following materials:

A-1. Order to Show Cause
A-2. Affidavit in Support of Order to Show Cause
A-3. Notice of Petition
A-4. Article 78 Petition
A-5. Verification of Petition
A-6. Request for Judicial Intervention ("RJI")
A-7. Application for an Index Number
A-8. Affidavit in Support of Request for Reduction/Waiver of Fees

Part D of this Chapter explains what each of these papers is and how to use them, and you should read them carefully before proceeding. DO NOT TEAR THESE FORMS OUT OF THE *JLM*. You must copy them on your own paper, inserting the facts and language that apply to your case. You should type your papers if possible, or neatly handwrite them. You should use 8½ by 11 inch paper. Do not include the bracketed or italicized material in your papers. This material is included simply as an example of the type of information that you should include from your own case. The endnotes following the sample documents tell you how to fill in the necessary information.

If you need to know the name or address of the court to which you should send these papers, read this Chapter and then look in Appendix II at the end of the *JLM*. Appendix II lists the addresses of the New York state courts. For an introduction to the court system and the legal process, see *JLM*, Chapter 5, "Choosing a Court and a Lawsuit."

A-1. ORDER TO SHOW CAUSE

At a Term of the Supreme Court of the State of New York, held in and for the County of _____ on the __th day of _____, 20____.[1]

Present: Hon. _____, Justice[2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[3]

In the Matter of the Application of _____,[4] Petitioner, - against - _____,[6] Respondent, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	ORDER TO SHOW CAUSE Index No. _____[5]

Upon the annexed affidavit in support of an Order to Show Cause of _____,[7] verified on the ____th day of _____, 20____,[8] the Verified Petition,[9] and _____[10] sworn to on the _____th day of _____, 20___,[11] it is

ORDERED that respondent _____[12] show cause at a Term of this Court, to be held in the County of _____ [13] on the _____th day of _____, 20____,[14] or as soon thereafter as counsel may be heard, why a judgment should not be made and entered in this matter pursuant to Article 78 of the Civil Practice Law and Rules:

VACATING and setting aside Respondent's determination of [June 15, 2000] [assigning petitioner to 120 days confinement in the Special Housing Unit (solitary confinement, "SHU")] because [the underlying Superintendent's Hearing is null and void];[15]

DIRECTING Respondent to [expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing];[16]

GRANTING such other and further relief as the Court may deem just and proper. It is further

ORDERED that pending the hearing of this special proceeding and pursuant to section 7805 of the N.Y. Civil Practice Law and Rules, Respondent and all other officers, employees, agents, attorneys and persons working in active concert or participation with Respondent are stayed and prohibited from taking action related to or enforcing Respondent's determination of _____, 20____.[17] It is further

ORDERED that service of a copy of this order, together with the papers upon which it is granted, upon both the Respondent _____[18] and the Attorney General, by mail, on or before _____ _____, 20____,[19] shall be deemed sufficient.

ENTER:

_____[20]
JUSTICE OF THE SUPREME COURT

A-2. AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[21]

In the Matter of the Application of	:	
	:	
_____,[22]	:	AFFIDAVIT IN
Petitioner,	:	SUPPORT OF ORDER
	:	TO SHOW CAUSE
- against -	:	
	:	Index No. ____[23]
_____,[24]	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	

STATE OF NEW YORK)
COUNTY OF _____[25] ss:)

I, _____,[26] being duly sworn, depose and say:

1. I am the petitioner in the above-entitled proceeding.

2. I make this affidavit in support of my annexed application for an Order to Show Cause to prosecute the attached petition pursuant to Article 78 of the Civil Practice Law and Rules which challenges _____ _____.[27]

3. _____[28]

4. Petitioner seeks to proceed by Order to Show Cause rather than by Notice of Petition because _____.[29]

5. Petitioner, being incarcerated, also cannot effect personal service of the within papers and respectfully requests that timely service by mail be deemed sufficient.

6. Petitioner designates _____[30] County as the place of venue.

7. No previous application for the relief requested herein has been made.[31]

8. I have moved by the annexed affidavit for a reduction/waiver of the filing fees.[32]

WHEREFORE, petitioner respectfully requests that this Court enter an order directing Respondent to show cause why a judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules ____[33] and granting such other and further relief as the Court may deem just and proper.

_____[34]
_____[35]
Sworn to before me this
__th day of _____, 20__
_____[36]
NOTARY PUBLIC

A-3. NOTICE OF PETITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[37]

In the Matter of the Application of	
_____,[38]	
Petitioner,	
	NOTICE OF PETITION
- against -	
	Index No. ____[39]
_____,[40]	
Respondent,	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	

To _____:[41]

PLEASE TAKE NOTICE that upon the annexed petition of _____,[42] verified the [*18th day of July, 2000*],[43] and the annexed affidavit of [*Roberta A. Smith*],[44] sworn to on the [*18th day of July, 2000*],[45] petitioner will apply to this Court on the [*18th day of August, 2000*],[46] or as soon thereafter as counsel may be heard, for a judgment granting the relief requested in the annexed Petition.

PLEASE TAKE FURTHER NOTICE that you must serve a verified answer, any supporting affidavits and documents, and a certified transcript of the record of the proceeding at least five days before this application is made.[47]

Petitioner designates _____County as the place of trial. The basis of venue is _____ _____[48]

[49]

[Sign your name]

[Print your name]
Dated:____, 20____

A-4. ARTICLE 78 PETITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[50]

In the Matter of the Application of	
_____,[51] Petitioner,	
- against -	PETITION
_____,[53] Respondent,	Index No. ____[52]
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	

To THE SUPREME COURT OF THE STATE OF NEW YORK FOR _____ COUNTY:

The petition of _____,[54] complaining of the Respondent _____,[55] respectfully alleges:

1. Petitioner _____[56] is an inmate at _____,[57] _____,[58] New York.

2. Respondent [Ronald R. Roe, Superintendent of Ossining Correctional Facility, is petitioner's legal custodian and is charged with the overall supervision and administration of Ossining].[59]

3. This petition challenges [disciplinary action taken on June 15, 2000], when respondent, [pursuant to a Superintendent's Hearing,] had determined to [place him in the Special Housing Unit ("SHU," solitary confinement) for a period of 120 days].[60]

4. The within proceeding is brought pursuant to C.P.L.R. Article 78 to challenge the final determination of _____, dated _____.[61]

5. [On June 9, 2000, while confined to a private room/cell in the infirmary at Ossining Correctional Facility, petitioner began to feel claustrophobic and believed he was suffering from an asthmatic episode.][62]

6. [Corrections Officers Smith and Brown were called to the infirmary to restrain petitioner so that he could be given an injection to subdue him.]

7. [Petitioner was in an agitated state because he believed that he was going to be given a dose of anti-psychotic medication.]

8. [Once the officers arrived, they ordered petitioner to stand to the side of the room. He did not comply with this order.]

9. [Once the officers were in petitioner's room, he raised his hands and spoke to the officers to indicate that he did not want to receive medication. The officers reported, however, that when petitioner raised his hands, his fists were clenched.]

10. [The officers then grabbed petitioner and held him while the nurse administered an injection. Then they escorted petitioner to the Mental Health Unit where he was placed in a special observation cell ("dry cell").]

11. [On June 10, 2000, while in the observation cell, petitioner was served with a misbehavior report, charging him with violation of the following inmate rules: 100.11 (attempted assault) and 106.10 (refusing a direct order). A copy of the misbehavior report is attached as Exhibit 1.]

12. [The Superintendent's Hearing was commenced on June 15, 2000, while petitioner was still confined in the Mental Health Unit. Petitioner pleaded not guilty to the charges.]

13. [The hearing officer read into the record reports written by Correction Officers Smith and Brown. Neither report alleged that petitioner had attempted to assault either of the officers. (Copies of these reports are attached as Exhibits 2 and 3.)]

14. [The hearing officer then found petitioner guilty of both charges and imposed a penalty of 120 days confinement in the SHU, finding that the mere raising of hands with fists clenched constituted an attempt to assault.]

15. [Petitioner did not attempt to strike either officer, however. Neither officer's report indicated otherwise. The reports stated in a conclusory fashion that petitioner "raised his fists in an attempt to strike" the officers. Without further clarification, this statement is insufficient to conclude that petitioner attempted to assault either officer. Petitioner was not given an opportunity to present witnesses on his behalf.]

16. [Furthermore, the hearing officer made no inquiry into petitioner's mental state at the time of the incident or at the time of the hearing, even though the incident arose because the staff had decided petitioner was out of control and would have to be medicated by force, and even though petitioner was housed in the Mental Health Unit at the time of the hearing. Petitioner's mental state affected his responsibility for his actions and his ability to proceed at the hearing.]

17. Respondent's determination was [arbitrary, capricious, and an abuse of discretion] because [the hearing was held at a time when petitioner was incompetent to proceed on his own behalf, petitioner had no opportunity to present witnesses on his behalf, and respondent failed to determine petitioner's mental state. Because petitioner had suffered a claustrophobic attack and sudden involuntary medication, he cannot be held responsible for refusing the direct order.][63]

18. [No previous application has been made for the requested relief.][64]

WHEREFORE, petitioner respectfully requests that judgment be entered pursuant to Article 78 of the Civil Practice Law and Rules:

[1. VACATING and setting aside Respondent's determination of June 15, 2000, assigning petitioner to 120 days confinement in the Special Housing Unit (solitary confinement, "SHU") because the underlying Superintendent's Hearing is null and void;

2. DIRECTING Respondent to expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing;

3. GRANTING such other and further relief as the Court may deem just and proper.][65]

_____[66]

[your name]

Petitioner, pro se.[67]

Dated:____

[68]

A-5. VERIFICATION OF PETITION

VERIFICATION[69]
STATE OF NEW YORK)
COUNTY OF _____[70] ss.:)

_____,[71] being duly sworn, deposes and says that deponent is the petitioner in the above-encaptioned proceeding, that [*he/she*] has read the foregoing petition and knows the contents thereof, that the same is true to deponent's own knowledge, except as to matters therein stated upon information and belief, which matters deponent believes to be true.

_____[72]

Sworn to before me this

__th day of _____, 20__

_____
NOTARY PUBLIC [73]

A-6. REQUEST FOR JUDICIAL INTERVENTION

REQUEST FOR JUDICIAL INTERVENTION
Index No.__[74]
Supreme Court ___[75] County
Date Purchased___

___
PLAINTIFF(S):[76]
IAS entry date:____
Judge Assigned:___

___
DEFENDANTS(S):[77]
RJI Date:__
_____-

NATURE OF JUDICIAL INTERVENTION:
[][78] Order to Show Cause
(Clerk enter return date_____)[79]
[][80] Notice of Petition (return _____)[81]
NATURE OF ACTION OR PROCEEDING
SPECIAL PROCEEDINGS
[] Art. 78
Is this proceeding against a:
[Yes/No] Municipality: _____[82][Yes/No] Public Authority: _____[83]
[Yes/No] Does this proceeding seek equitable relief?[84]
[Yes/No] Does this proceeding seek recovery for personal injury?[85]
[Yes/No] Does this proceeding seek recovery for property damage?[86]
Estimated time period for case to be ready for trial: 0-12 months
Attorney for Plaintiff(s):
Name[87] Address Phone
Attorney for Defendant(s):
Name[88] Address Phone
RELATED CASES:
Title[89] Index Number Court Nature of Relationship

I affirm under penalty of perjury that, to my knowledge, other than as noted above, there are and have been no related actions or proceedings, nor has a request for judicial intervention previously been filed in this proceeding.

Dated: ____[90]

___

(Signature)

___

(Print Name)

A-7. APPLICATION FOR AN INDEX NUMBER

INDEX NUMBER[91]

Application for INDEX NUMBER
pursuant to section 8018, New York Civil Practice Law & Rules
Title of Action: ARTICLE 78[92]
[David Smith
v.
William Jones, Commissioner of the Department of Correctional Services]
Name and address of Attorney for Plaintiff or Petitioner Telephone No.[93] (PRO SE)
Name and address of Attorney for Defendant or Respondent Telephone No.[94]
A. Nature of Special Proceeding Article 78 Proceeding
B. Application for Index Number filed by: ü Plaintiff ü Defendant
C. Was a previous Third Party Action filed? ü Yesü No

COMPLETE Do Not Detach THIS STUB

Supreme Court,[95] _____ County

_____ [96]

v.

_____ [97] INDEX NUMBER:[98]

A-8. AFFIDAVIT IN SUPPORT OF REQUEST FOR REDUCTION/WAIVER OF FEES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[99]

In the Matter of the Application of	
_____,[100]	Affidavit in Support of Application for Fee Reduction/Waiver Pursuant to N.Y.C.P.L.R. 1101(f)
Petitioner,	
- against -	
	Index No. _____[101]
_____,[102]	
Respondent,	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	

I, _____,[103] being duly sworn, hereby declare as follows:

1. I am the petitioner in the above-entitled proceeding, I am an inmate in a state correctional facility [*place of incarceration:* _____][104], and I submit this affidavit in support of my application for a reduction of the filing fees pursuant to N.Y. C.P.L.R. 1101(f) (and that an attorney be assigned to represent me).[105]

2. I currently receive income from the following sources, exclusive of correctional facility wages:_____ _____.

3. I own the following valuable property (other than miscellaneous personal property):

[List property:]	[Value:]
_____	_____
_____	_____

4. I have no savings, property, assets, or income other than as set forth herein.

5. I am unable to pay the filing fee necessary to prosecute this proceeding.

6. No other person who is able to pay the filing fee has a beneficial interest in the result of this proceeding.

7. The facts of my case are described in my claim and other papers filed with the court.

8. I have made no prior request for this relief in this case.

_____
(signature)
Sworn to before me
this ____ day of _____, 20____.

_____[106]
NOTARY PUBLIC AUTHORIZATION

I, _____,[107] inmate number _____, [108] request and authorize the agency holding me in custody to send to the Clerk of the Court certified copies of the correctional facility trust fund account statement (or the institutional equivalent) for the past six months.

I further request and authorize the agency holding me in custody to deduct the filing fee from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court. This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT I MAY HAVE TO PAY THE ENTIRE FEE IF THE COURT DENIES MY REQUEST FOR A FEE REDUCTION. MOREOVER, I UNDERSTAND THAT THE FEE DETERMINED BY THE COURT WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

_____[109]

(signature)

Fill in the forms shown in Appendix A as follows.

---

1. Name of the county in which the case will be filed, in all capital letters. When filling in county names, note that each borough of New York City is a county of New York State, but some of them have different names: Manhattan is New York County; Brooklyn is Kings County; and Staten Island is Richmond County. *See* N.Y. C.P.L.R. 506(b) (McKinney 1994 & Supp. 1999). The court clerk will fill in the date.

2. The clerk or judge will fill this in. You should leave this blank.

3. Name of the county the court is in, in capital letters.

4. Your name in capital letters.

5. Leave blank.

6. Name, in all capital letters, of the officer or agency whose determination you are attacking (the respondent). In most cases, prisoners will name the superintendent of the prison. You may name more than one respondent; if you do, do not forget to change the wording in your papers to refer consistently to all the respondents.

7. Your name.

8. Here, you should give the date the petition was approved/verified. See Appendix A-4 for a sample petition and Appendix A-5 for a sample verification.

9. A sample petition is contained in Appendix A-4.

10. Insert any other papers you are submitting with this Order.

11. The date you signed and notarized your documents.

12. Print or type in all capital letters the name of the respondent.

13. County in which you are filing the petition.

14. Leave this blank. The judge will fill in the information about the date.

15. Do not copy the bracketed material. You should briefly explain in your own words exactly what the respondent did to you and why you think it was incorrect.

16. Again, do not copy the bracketed language. Explain in your own words what you want the court to do for you.

17. This paragraph is the "stay" described in Part D. The "stay" will be in effect until the hearing date. The date you insert here is the date of the administrative decision you disagree with and want the court to reverse. Until the court decides your case, this order will prevent the respondent from enforcing the administrative decision you are challenging.

18. Respondent's name.

19. Leave this blank. The judge will fill in the date.

20. Leave this blank. The judge will sign on the line.

21. Name of the county the court is in, in capital letters.

22. Your name in capital letters.

23. Leave blank.

24. Name, in all capital letters, of the officer or agency whose determination you are attacking (the respondent). In most cases, prisoners will name the superintendent of the prison. You may name more than one respondent; if you do, do not forget to change the wording in your papers to refer consistently to all the respondents.

25. Name of the county in which you are making this affidavit.

26. Your name.

27. Write in the decision you are complaining about and the date of the decision.

28. This paragraph should state the relevant facts and why the decision you disagree with is wrong. It should explain the statement of the claims you made in the Order to Show Cause. If there are many issues, organize your statements and arguments into several paragraphs, each dealing with a separate issue. *Remember*: this is a sworn statement, and it is a crime to include anything you know is a lie. If you want to include a statement you think is true, but you are not completely sure about it, you can say that you are making the statement "upon information and belief."

29. This paragraph should state why you are using an Order to Show Cause instead of a Notice of Petition. (See Part D(2) on the difference between an Order to Show Cause and Notice of Petition and the requirements for proceeding by Order to Show Cause.) You should be sure to explain: (1) why a *hearing is needed as soon as possible, but within 20 days* (for example, you may be worried about being placed in solitary confinement before 20 days are up); and (2) why a *stay* is needed (for example, you do not want to wrongfully be placed in solitary confinement before you have a chance for the court review your case).

The reasons for these requests may be similar (as they are in the examples above), but you should explain them both. It is a good practice to argue that you will be "irreparably injured" if the court does not grant a stay and a speedy hearing—this means that you will be hurt in a way that the court will not be able to fix later if the officer's or agency's decision takes effect before you have had a chance to contest it in the hearing.

30. Name of the county in which you are filing.

31. Make sure you include this statement only if this is the first time you have asked for a review of the decision. If you have applied for similar relief, explain why it was inadequate or why changed circumstances have caused you to bring this action.

32. Include this statement if you are attaching an application to request for a reduction or waiver of fees. *See* Appendix A-8, Affidavit in Support of Request for Reduction/Waiver of Fees.

33. This paragraph basically states what you would like the court to do for you. You should copy the language of the paragraphs numbered 1 and 2 of the Order to Show Cause. *See* Appendix A-1. You can write them out as part of this sentence without separating them into paragraphs.

34. Sign your name here *in the presence of a notary public*.

35. Print or type your name and address.

36. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature. (Use this technique only as a last resort.) If another prisoner is your witness, you should add at the bottom of the affidavit:

> I declare that I have not been able to have this [*affidavit*] notarized according to law because [*explain here your efforts to get the affidavit notarized*]. I therefore declare under penalty of perjury that all of the statements made in this [*affidavit*] are true to my own knowledge, and I pray leave of the Court to allow this [*affidavit*] to be filed without notarization.
>
> [Your signature]

37. Name of the county the court is in, in capital letters.

38. Your name in capital letters.

39. Leave blank.

40. Name, in all capital letters, of the officer or agency whose determination you are attacking (the respondent). In most cases, prisoners will name the superintendent of the prison. You may name more than one respondent; if you do, do not forget to change the wording in your papers to refer consistently to all the respondents.

41. Respondent's name in capital letters.

42. Your name.

43. Give the date you sign your petition.

44. List each affidavit (sworn statement) included in your papers. You can, for example, ask witnesses to the facts of your case to make affidavits to strengthen your petition.

45. This is the date on which the witness signed the affidavit.

46. Set a court date far enough ahead so that the respondent will have 20 days notice by the time he or she receives the Notice of Petition and petition.

47. The respondent is required to submit a certified transcript (written record) of any administrative hearing that was held. If you are seeking review of an official's or agency's failure to act or perform an administrative duty, then there will be no transcript, so do not include the demand for one.

48. Here you should write in the name of the county that the court is in. You should also briefly explain why you chose this court. Generally all you need to say is you are filing in this county because the decision you are challenging was made in this county. "Venue" simply refers to the location of the court. *See* N.Y. C.P.L.R. 506(b) (McKinney 2003).

49. Sign here and print your name clearly underneath.

50. Name of the county the court is in, in capital letters.

51. Your name in capital letters.

52. Leave blank.

53. Name, in all capital letters, of the officer or agency whose determination you are attacking (the respondent). In most cases, prisoners will name the superintendent of the prison. You may name more than one respondent; if you do, do not forget to change the wording in your papers to refer consistently to all the respondents.

54. Your name in capital letters.

55. Respondent's name(s) in capital letters.

56. Your name.

57. Name of prison in which you are incarcerated.

58. Address of prison.

59. Do not copy the bracketed words. Write the respondent's name and state his or her, or its duties that resulted in the decision or action you are challenging. If the respondent is the Board of Parole, for example, you could state that the New York State Board of Parole is responsible for deciding whether or not to parole a prisoner.

60. Again, do not copy the bracketed words. You should give the date when you were told about the decision that you are complaining of and briefly describe the decision. If you are requesting that the court order the respondent to do something required by law, you should explain that the respondent has not performed its duty.

61. In this paragraph, you should state how your administrative remedies have been exhausted.

62. Again, do not copy the bracketed words. State what happened in your own words, and be sure to include all of the facts the court might think are important. Then state why you think the decision was incorrectly made. If you know of a specific law that applies, you should include it in your statement. This section will usually run for several paragraphs; separate each issue or argument into different paragraphs to make your petition more understandable.

The sample facts and argument in this and following paragraphs have been shortened for reasons of space and clarity. You will want to go into more detail than is given here.

63. Here you should state the particular *legal* mistake that the respondent made in making the determination that you are challenging. Refer to Part B of this Chapter for a description of the basic legal reasons why decisions may be challenged in an Article 78 proceeding. They are

That the respondent failed or refused to perform a duty required by law (this would include constitutional violations and violations of Department of Correctional Services regulations);

That the respondent exceeded his or her legal authority;

That the respondent's determination was arbitrary, capricious, or an abuse of discretion; or

That the respondent's determination was not supported by substantial evidence.

You can change these words to fit your case's facts, as long as your complaint falls within one of the Part B categories.

64. In this line, you should state whether you have or you have not filed a previous challenge to the administrative determination that you want the court to review.

65. Here you should state what you want the court to do to correct the respondent's mistake. Be sure to request the court to declare the determination that you are challenging void (without legal force). You should also specifically request what needs to be done to set the situation right and undo the mistake, or prevent it from taking effect. For example, you could request that the court issue an order "DIRECTING respondent to restore petitioner's good-time credit," "ENJOINING (prohibiting) Respondent from transferring petitioner to any other facility" (if your transfer has not yet taken place), etc.

66. Sign your name here and print your name underneath.

67. "Pro se" means that you are appearing by yourself, without a lawyer.

68. Write the date when you are signing the papers, followed by your complete mailing address. You must also include a verification, a sample of which follows.

69. A verification is a brief affidavit in which you swear to the truth of the statements you make in a legal paper, such as an Article 78 petition. Your petition will not be accepted without a verification.

70. Name of the county in which the affidavit is signed, in capital letters.

71. Your name.

72. Sign your name here *in the presence of a notary public.*

73. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature. (Use this technique only as a last resort.) If another prisoner is your witness, you should add at the bottom of the affidavit:

> I declare that I have not been able to have this [*verification*] notarized according to law because [*explain here your efforts to get the verification notarized*]. I therefore declare under penalty of perjury that all of the statements made in this [*verification*] are true to my own knowledge, and I pray leave of the Court to allow this [*verification*] to be filed without notarization.
>
> [Your signature]

74. The court will fill in this blank.

75. Write the name of the county where you are bringing the action.

76. Write your name.

77. Write the name of the respondents.

78. If you are filing an Order to Show Cause, check this box.

79. If you are filing an Order to Show Cause, write the date you suggest the case be heard.

80. If you are filing a Notice of Petition, check this box.

81. If you are filing a Notice of Petition, write the date you suggest the case be heard.

82. Write "no" unless you are suing a city.

83. Write "yes" if you are suing any public officials or government agencies.

84. Write "yes" if you are seeking to prevent an agency or official from acting in a way which is harmful to you.

85. Write "yes" if you want to recover for injuries suffered by you.

86. Write "yes" if you want to recover for property damage. If not, write "no."

87. Write your name and address.

88. Write the name and address of the respondents.

89. If you have previously brought an Article 78 proceeding that is related to the Article 78 proceeding you are currently bringing, write the title, index number, court and nature of relationship of that proceeding.

90. Write the date.

91. Leave this box empty. Do not write in a number.

92. Write the name of your action.

93. Write your name and address.

94. Write the name and address of the respondent.

95. Write the name of the county in which you are bringing the action.

96. Write your name as the petitioner.

97. Write the name and official title of the respondent or respondents.

98. Leave this blank. Do not write a number.

99. Name of the county the court is in, in capital letters.

100. Your name in capital letters.

101. Leave blank.

102. Name, in all capital letters, of the officer or agency whose determination you are attacking (the respondent). In most cases, prisoners will name the superintendent of the prison. You may name more than one respondent; if you do, do not forget to change the wording in your papers to refer consistently to all the respondents.

103. Your name.

104. Name and address of your correctional facility.

105. Include this part of the sentence if you would like to request that a lawyer represent you.

106. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature. (Use this technique only as a last resort.) If another prisoner is your witness, you should add at the bottom of the affidavit:

> I declare that I have not been able to have this [*affidavit*] notarized according to law because [*explain here your efforts to get the affidavit notarized*]. I therefore declare under penalty of perjury that all of the statements made in this [*affidavit*] are true to my own knowledge, and I pray leave of the Court to allow this [*affidavit*] to be filed without notarization.
>
> [Your signature].

107. Your name.

108. Your inmate number.

109. Your signature. By signing this section, you give permission for your facility to send the Court copies of your trust fund account statement. You also authorize the facility to withdraw the filing fee from your account and to send it to the Court. The entire filing fee will be withdrawn automatically from your account even if your case is dismissed.

A JAILHOUSE LAWYER'S MANUAL

Chapter 23: Your Right to Adequate Medical Care

Columbia Human Rights Law Review

Ninth Edition 2011

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CHAPTER 23

YOUR RIGHT TO ADEQUATE MEDICAL CARE*

A. Introduction

The U.S. Constitution requires prison officials to provide all state and federal prisoners and pretrial detainees (people in jail waiting for trial) with adequate medical care.[1] If you think your right to medical care might have been violated, this Chapter will help you determine whether you have a legal claim for which you can get *relief*.

Part B of this Chapter explains your right to medical care under the federal Constitution and state law. Part C gives specific examples of health care categories for which you might have rights to medical care (diagnosed conditions, elective procedures, psychiatric care, exposure to second-hand smoke, and dental care). Part D is about special medical issues for women prisoners, including the right to basic medical and gynecological care, abortions, and accommodations for pregnant women. Part E talks about your right to receive information about your medical treatment before being treated and your right to keep your medical information confidential in prison. Part F explains the possible ways to seek relief in state and federal courts if your rights have been violated.

This Chapter will focus on federal law and some New York State laws. If you are a state prisoner, your right to adequate medical care might also be protected by your state's *statutes*, *regulations*, and *tort* law.[2] The New York Correction Law[3] and the Official Compilation of Codes, Rules, and Regulations of the State of New York explain the right to adequate medical care for New York State prisoners. If you are in prison in another state, be sure to research the law in that state.

The rights of prisoners with mental illnesses, infectious diseases, or disabilities present special issues not included in this Chapter. For more information about the rights of prisoners with mental health concerns, see Chapter 29 of the *JLM*, "Special Issues for Prisoners with Mental Illness." For more information about the rights of prisoners with infectious diseases (and the rights of prisoners to avoid exposure to infectious diseases), see Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prisons." For more information on the rights of prisoners with disabilities, see Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities."

It is important that you speak up about any medical issue that you might have. If you end up going to court to pursue your right to adequate medical care, a judge will ask for evidence that you tried to obtain medical care in a variety of ways within the prison first. To prove a claim of *exhaustion* (meaning that you tried administrative remedies before going to court) you must show that you properly pursued the grievance procedure of the prison system. Additionally, if you bring a claim of "deliberate indifference" (discussed in Part B(1)), recording any requests for care or complaints made to guards and medical care professionals can help lay the groundwork for this claim. Keeping a record will also allow you to show that the defendants (prisons or prison guards) were aware of your medical problems (the "subjective component," discussed in Part B(1)(b)). The requirements for proving a defendant's personal involvement are more complicated. Be sure to make the prison officials around you aware of your health concerns as soon as they arise, and document any attempts you made through the proper channels to receive your desired medical care.

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* This Chapter was revised by Priya Cariappa, based in part on previous versions by Erin LaFarge, Leah Threatte, Helen Respass, Pamela Addison, Susan Kraham, Gail Huggins, Erik Moulding-Johnson, Emmanuella Souffrant, and Richard F. Storrow. This Chapter was generally informed by John Boston's very helpful "Overview of Prisoners' Rights" (Updated for Second Circuit, Staff Attorneys Orientation, September 26, 2006). Special thanks to Milton Zelermyer of the Prisoners' Rights Project of the Legal Aid Society for his helpful comments.

1. *See* Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926) ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.").

2. As a state prisoner, you may bring a suit under either state law or federal law. See Part F(1) of this Chapter for a discussion of your options.

3. N.Y. Correct. Law § 45(3) (McKinney 2003 & Supp. 2009) (detailing the responsibilities of the Commission of Corrections, including the duty to "visit, inspect and appraise the management of correctional facilities with specific attention to matters such as safety, security, health of inmates, sanitary conditions" and other things that affect a prisoner's well-being).

If, after reading this chapter, you think you are not receiving adequate medical care, you should first try to protect your rights through the "administrative grievance procedures" that your prison has set up for grievances (complaints). Courts are likely to dismiss your case if you do not exhaust (use) all of the options available through your institution first.[4] To learn more about the inmate grievance procedure and exhaustion requirement, see Chapter 15 of the *JLM*, "Inmate Grievance Procedures." If you are unsuccessful or do not receive a favorable result through the inmate grievance procedure, you can then either bring a case under Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983), file a tort action in state court (or in the New York Court of Claims if you are in New York), or file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5 of the *JLM*, "Choosing a Court & a Lawsuit," Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," and Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

If you decide to pursue any claim in federal court, you **MUST** read Chapter 14 of the *JLM* on the Prison Litigation Reform Act ("PLRA"). You should also be aware of the negative consequences of filing lawsuits that are deemed frivolous or malicious (lawsuits which are based on lies or filed for the sole purpose of harassing someone) under Section 1932 of Title 28 of the United States Code (28 U.S.C. § 1932).[5]

B. Source of the Right to Adequate Medical Care

1. Constitutional Law

The Eighth Amendment of the Constitution protects prisoners from "cruel and unusual punishment."[6] The U.S. Supreme Court has decided that failing to provide medical care to prisoners violates this amendment.[7] In 1976, the Court explained in *Estelle v. Gamble* that "deliberate indifference"—purposely ignoring the "serious medical needs" of prisoners—amounts to "cruel and unusual punishment" forbidden by the Eighth Amendment.[8]

In addition, the Supreme Court ruled that claims for a violation of the right to medical care have an *objective* component and a *subjective* component. A prisoner must first prove that the harm was "sufficiently serious" (the objective component).[9] A prisoner must also show that the prison official responsible for the

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4. Porter v. Nussle, 534 U.S. 516, 519–20, 122 S. Ct. 983, 985–86, 152 L. Ed. 2d 12, 19 (2002) (finding all complaints about conditions and incidents in a correctional facility must first be taken through the administrative remedy procedure available at the facility before being brought to court); *see also* Booth v. Churner, 532 U.S. 731, 738–39, 121 S. Ct. 1819, 1823–24, 149 L. Ed. 2d 958, 965 (2001) (finding that it is mandatory to bring civil rights claims through the correctional institution's administrative procedures before bringing the claim to the court); Anderson v. XYZ Corr. Health Serv., 407 F.3d 674, 681 (4th Cir. 2005) (finding that prison officials can use as an affirmative defense the fact that a prisoner failed to exhaust his administrative remedies). Regardless of whether your complaint is about one incident, many incidents, or an ongoing condition, the court will not hear your complaint if your prison's grievance procedure provides a remedy for your problem and you have not used it.

5. 28 U.S.C. § 1932 (2006) states, in part, that for any civil action brought by a prisoner, the court may revoke earned good-time credit if the court finds that "the claim was filed for a malicious purpose."

6. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

7. Estelle v. Gamble, 429 U.S. 97, 104–05, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.").

8. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874 (1976)). In *Estelle*, a prisoner injured his back during his prison work assignment. Although the medical treatments the prisoner received showed that *in his particular case* the officials were not purposefully ignoring his medical needs, evidence of "deliberate indifference" may represent "cruel and unusual punishment" in other cases.

9. Wilson v. Seiter, 501 U.S. 294, 303–04, 111 S. Ct. 2321, 2326–27, 115 L. Ed. 2d 271, 282–83 (1991) (holding that a prisoner can bring an 8th Amendment claim by applying the deliberate indifference standard to a condition of confinement that denies an obvious human need, such as "food, warmth or exercise," and proving that a prison official was deliberately indifferent to that "identifiable human need").

harm knew and ignored "an excessive risk to [the] inmate['s] health or safety" (the subjective component).[10] Since deciding *Estelle*, the courts have tried to clarify the meaning of "serious medical need" and "deliberate indifference."[11] This Chapter explains each standard separately below.

Note that the Constitution does not guarantee comfortable prisons; prison conditions may be "restrictive and even harsh."[12] However, the medical care you receive should meet an acceptable standard of treatment and care in terms of modern medicine and technology and current beliefs about human decency.[13]

(a) The Objective Component: "Sufficiently Serious"

To meet the objective component, you must show that you suffered a "sufficiently serious" injury as a result of failing to receive medical treatment and that prison officials were deliberately indifferent to your "serious medical need." Courts define "serious medical need" as "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's attention."[14] To decide if a medical need is "serious," the Second Circuit (which governs New York, Connecticut, and Vermont) considers several factors including, but not limited to, the following:

(1) whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment";
(2) whether the medical condition significantly affects daily activities; and
(3) whether "chronic and substantial pain" exists.[15]

The Prison Litigation Reform Act ("PLRA") only considers harm to be sufficiently serious if it is in the form of a physical injury.[16] For example, in one case a patient with HIV was denied his medication for

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10. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (adopting the subjective test for deliberate indifference).

11. The Second Circuit defined a serious medical need as "a condition of urgency, one that may produce death, degeneration, or extreme pain." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (quoting Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). However, in *Brock* it specifically rejected the notion that "only 'extreme pain' or a degenerative condition" meets the legal standard since "the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003) (quoting Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977)). More recently, the court in dictum repeated the "death, degeneration, or extreme pain" formula. Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005). However, the *Brock* holding would still seem to be the law of the Circuit. *See also* Berry v. City of Muskogee, 900 F.2d 1489, 1495–96 (10th Cir. 1990) (holding that deliberate indifference requires more than negligence, but less than intentional and malicious infliction of injury); Anderson v. City of Atlanta, 778 F.2d 678, 686 (11th Cir. 1985) (finding that a policy of inadequate staffing of medical personnel may raise a question of deliberate indifference); Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982) (stating that serious deficiencies in a prison's medical care, including failure to provide the opportunity to make a sick call or to voice medical concerns, meet the standard of deliberate indifference); Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) (determining deliberate indifference by weighing the seriousness of a prisoner's mental illness and the length of incarceration against availability and expense of psychiatric care).

12. Rhodes v. Chapman, 452 U.S. 337, 347–49, 101 S. Ct. 2392, 2399–400, 69 L. Ed. 2d 59, 69–70 (1981) (stating that placing two prisoners in a cell does not deprive prisoners of essential human needs or inflict needless pain such that the 8th Amendment would be violated).

13. Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) ("Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" (citing Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958))).

14. Brown v. Johnson, 387 F.3d 1344, 1350–52 (11th Cir. 2004) (holding HIV and hepatitis were serious needs); *see also* Carnell v. Grimm, 872 F. Supp. 746, 755 (D. Haw. 1994) ("A 'serious' medical need exists if the failure to treat the need could result in further significant injury or 'unnecessary and wanton infliction of pain.'" (quoting Estelle v. Gamble 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976))), *appeal dismissed in part*, *aff'd in part,* 74 F.3d 977 (9th Cir. 1996).

15. Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003). The Second Circuit defined a serious medical need as "a condition of urgency, one that may produce death, degeneration, or extreme pain." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (quoting Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). However, in *Brock*, the court specifically rejected the notion that "only 'extreme pain' or a degenerative condition" meets the legal standard, since "the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." Brock v. Wright, 315 F.3d 158, 163 (2d Cir. 2003). More recently, the court in dictum repeated the "death, degeneration, or extreme pain" formula. Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005). However, the *Brock* holding would still seem to be the law of the Circuit.

16. See Chapter 14 of the *JLM* for more information on the limits the PLRA imposes on your ability to bring a

several days.[17] His illness was clearly serious, but it was determined that missing a few days of medication caused him no additional harm. However, if the medical condition you suffer from is extremely painful, simply being left to endure the pain without medical attention or care could be considered "sufficiently serious" harm. For example, in *Hemmings v. Gorczyk*, a prisoner suffered a ruptured tendon during a basketball game, but prison medical staff diagnosed it as a sprain and refused for two months to send him to a specially trained doctor.[18] The Second Circuit found that his condition was painful enough to satisfy the objective portion of the "deliberate indifference" standard. The general trend seems to be that the courts will consider injuries to be serious only if they significantly change a prisoner's quality of life. The Second Circuit has held that the denial of care has to be objectively serious enough to create "a condition of urgency," that is, a situation where death, permanent injury, or extreme pain appears likely or has occurred.[19] Other circuits have similarly high requirements for what counts as a serious injury or denial of care.[20]

Recent medical care decisions have emphasized pain[21] and disability when evaluating medical need.[22] Drug or alcohol withdrawal is a serious medical need.[23] Transsexualism or gender identity disorder ("GID") has been recognized as a serious medical need in some cases.[24] There might also be a "serious cumulative

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lawsuit while in prison.

17. Smith v. Carpenter, 316 F.3d 178, 181 (2d Cir. 2003) (holding that a jury may consider the lack of adverse medical effects to the prisoner in determining whether a denial of medical care meets the objective serious medical need requirement).

18. Hemmings v. Gorczyk, 134 F.3d 104, 109 (2d Cir. 1998).

19. *See* Brock v. Wright, 315 F.3d 158, 163–64 (2d Cir. 2003) (finding that failing to adequately examine painful swollen tissue from a knife cut could constitute deliberate indifference); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (finding that deliberate indifference was exhibited when a portion of a prisoner's ear had been cut off during a fight and prison officials merely stitched a stump of the prisoner's ear instead of attempting to suture the severed portion back on); *see also* Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006) (defining sufficiently serious as "whether 'a reasonable doctor or patient would find it important and worthy of comment,' whether the condition 'significantly affects an individual's daily activities,' and whether it causes 'chronic and substantial pain'" (quoting Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998))).

20. The Ninth Circuit held in *Hunt v. Dental Dept.*, 865 F.2d 198, 200–01 (9th Cir. 1989) that failure to put an inmate who lost his dentures on a soft food diet could be sufficient to state a claim of deliberate medical indifference. In *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993), the Sixth Circuit held that refusal to admit a paraplegic prisoner into an infirmary where he could use his wheelchair constituted deliberate indifference.

21. Numerous courts have cited pain as an appropriate reason for finding that a prisoner's medical needs are serious. *See, e.g.*, Blackmore v. Kalamazoo County, 390 F.3d 890, 899–900 (6th Cir. 2004) (holding that a two-day delay in treatment of appendicitis caused pain sufficient to pose serious risk of harm, even though the appendix did not in fact rupture); Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) (holding that a claim alleging a back condition that resulted in pain so serious it caused the prisoner to fall down sufficiently pleaded a serious need); Farrow v. West, 320 F.3d 1235, 1244–45 (11th Cir. 2003) (holding that pain, bleeding, and swollen gums of a prisoner who needed dentures helped show serious medical need); Boretti v. Wiscomb, 930 F.2d 1150, 1154–55 (6th Cir. 1991) (holding needless pain that does not lead to permanent injury is still actionable); Moreland v. Wharton, 899 F.2d 1168, 1170 (11th Cir. 1989) (finding that an allegation of a "significant and uncomfortable health problem" was a serious need); Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 (8th Cir. 1989) (holding that delay in medical care for a condition that is "painful in nature" is actionable).

22. Miller v. King, 384 F.3d 1248, 1261 (11th Cir. 2004) (holding that paraplegia with inability to control passing urine is a serious medical need), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (finding that loss of vision may not be "pain" but it is "suffering"); Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (determining that prison must provide treatment when a "substantial disability" exists); Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (finding that medical need is serious if it imposes a "life-long handicap or permanent loss").

23. *See* Morrison v. Washington County, 700 F.2d 678, 685 (11th Cir. 1983) (referring to patient who died after experiencing alcohol withdrawal as "seriously ill"); Kelley v. County of Wayne, 325 F. Supp. 2d 788, 791–92 (E.D. Mich. 2004) (finding that heroin withdrawal is a "serious medical condition").

24. *See, e.g.*, Praylor v. Tex. Dept. of Crim. Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (assuming that transsexualism constitutes a serious medical need but deciding the case on other grounds); Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (assuming that transsexualism constitutes a serious medical need but deciding the case on other grounds). Note, however, that courts differ over the extent of prison officials' obligations to provide hormone therapy and surgery. *See* Praylor v. Tex. Dept. of Crim. Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (determining that denial of hormone therapy was not deliberate indifference under the circumstances); De'Lonta v. Angelone, 330 F.3d 630, 635–36 (4th Cir. 2003) (finding that prisoner with GID was entitled to treatment for compulsion to self-mutilate after her hormone treatment was stopped); Maggert v. Hanks, 131 F.3d 670, 671–72 (7th Cir. 1997) (denying hormonal treatment and surgical procedures for prisoner with "gender dysphoria" because the condition is not "generally considered a severe enough condition" to warrant costly treatment); Kosilek v. Maloney, 221 F. Supp. 2d 156,

effect from the repeated denial of care" for minor problems.[25] Where medical treatment is delayed, courts look at whether the *effects* of the delay or interruption—not the underlying medical condition—are objectively serious enough to present an Eighth Amendment question.[26] Whether a medical need is "serious" should be determined on a case-by-case basis and not only by a prison's "serious need list."[27] Prisons are not allowed to have a rigid list of serious medical needs without allowing some flexibility in individual prisoner evaluations.[28] In addition, a treatment considered "elective" by a hospital or prison may still be a "serious medical need."[29]

(b) The Subjective Component ("Knew of and Disregarded a Risk")

In addition to proving that an injury is sufficiently serious, a prisoner bringing an Eighth Amendment medical claim must also prove that prison officials purposely allowed him to go without necessary help. While an x-ray can prove *objectively* that your leg was broken, what happened in the official's head when deciding what to do about your leg (in other words, his *subjective* state of mind) is more difficult to prove. The following Subsections try to explain the subjective standard and give examples that may help you form an idea of the types of situations that have and have not been found to meet this standard.

As the Court held in *Farmer v. Brennan*, an official cannot be found *liable* for an Eighth Amendment violation unless two things happen. First, the official has to *know* the facts that could have shown or proven that a prisoner's health was in danger. Second, after the official is aware of the threat to a prisoner's health, the official must actually **believe** that the prisoner's health is in danger.[30] Since *Farmer v. Brennan*, courts have struggled to determine exactly how much knowledge a prison official must have in order to meet the standard. In general, the standard is very high, as you will see from the cases discussed below.

2. Courts Defer to Prison Health Officials' Medical Judgment

It can be difficult to win a deliberate indifference medical care claim when the prisoner and the prison officials have different opinions over what medical treatment is best for the prisoner. For example, a prison doctor might give a prisoner X medication for his medical condition, but the prisoner believes Y medication is better. As long as both X and Y medications are approved for treating the prisoner's disease, the prisoner will probably not win in court because *the court will defer to the doctor's professional medical judgment* that X was best for the prisoner.

A difference in opinion over medical treatment, or even an error in medical judgment, is not likely actionable.[31] But that does not mean that you can never challenge a prison doctor's decisions; "a medical professional's erroneous treatment decision can lead to deliberate indifference liability if the decision was

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193 (D. Mass. 2002) (finding that the 8th Amendment requires that treatment decisions for a prisoner with GID be based on individualized medical evaluation rather than a general treatment policy).

25. Jones v. Evans, 544 F. Supp. 769, 775 n.4 (N.D. Ga. 1982) (finding that confiscating a prisoner's medically prescribed back brace might have serious enough effects to constitute an 8th Amendment violation).

26. Kikumura v. Osagie, 461 F.3d 1269, 1292, 1295–96 (10th Cir. 2006) (holding delay must be shown to have caused "substantial harm" and that pain caused by delay can amount to substantial harm); Spann v. Roper, 453 F.3d 1007, 1008–09 (8th Cir. 2006) (holding that no medical evidence was needed for a jury to find that a three-hour delay in treating an overdose was objectively serious).

27. Martin v. DeBruyn, 880 F. Supp. 610, 614 (N.D. Ind. 1995) (holding that "[c]ourts determine what constitutes a serious medical need on a case-by-case basis" and that prisoner's ulcers were "serious" even though prison directive did not include ulcers in a list of serious medical needs).

28. Martin v. DeBruyn, 880 F.Supp. 610, 616 (N.D. Ind. 1995) (refusing to accept "an inelastic list of conditions which [a prison] considers 'serious medical needs'" because "the definition of such a need is necessarily elastic").

29. Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (holding that a hospital's "gratuitous classification" of a surgery as "elective" does not remove prison's duty "to promptly provide necessary medical treatment").

30. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

31. *See* Stewart v. Murphy, 174 F.3d 530, 535 (5th Cir. 1999) (holding that physician's failure to discover ulcer earlier, to read nurses' notes, and to follow up to ensure that his orders were carried out was at most negligence and not deliberate indifference); Perkins v. Kansas Dept. of Corr., 165 F.3d 803, 811 (10th Cir. 1999) (upholding denial of particular drug for HIV-positive prisoner since other drugs were provided and prisoner "simply disagrees" about appropriate treatment).

made in the absence of professional judgment."[32] Therefore, the prison health official must actually use legitimate medical judgment.

Under the deliberate indifference standard, courts defer to the prison health official's medical judgment regarding treatment for the particular patient. Prison officials may rely upon their own medical authorities instead of the prisoner's civilian physician.[33] While a general prison medical policy might be fine for most prisoners, forcing some prisoners to follow that medical policy might constitute deliberate indifference to those *particular* prisoners' medical conditions. For example, the Second Circuit recently held that a statewide prison medical policy that denied Hepatitis C treatment to prisoners with any substance abuse problems within the past two years might lead to deliberate indifference if applied to a particular prisoner. The prison followed the policy despite "the unanimous, express, and repeated recommendations of plaintiff's treating physicians, including prison physicians," to depart from the policy in the plaintiff's case.[34]

3. Common Types of Deliberate Indifference

Listed below are some common situations in which courts have found prison medical staff to be deliberately indifferent, and not just exercising differences of professional opinion. They include

(1) Ignoring obvious conditions;
(2) Failing to provide treatment for diagnosed conditions;
(3) Failing to investigate enough to make an *informed* judgment;
(4) Delaying treatment;
(5) Interfering with access to treatment;
(6) Making medical decisions based on non-medical factors; and
(7) Making a "medical" judgment so bad it's not medical.

(a) Ignoring Obvious Conditions

A prisoner can meet the subjective standard if he proves that a prison official *should have* been aware of a serious and substantial risk to his health *because the problem was so obvious*. Even if the guard did not notice the risk (injury, disease, physical condition, etc.), the officer can be held liable if the risk to the prisoner was very obvious. Thus, in *Brice v. Virginia Beach Correction Center*, the court found a prison guard may have ignored a serious and substantial risk (and thus may have been deliberately indifferent) when a prisoner received no medical care after a fight, even though the prisoner's mouth was bleeding and he complained of horrible pain.[35] In *Phelps v. Kapnolas*, the court said that a prison official disregarded an obvious risk by putting a prisoner in solitary confinement with inadequate food when the official should have known such a small amount would cause pain and distress.[36]

In *Phillips v. Roane County, Tenn.*, the Sixth Circuit ruled that correctional officers at the Roane County Jail, as well as a doctor and paramedic who worked at the facility, were liable for the death of a female prisoner. Medical examiners testified that the prisoner died from untreated diabetes. According to the court, prison authorities were aware of her deteriorating condition during the two weeks before her death, as she complained of vomiting, chest pain, fatigue, nausea, and constipation. Their failure to take her to a hospital was considered "deliberate indifference" to her medical needs.[37]

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32. Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006); *see also* Greeno v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (finding that medical staff's "obdurate refusal" to change prisoner's treatment, despite his reports that his medication was not working and his condition was worsening, could constitute deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (finding that failure to inquire further into and treat severe pain, along with repeated delays in seeing the patient, could permit a jury to find deliberate indifference); Hunt v. Uphoff, 199 F.3d 1220, 1223–24 (10th Cir. 1999) (finding that a doctor's denial of insulin and other treatments recommended by another doctor could constitute more than a mere difference of medical opinion, and that the prisoner could potentially prove deliberate indifference).

33. Vaughan v. Lacey, 49 F.3d 1344, 1346 (8th Cir. 1995) (holding that prison authorities can rely on prison doctors even where a prisoner's private physician holds a different medical opinion about appropriate treatment).

34. Johnson v. Wright, 412 F.3d 398, 404 (2d Cir. 2005) (holding that "a deliberate indifference claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner's treating physicians" (citing Gill v. Mooney, 824 F.2d 192, 196 (2d Cir. 1987))).

35. Brice v. Va. Beach Corr. Ctr., 58 F.3d 101, 103–05 (4th Cir. 1995).

36. Phelps v. Kapnolas, 308 F.3d 180, 186–87 (2d Cir. 2002).

37. Phillips v. Roane County, Tenn., 534 F.3d 531, 539–40, 546 (6th Cir. 2008).

The risk to the prisoner must be very obvious because courts frequently find that the prison official is not liable when he did not have sufficient knowledge of a prisoner's condition. In *Reeves v. Collins*, prison guards were not liable when they forced a prisoner to work, even after he warned them he had a previous back injury, was doubled over, and complained of excessive pain.[38] He was later taken to the infirmary and diagnosed with a double hernia. The court decided that the guards had not disregarded a substantial risk because even if the guards had checked the prisoner's medical records (which they did not), they would not have learned of the prisoner's history of hernias due to a mistake in the records.

In *Sanderfer v. Nichols*, a prison doctor was not liable for her failure to treat a patient's hypertension, causing him to have a fatal heart attack.[39] Although the plaintiff's medical records included a history of hypertension, the doctor was not liable because the plaintiff complained only of bronchitis when he met with the doctor. The prisoner never told the doctor that hypertension was a problem for him, and his blood pressure later was checked on three occasions and was normal. *This means that it is very important that you speak up and tell prison officials about your health problems.*

(b) Failure to Provide Treatment for Diagnosed Conditions

The easiest way to meet the subjective standard is to offer proof that a prison doctor diagnosed you with a serious medical condition and prescribed treatment for you, but you never received that treatment. In *Hudson v. McHugh*, the prisoner was transferred from a halfway house to a county jail but was not given his medicine.[40] After eleven days without it, despite repeated requests to the jail's medical personnel, he had a seizure. The Seventh Circuit held that this was the most obvious kind of case in which a prisoner could raise a claim: "[T]his is the prototypical case of deliberate indifference, an inmate with a potentially serious problem repeatedly requesting medical aid, receiving none, and then suffering a serious injury."[41] It is important to note that not only was the prisoner denied his medicine, but he also requested it several times before he became dangerously ill. *If you are making an inadequate medical care claim, you should tell the court about your requests for medical treatment to show that officials knew of your needs.*

(c) Failing to Investigate Enough to Make an Informed Judgment

Courts are more likely to respect the opinions of prison medical staff who have made "informed" medical judgments or decisions. But, the court may find an informed judgment was not made, allowing for an Eighth Amendment claim.[42] A judgment may not be informed if, in response to a prisoner complaining of a medical problem, prison officials do not properly treat the prisoner,[43] investigate the cause of the prisoner's medical condition,[44] order diagnostic tests,[45] send the prisoner to a specialist,[46] or consult the prisoner's medical records before stopping medication.[47] An "uninformed" decision may be found to be "deliberately indifferent."

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38. Reeves v. Collins, 27 F.3d 174, 176–77 (5th Cir. 1994).

39. Sanderfer v. Nichols, 62 F.3d 151, 155 (6th Cir. 1995) (finding that even though the doctor probably should have checked the prisoner's medical records, her failure to do so was at most negligence, not deliberate indifference).

40. Hudson v. McHugh, 148 F.3d 859, 861 (7th Cir. 1998).

41. Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998); *see also* Erickson v. Pardus, 551 U.S. 89, 92–95, 127 S. Ct. 2197, 2199–2200, 167 L. Ed. 2d 1081, 1085–86 (2007) (holding that refusal to continue prescribed treatment because of alleged theft of syringe used for the treatment could amount to deliberate indifference).

42. Tillery v. Owens, 719 F. Supp. 1256, 1308 (W.D. Pa. 1989) *aff'd*, 907 F.2d 418 (3d Cir. 1990) (holding that if an informed judgment has not been made, the court may find an 8th Amendment claim). The 8th Amendment protects you from cruel and unusual punishment. U.S. Const. amend. VIII ("[N]or [shall] cruel and unusual punishments [be] inflicted.").

43. McElligott v. Foley, 182 F.3d 1248, 1252, 1256–57 (11th Cir. 1999) (finding that failure to inquire about and treat plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could constitute deliberate indifference).

44. Liscio v. Warren, 901 F.2d 274, 276–77 (2d Cir. 1990) (finding that failure to investigate the cause of a detainee's delirium, and consequent failure to diagnose alcohol withdrawal, could constitute deliberate indifference).

45. *See* Greeno v. Daley, 414 F.3d 645, 655–57 (7th Cir. 2005) (finding that a doctor could be deliberately indifferent for refusing to send a prisoner to a specialist or order an endoscopy despite the prisoner's complaints of severe pain, and that doctor could not rely on lack of "objective evidence" since often there is no objective evidence of pain); Miltier v. Beorn, 896 F.2d 848, 853 (4th Cir. 1990) (finding that deliberate indifference could exist where doctor failed to perform tests for cardiac disease in prisoner with symptoms that called for such tests).

46. *See* Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (finding that a doctor could be deliberately indifferent for refusing to send a prisoner to a specialist or to order an endoscopy despite the prisoner's complaints of severe pain, and noting that the doctor could not rely on lack of "objective evidence" since often there is no objective evidence of pain).

47. *See* Steele v. Shah, *decision reported at* 87 F.3d 1266, 1270 (11th Cir. 1996), *decision reported in full at* No.

(d) Delay in Treatment

The subjective standard can be met by proving that a delay of treatment caused serious consequences. Delay in treatment is sometimes an issue of professional opinion—your medical problem is not so serious that you need to see a doctor immediately—but some delays are very serious and may prove deliberate indifference. If you are suffering from an injury that prison officials know about, but you have to wait a very long time before getting medical treatment, you may be able to bring a claim. You will have to allege that the prison officials knew of, and ignored, a serious risk to your health. In particular, denial of or delay in access to medical personnel,[48] or in their providing treatment,[49] can be deliberate indifference. In determining whether or not a delay constitutes deliberate indifference, two factors are taken into account:

(1) the seriousness of the prisoner's medical need;[50] and
(2) whether the delay was objectively serious enough to present an Eighth Amendment question.[51]

Remember that a valid reason for having to wait for non-emergency medical treatment might exist. For example, if no prison official who can properly take care of your non-emergency medical needs is on duty, waiting until a properly trained person can come to examine and treat you is probably best.

Security concerns may also justify denying your request for a particular medical treatment. For instance, in *Schmidt v. Odell*, the court rejected the plaintiff's claim that failure to provide him with a wheelchair was a constitutional violation. The court found that having a wheelchair among the jail's population could pose a legitimate security risk. The court concluded that this was sufficient to show that the refusal to provide a wheelchair did not alone violate the Eighth Amendment. However, the court noted that the prison's delay in providing a *shower* chair "appears to have resulted not only in the unnecessary infliction of pain, but also in needless indignity that a jury could find was inconsistent with the Eighth Amendment."[52]

Even when there is no apparent reason for delay in treatment, a court might not find that officials acted with deliberate indifference if the delay does not cause a great deal of harm. In *Smith v. Carpenter*, the court said that it was proper for a jury to consider the fact that a prisoner did not suffer any bad effects after officials refused to give him treatment for his HIV-related illness for periods of five and seven days; the jury

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9303396 U.S. App. LEXIS 23301 at *18–19 (11th Cir. July 17, 1996) (denying summary judgment to prison doctor who discontinued psychiatric medication for a prisoner the doctor knew was at risk for suicide based on a cursory interview, without reviewing medical records).

48. *See* Estate of Carter v. City of Detroit, 408 F.3d 305, 310, 312–13 (6th Cir. 2005) (finding that an official who knew prisoner was exhibiting "the classic symptoms of a heart attack" and did not arrange transportation to a hospital could be found deliberately indifferent because of the immediate threat of the symptoms); Johnson v. Karnes, 398 F.3d 868, 875–76 (6th Cir. 2005) (finding that prison doctor's failure to schedule surgery for severed tendons despite emergency room instruction to return prisoner in three to seven days could constitute deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (finding that repeated delays in doctor's seeing a patient with constant severe pain, continuing of ineffective medications, and failure to order diagnostic tests, could constitute deliberate indifference); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (holding that a two-month failure to get prisoner with head injury to a doctor stated a claim); Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003) (holding that delay of provision of HIV medicine to an HIV-positive prisoner could state an 8th Amendment claim when the temporary interruption of medication causes significant harm).

49. Spann v. Roper, 453 F.3d 1007, 1008–09 (8th Cir. 2006) (finding that a nurse could be deliberately indifferent for leaving a prisoner in his cell for three hours although she knew he had taken an overdose of mental health medications intended for another); McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding an extended delay in starting hepatitis C treatment constituted a valid claim).

50. *See* Kikumura v. Osagie, 461 F.3d 1269, 1292 (10th Cir. 2006) (explaining delay must be shown to have caused "substantial harm," including pain suffered while awaiting treatment); Weyant v. State, 101 F.3d 845, 856–57 (2d Cir. 1996) (finding delay of hours in getting medical attention for a diabetic in insulin shock could be deliberate indifference, shown by evidence that official acted with reckless disregard for detainee's serious medical condition).

51. Spann v. Roper, 453 F.3d 1007, 1008–09 (8th Cir. 2006) (holding that a jury could find a three-hour delay in addressing a medication overdose to be objectively sufficiently serious). *But see* Smith v. Carpenter, 316 F.3d 178, 186–89 (2d Cir. 2003) (determining that brief interruptions of HIV medications, with no discernible adverse effects, did not present serious medical needs).

52. Schmidt v. Odell, 64 F. Supp. 2d 1014, 1029–1031 (D. Kan. 1999); *see also* Vines v. Buchler, *decision reported at* 101 F.3d 110, 110 (7th Cir. 1996), *opinion reported in full at* No. 96-1677, 1996 U.S. App. LEXIS 28693, at *3–5 (7th Cir. Oct. 31, 1996) (explaining that a prisoner who was denied his back brace for seven weeks and required to perform work on a sod-laying crew failed to show that prison officials were deliberately indifferent to his medical condition, since the back brace was prohibited for security reasons and the prisoner received ongoing medical treatment for his back condition).

found no deliberate indifference.[53] In *Jolly v. Badgett*, the prisoner had epilepsy, a condition that causes seizures and high blood pressure. He took medication to prevent the life-threatening consequences of this disease, but officials refused to allow the prisoner to leave his cell to get water to take his medication until two hours after his prescribed time. The court found that officials did not act with deliberate indifference without evidence that the officials knew the delay would have a dangerous effect.[54]

In general, if there is a legitimate reason for a delay in your treatment, or if you cannot prove officials knew that treatment needed to be given to you immediately, you will have a hard time meeting the subjective standard that a prison official knew of and ignored a substantial risk to your health.

(e) Interference with Access to Treatment

You can also meet the subjective standard of deliberate indifference by showing that prison officials interfered with your ability to obtain treatment. Prison guards and/or prison medical staff can prevent prisoners from accessing treatment in many different ways, including:

(1) Denying you access to medical specialists who are qualified to address your health problem;[55]
(2) Allowing you to see a specialist but then refusing to carry out the specialist's recommendations (or those of a specialist who directed treatment before you were incarcerated);[56] or
(3) Refusing to carry out or simply ignoring medical orders.[57]

For example, in *Brown v. Coleman*, the court found deliberate indifference because, although the prison medical staff repeatedly recommended surgery for a prisoner, officials with no medical training ignored the recommendations.[58] In *Martinez v. Mancusi*, the court found that the prisoner could bring a claim against prison officials who had used force to remove him from a hospital where he was recovering from leg surgery.[59] Prison officials ignored the doctor's instructions that the prisoner could not walk and removed the prisoner, who was partially paralyzed, without the doctor's permission. This caused the surgery to be unsuccessful. The prisoner was also denied the pain medication his surgeon prescribed him and thus was left in constant pain. In *Woodall v. Foti*, a prisoner with suicidal tendencies had received treatment for manic depression before being incarcerated.[60] The prisoner's diagnosis was confirmed by the prison doctor. The prisoner claimed his condition worsened when he was denied treatment by the sheriff, who placed him

53. Smith v. Carpenter, 316 F.3d 178, 185–89 (2d Cir. 2003).

54. Jolly v. Badgett, 144 F.3d 573, 573 (8th Cir. 1998).

55. *See* Mata v. Saiz, 427 F.3d 745, 756–59 (10th Cir. 2005) (finding nurse's failure to perform "gatekeeper" role by referring patient to a practitioner for symptoms of cardiac emergency could be deliberate indifference); Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (finding refusal to refer prisoner to a specialist or order an endoscopy for two years despite intense abdominal pain could be deliberate indifference); Hartsfield v. Colburn, 371 F.3d 454, 457–58 (8th Cir. 2004) (holding that six weeks' delay in sending prisoner to a dentist that resulted in infection and loss of teeth raised an 8th Amendment claim); LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001) (determining that failure to make timely referral to a specialist or tell the patient to seek one out was deliberate indifference); Mandel v. Doe, 888 F.2d 783, 789–95 (11th Cir. 1989) (affirming an award of damages where physician's assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the prisoner from seeing a doctor).

56. *See* Gil v. Reed, 525 F.3d 551, 55–53 (7th Cir. 2008) (finding that prisoner stated a claim where prison staff prescribed the same medication that the prison specialist warned against taking); Miller v. Schoenen, 75 F.3d 1305, 1311 (8th Cir. 1996) (finding that not providing medical care that an outside doctor and outside hospitals said was needed supported a deliberate indifference claim); Starbeck v. Linn County Jail, 871 F. Supp. 1129, 1145–47 (N.D. Iowa 1994) (explaining that when outside doctors had recommended surgery, prison officials who failed to provide the surgery must present evidence why they did not follow the outside doctors' recommendations).

57. Estelle v. Gamble, 429 U.S. 97, 104–05, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260–61 (1976) (holding that "intentionally interfering with the treatment once prescribed" can constitute an 8th Amendment claim); *see* Lawson v. Dallas County, 286 F.3d 257, 263 (5th Cir. 2002) (affirming disregard for follow-up care instructions for paraplegic could be deliberate indifference); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (holding denial of prescription eyeglasses enough to allege deliberate indifference); Erickson v. Holloway, 77 F.3d 1078, 1080–81 (8th Cir. 1996) (finding officer's refusal of emergency room doctor's request to admit the prisoner and take x-rays could show deliberate indifference); Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (finding nurse's failure to perform prescribed dressing change raises "a genuine issue" for trial); McCorkle v. Walker, 871 F. Supp. 555, 558 (N.D.N.Y. 1995) (finding the allegation that prison officials failed to obey a medical order to house asthmatic prisoner on a lower tier was sufficient to state a claim).

58. Brown v. Coleman, *decision reported at* 60 F.3d 837, 837 (10th Cir. 1995), *opinion reported in full at* No. 94-7183, 1995 U.S. App. LEXIS 16928, at *4–5 (10th Cir. Jul. 12, 1995) (*unpublished*).

59. Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970).

60. Woodall v. Foti, 648 F.2d 268, 271 (5th Cir. 1981).

in solitary confinement. On appeal, the court found that if these facts were true, the sheriff's actions could meet the subjective standard because of an interference with access to treatment.

Refusing to treat a prisoner unless the prisoner complies with an official's order can be considered deliberate indifference. In *Harrison v. Barkley*, a prison dentist refused to fix the prisoner's cavity unless the prisoner allowed the dentist to pull another one of the prisoner's teeth because the policy of the prison was to pull teeth that were in such poor condition. Although the tooth was rotten, the prisoner did not want it removed because it was not painful and he only had a few teeth left.[61] The court said that in a situation like this one, the dentist's actions constituted deliberate indifference. Similarly, in *Benter v. Peck*, a district court in Iowa found that doctors treating prisoners have a responsibility to provide the medical care that they need.[62] In that case, the doctor allowed the prison to withhold eyeglasses from a prisoner who could not function without them in order to force him to pay for the glasses. The court held that withholding the prescription glasses from the prisoner rose to the standard of deliberate indifference.

(f) Making Medical Decisions Based on Non-Medical Factors

If the prison health staff is making medical decisions about you based on non-medical factors, you may be able to claim deliberate indifference.[63] Prisons should *not* decide what medical treatment you get based on factors like their own lack of staff[64] or interpreters,[65] the prison's budgetary restrictions,[66] because you are about to be released,[67] or because they want to punish you.[68] In particular, "systemic deficiencies in staffing, facilities, or procedures [which] make unnecessary suffering inevitable" may support a finding of deliberate indifference.[69] In other words, problems that are universal and part of the prison system (its staffing, facilities, or policies that cause suffering) can still be causes of actions even though you are not the only one hurt. Interestingly, a San Francisco judge refused to send a convicted robber to jail, citing the poor medical care the man would receive and equating a prison sentence to a death sentence.[70] While this was an extremely unusual situation, the case law may still help you develop a claim about systemic deficiencies.

(g) "Medical" Judgment So Bad It's Not Medical

You also can claim deliberate indifference if you believe your prison's health staff is making medical decisions that are so incompetent or inadequate that no trained health professional would *ever* make that

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61. Harrison v. Barkley, 219 F.3d 132, 138 (2d Cir. 2000).

62. Benter v. Peck, 825 F. Supp. 1411, 1417 (S.D. Iowa 1993). *But see* Martin v. DeBruyn, 880 F. Supp 610, 614 (N.D. Ind. 1995) (determining that the 8th Amendment does not require the State to provide an inmate with a necessary commodity that would not be free outside of the prison and which the prisoner has the sufficient funds to purchase).

63. *See* Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (withholding a dental referral for prisoner's behavioral problems could be deliberate indifference); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985) (finding prison's refusal to provide specialty consultations without a court order was deliberate indifference).

64. Casey v. Lewis, 834 F. Supp. 1477, 1547–48 (D. Ariz. 1993) (finding that withholding treatment for lack of staff might be deliberate indifference if it results in substantial harm).

65. Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995) (explaining that failure to provide a translator for medical encounters can constitute deliberate indifference).

66. Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (holding that budgetary restrictions could not justify deliberate indifference to a prisoner's serious medical needs); Starbeck v. Linn County Jail, 871 F. Supp. 1129, 1146 (N.D. Iowa 1994) ("[An allegation that a prisoner's surgery was denied because the State of Iowa did not want to pay the costs of guards during the prisoner's recuperation] could rise to deliberate indifference to the [prisoner's] serious medical need.").

67. McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding that an allegation that a prisoner was "denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment" was enough for a claim of deliberate indifference).

68. Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (finding that withholding a necessary dental referral because of a prisoner's behavioral problems could give rise to a finding of deliberate indifference).

69. Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (citing Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974)); *see also* Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991) ("In institutional level challenges to prison health care … systemic deficiencies can provide the basis for a finding of deliberate indifference."); DeGidio v. Pung, 920 F.2d 525, 529 (8th Cir. 1990) (holding that lack of "adequate organization and control in the administration of health services" could constitute an 8th Amendment violation); *see also* Marcotte v. Monroe Corr. Complex, 394 F. Supp. 2d 1289, 1298 (W.D. Wash. 2005) (explaining that failure to remedy known deficient infirmary nursing procedures and other health department citations was deliberate indifference).

70. Andy Furillo, Ill. Man's Prison Term Blocked, S.F. Judge Cites Findings of Poor Medical Care, Says Move from Local Jail Could Equal a Death Sentence, Sacramento Bee, Mar. 20, 2007, at A3.

decision. For example, in 2004, a California court granted a *preliminary injunction* ordering a prison to provide immediate medical treatment to a prisoner and to arrange for a medical evaluation of the prisoner's eligibility for a liver transplant. Prison officials had refused to allow the evaluation, but the prisoner would die without a transplant. The court held the prisoner might win his deliberate indifference claim because the prison offered no alternative treatment that would save the prisoner's life.[71] The court noted that:

> In order to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the *course of treatment the doctors chose was medically unacceptable in light of the circumstances* and that they chose this course in conscious disregard of an excessive risk to plaintiff's health.[72]

A "medically unacceptable" treatment may be "an easier and less efficacious treatment"[73] or simply no treatment at all. Showing that prison health staff failed to follow professional medical standards or prison medical care procedures can help you make this deliberate indifference claim. These standards or protocols can serve as evidence that the prison official knew of the risk posed by particular symptoms or conditions and deliberately ignored that risk.[74]

4. Medical Negligence

(a) Medical Negligence Is Not Unconstitutional

You *cannot* win a federal constitutional claim of deliberate indifference by alleging only that prison medical staff acted negligently, no matter how often or repeatedly they were negligent. (However, you still may be able to make a state *tort* claim of negligence, which is described in the next Subsection.) *Negligence* is when you fail to exercise care to protect someone at risk in a situation in which a *reasonable person* would exercise care.[75] Medical negligence is often called medical *malpractice*. Again, "the Eighth Amendment does *not* protect prisoners from medical malpractice."[76]

At one time, negligence was grounds for liability.[77] After *Farmer v. Brennan*, however, mere negligence—even repeated negligence—cannot by itself constitute deliberate indifference.[78] Therefore, in a class action suit brought by prisoners in Ohio, the court held if the prisoners could only prove the prison

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71. Rosado v. Alameida, 349 F. Supp. 2d 1340, 1346 (S.D. Cal. 2004).

72. Rosado v. Alameida, 349 F. Supp. 2d 1340, 1344–45 (S.D. Cal. 2004) (emphasis added).

73. Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (refusing prisoner's request to reattach his ear and instead only sewing up the stump constitutes indifference); *see also* McElligott v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (determining that medical staff's failure to examine and treat patient's severe pain, and repeated delays in doctor's seeing the patient, could support a finding of deliberate indifference).

74. Mata v. Saiz, 427 F.3d 745, 757–58 (10th Cir. 2005) (explaining that violation of prison medical protocols was circumstantial evidence that the nurse "knew of a substantial risk of serious harm").

75. *See* Black's Law Dictionary 1061 (8th ed. 2004) (defining negligence as the "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation").

76. Rosado v. Alameida, 349 F. Supp. 2d 1340, 1344–45 (S.D. Cal. 2004) (emphasis added). This proposition was suggested earlier by Estelle v. Gamble, 429 U.S. 97, 105–06, 97 S. Ct. 285, 290–91, 50 L. Ed. 2d 251, 260–61 (1976). But note that a finding of medical malpractice does not prevent a finding of deliberate indifference. Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996).

77. For example, in Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977), the court held that "while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment [indicate] a deliberate indifference by prison authorities." There are also three post-*Farmer* cases finding that systemic negligence can indicate deliberate indifference: Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991) (noting that although mere "incidents of negligence or malpractice do not rise to the level of constitutional violations … systemic deficiencies can provide the basis for a finding of deliberate indifference"); DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990) (holding that a "consistent pattern of reckless or negligent conduct" establishes deliberate indifference); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (observing that in class action suits, "deliberate indifference to inmates' health needs may be shown [either] by proving repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff … or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care"), *cert. denied,* 450 U.S. 1041, 101 S. Ct. 1759, 68 L Ed. 2d 239 (1981). For more information, see Part B(3)(f) of this Chapter, "Making Medical Decisions Based on Non-Medical Factors."

78. Farmer v. Brennan, 511 U.S. 825, 835–37, 114 S. Ct. 1970, 1977–79, 128 L. Ed. 2d 811, 824–25 (1994) (holding deliberate indifference does not include negligence, even repeated acts of negligence and to prove deliberate indifference, a prisoner must show the prison official actually knew about a "substantial risk of serious harm"). This proposition was suggested earlier by Estelle v. Gamble, 429 U.S. 97, 105–106, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 260–261 (1976).

doctor was repeatedly negligent in his treatment, but not that he was "subjectively aware of a substantial risk of serious harm," then the prisoners had not stated an Eighth Amendment claim.[79] Even if it is possible that an official's action led to the death of a prisoner, negligence alone is not enough to bring a federal constitutional claim.[80] Repeated acts of negligence can be evidence that a prison official is ignoring a substantial risk, but acts of negligence by themselves, without any other claim, cannot count as deliberate indifference.[81]

(b) State Law Negligence Claims Are Possible

If you believe that you were injured because prison medical staff acted negligently, you cannot make an Eighth Amendment deliberate indifference claim, but you can still make a negligence claim under state law. To prove negligence under state law, it is first necessary to prove that (1) the defendant (your prison) owed a duty of care to you; and (2) that this duty was "breached," meaning that the prison was responsible for some aspect of your well-being, and did not honor its responsibility.[82] Therefore, you must ask whether the medical practitioner did what a reasonable health professional would do in the same circumstances.

You can find many of the duties a prison owes its prisoners listed in state statutes. Thus, a New York plaintiff could use the state corrections law to prove that New York prisons have a duty to "provide reasonable and adequate medical care to the prisoners."[83] State case law also provides clear definitions of what duties a prison owes its prisoners. In New York, in order to prove a medical malpractice claim, the prisoner must prove a departure from accepted practice and that this departure was the *proximate cause* of the injury. To prove proximate cause, you must show that the injury would not have occurred without the departure from accepted practice. The court of claims also recognizes medical negligence as a cause of action. A state may be liable for "ministerial neglect" if employees fail to comply with the prison's own administrative procedures for providing medical care to inmates.[84] If you want to make a state tort claim of medical negligence or medical malpractice, see Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," to learn how to do so. You should note there is a difference between medical negligence and medical malpractice claims. A medical malpractice claim means a person believes it was a medical practitioner's fault for their injury. Medical negligence claims means a person had a prior injury or medical problem that was not treated or was not treated with proper care.

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79. Brooks v. Celeste, 39 F.3d 125, 129 (6th Cir. 1994) (making a clear distinction between the doctor being "merely repeatedly negligent" and acting with "deliberate indifference"); *see also* Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) ("Deliberate indifference requires more than negligence … [A] prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards an excessive risk to inmate health or safety.'").

80. Howard v. Calhoun County, 148 F. Supp. 2d 883, 889–90 (W.D. Mich. 2001) (concluding that although it was possible that the official was negligent in the way she handled the collapse of a prisoner who then died of a heart attack, negligence alone did not meet the standard of deliberate indifference).

81. Judge Posner offers an extensive discussion of the difference in *Sellers v. Henman*, explaining, "It is vital to keep negligence and deliberate indifference apart. It may be ... that repeated acts of negligence are some evidence of deliberate indifference." Thus, "the more negligent acts [prison officials] commit in a circumscribed interval, the likelier it is that they know they are creating *some* risk, and if the negligence is sufficiently widespread relative to the prison population[,] the cumulative risk to an individual prisoner may be excessive." Despite this, "the presence of multiple acts of negligence is merely evidentiary [and offers some evidence to support a claim]; it is not an alternative theory of liability." Sellers v. Henman, 41 F.3d 1100, 1102–03 (7th Cir. 1994); *see also* Brooks v. Celeste, 39 F.3d 125, 128 (6th Cir. 1994) ("[O]ne way to prove that an official acted with deliberate indifference is to show that he repeatedly acted in a certain manner. In such cases, the repeated acts, viewed singly and in isolation, would appear to be mere negligence; however, viewed together and as a pattern, the acts show … that *each act* was committed with deliberate indifference.").

82. See Part B(2) of Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," to learn more about negligence and negligence-based torts.

83. N.Y. Correct. Law § 70(2)(c) (McKinney 2003 & Supp. 2009) (stating that correctional facilities will be used with due regard to the "health and safety of every person in the custody of the department"); N.Y. Correct. Law § 23(2) (McKinney 2003 & Supp. 2009) (permitting transfer of prisoners to outside hospital facilities for medical care); *see also* Rivers v. State, 159 A.D.2d 788, 789, 552 N.Y.S.2d 189, 189 (3d Dept. 1990) (noting that state has a duty to provide reasonable and adequate medical care to prisoners); La Rocca v. Dalsheim, 120 Misc. 2d 697, 708, 467 N.Y.S.2d 302, 310 (Sup. Ct. Dutchess County 1983) (clarifying that the state has a duty to "provide a safe and humane place of confinement for its inmates").

84. Kagan v. State, 221 A.D.2d 7, 10, 646 N.Y.S.2d 336, 338 (2d Dept. 1996) (finding that the prison's breach of protocols governing medical standards caused plaintiff to lose her hearing and constituted ministerial neglect).

C. Specific Health Care Rights

This Part covers some areas for which you may have rights to medical care or treatment and includes examples of cases that might be useful to you. If you have specific questions about the rights of prisoners with mental illnesses or infectious diseases, make sure you also look at Chapter 29 of the *JLM*, "Special Issues for Prisoners with Mental Illness," and Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prisons." If you need to learn more about disability discrimination, see Chapter 28 of the *JLM*, "Rights of Prisoners with Disabilities."

1. Treatment for Diagnosed Conditions

To decide whether or not you have a claim for lack of treatment for diagnosed medical illnesses and conditions, there are several things you must consider. As discussed above, your claim must meet both the objective and subjective tests of "deliberate indifference." First, you must prove that the medical condition was "sufficiently serious," that is, serious enough to be a danger to your health or well-being. Second, you must prove that the prison official knew of and ignored the risk to you.

In the following examples, courts found that diagnosed medical conditions were sufficiently serious. In *Montalvo v. Koehler*, the court found that a failure to provide shower and sleeping facilities to a paraplegic prisoner confined to a wheelchair met the standard because it posed the risk of serious bodily injury to the prisoner.[85] Also, in *Koehl v. Dalsheim*, the court found that prison officials were deliberately indifferent when they confiscated a prisoner's eyeglasses.[86] The double vision, headaches, and severe pain that the prisoner experienced without his eyeglasses were sufficiently serious. Failure to treat a serious hip condition requiring surgery,[87] an infected and impacted wisdom tooth,[88] and a hernia[89] have all been found to meet the sufficiently serious standard.

The following are examples of harm that the courts did not consider to be sufficiently serious. In *Holmes v. Fell*, the court held that a prisoner's allergic reaction to a tuberculosis test, which caused swelling and a scar on the prisoner's arm, did not meet the sufficiently serious standard.[90] In fact, simple exposure to tuberculosis does not meet the standard when there is no reason to believe that the prisoner will actually catch the disease.[91] In *McGann v. Coombe,* the court held that prison officials were not deliberately indifferent when they refused to provide orthopedic footwear for the arthritis and gout in a prisoner's feet, but instead prescribed medication for the condition that was causing the foot problems.[92] In addition, the Eighth Amendment is not violated when prison officials refuse to treat penile warts[93] or an old injury that has healed but still causes pain.[94]

2. Elective Procedures

Generally, you will not be able to win on a claim that prison officials violated your Eighth Amendment rights based on their refusal to perform an elective procedure on you.[95] An elective procedure is an optional

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85. Montalvo v. Koehler, No. 90 Civ.5218, 1993 U.S. Dist. LEXIS 11785, at *4 (S.D.N.Y. Aug. 24, 1993) (*unpublished*). Note, however, that the prisoner lost his case because he failed to meet the subjective standard for deliberate indifference.

86. Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996).

87. Hathaway v. Coughlin, 37 F.3d 63, 67 (2d Cir. 1994).

88. Boyd v. Knox, 47 F.3d 966, 968–69 (8th Cir. 1995) (explaining that not all dental work meets the sufficiently serious standard, but in this case, prisoner's mouth was so infected that "he could barely open it" and "pus regularly oozed from the infection").

89. Brown v. Coleman, *decision reported at* 60 F.3d 837, 837 (10th Cir. 1995), *opinion reported in full at* No. 94-7183, 1995 U.S. App. LEXIS 16928, at *4–5 (10th Cir. Jul. 12, 1995) (*unpublished*).

90. Holmes v. Fell, 856 F. Supp. 181, 183 (S.D.N.Y. 1994).

91. McCorkle v. Walker, 871 F. Supp. 555, 558 (N.D.N.Y. 1995) (noting that prisoner "has not suffered" and was "unlikely … to suffer, an active case of TB" because he had received preventive medication after exposure).

92. McGann v. Coombe, *decision reported at* 131 F.3d 131, 131 (2d Cir. 1997), *opinion reported in full at* No. 97-2139, 1997 WL 738569, at *2 (2d Cir. Nov. 21, 1997) (*unpublished*).

93. Stubbs v. Wilkinson, *decision reported at* 52 F.3d 326, 326 (6th Cir. 1995), *opinion reported in full at* No. 94-3620, 1995 U.S. App. LEXIS 9471, at *6 (6th Cir. Apr. 20, 1995) (*unpublished*).

94. Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995) (finding that although prisoner's work boots hurt his ankle, his medical report identified an "Old Ankle Injury" that doctors did not expect to produce very much pain, and x-rays proved that the bone was not broken or deformed and therefore the injury was not sufficiently serious).

95. *See* Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 601 (E.D. La. 2002) (holding that a "non-therapeutic

procedure that you would benefit from but that is not immediately necessary for your survival or relative well-being. Remember that the Supreme Court has held the Constitution does not promise comfortable prisons and that conditions may be "restrictive and even harsh."[96]

However, prison officials may not call a necessary procedure "elective" just to avoid having to provide it.[97] Furthermore, if your condition gives you continual pain or discomfort for a long period of time, you may be able to bring a claim that your condition is sufficiently serious to warrant an elective procedure, even though the condition may not require immediate attention. Lengthy delays in providing prisoners with elective surgery for certain medical conditions can be unacceptable.[98] Courts seem to recognize that there are some situations that, while not serious enough to be considered emergencies, are too serious to be considered elective; but, you may have to get a court order before you are allowed to be treated in such a situation.[99]

3. Exposure to Second-Hand Smoke

Prisoners have the right to be free from exposure to *excessive* second-hand smoke.[100] Courts used to reject prisoners' claims of cruel and unusual punishment through exposure to environmental tobacco smoke ("ETS") because plaintiffs had not yet suffered serious injuries.[101] However, in *Helling v. McKinney*, the Supreme Court rejected the argument that "only deliberate indifference to *current* serious health problems of inmates is actionable under the Eighth Amendment" by comparing forced exposure to ETS to live electrical wires or communicable diseases.[102] The Court concluded that prison officials may violate the Eighth Amendment prohibition against cruel and unusual punishment if they, with deliberate indifference, expose prisoners to high levels of ETS.

To satisfy the objective component of the Eighth Amendment under *Helling*, you will have to show you are exposed to ETS levels that "pose an unreasonable risk of serious damage to [your] future health" in a way that violates contemporary standards of decency.[103] To obtain an injunction against further ETS exposure, you do not need an actual physical injury to show an Eighth Amendment violation.[104]

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abortion sought due to financial and emotional reasons" rather than medical necessity is *not* a "serious medical need" for 8th Amendment purposes); Grundy v. Norris, No. 01-1855, 2001 U.S. App. LEXIS 23716, at *2–3 (8th Cir. Nov. 2, 2001) (per curiam) (*unpublished*) (holding prison officials were not deliberately indifferent in delaying surgery for prisoner's injured shoulder in part because medical evidence showed the surgery was elective).

96. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

97. Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) ("The hospital's gratuitous classification of [the prisoner's] surgery as 'elective' … does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners."); Baker v. Blanchette, 186 F. Supp. 2d 100, 105 n.4 (D. Conn. 2001) (stating that although prisoner could wait to have surgery, merely classifying the surgery as elective does not abolish the prison's duty to provide treatment for a serious medical need); Delker v. Maass, 843 F. Supp. 1390, 1399 (D. Or. 1994) (holding that prison officials may not simply characterize a surgery as elective in order to avoid performing the procedure).

98. *See* Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (holding that a prisoner who had to wait nine years for elective arm surgery had suffered a constitutional violation); West v. Keve, 541 F. Supp. 534, 539–40 (D. Del. 1982) (finding that a 17-month delay between recommendation and performance of elective surgery was unacceptable, but that defendants were not ultimately liable since their actions were in good faith).

99. Victoria W. v. Larpenter, 369 F.3d 475, 485 (5th Cir. 2004) (upholding policy of requiring prisoners to obtain a court order to receive an elective medical procedure because the policy was "reasonably related to a legitimate penological interest"). Note this case involved seeking an abortion, which has its own case law—see Section D(2) below.

100. Helling v. McKinney, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481–2482, 125 L. Ed. 2d 22, 32–33 (1993) (holding that a prisoner may prove that his involuntary exposure to ETS is such that his future health is unreasonably endangered).

101. *See* Grant v. Coughlin, No. 91 Civ. 3433 (RWS), 1992 U.S. Dist. LEXIS 8003, at *9 (S.D.N.Y. June 9, 1992) (*unpublished*) (explaining that throat and lung irritation and a risk of serious medical harm do not meet the serious medical requirement necessary for an 8th Amendment violation).

102. Helling v. McKinney, 509 U.S. 25, 33–34, 113 S. Ct. 2475, 2480–81, 125 L. Ed. 2d 22, 31–32 (1993) (emphasis added).

103. Helling v. McKinney, 509 U.S. 25, 35–36, 113 S. Ct. 2475, 2481–82, 125 L. Ed. 2d 22, 32–33 (1993) (finding that a prisoner, whose cellmate smoked five packs of cigarettes a day, stated an 8th Amendment deliberate indifference cause of action against prison officials by alleging they "exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health"). Note that *Helling* provides for injunctive relief, not monetary damages. *See also* Fontroy v. Owens, 150 F.3d 239, 244 (3d Cir. 1998) (holding that no damages are available "for emotional distress allegedly caused by exposure to asbestos without proof of physical injury").

104. Shepherd v. Hogan, No. 04-4047-pr, 2006 U.S. App. LEXIS 12477, at *4 (2d Cir. May 18, 2006) (*unpublished*) (finding that future risk can be enough to constitute a substantial risk of serious harm, even if no symptoms are

Note that claiming prison officials are deliberately indifferent to the risk of future harm is different from claiming deliberate indifference to current harm.[105] You can claim that ETS exposure affects your current health, but you have to prove you have a serious medical need made worse by the exposure.[106] In *Talal v. White*, the Sixth Circuit found the Eighth Amendment's objective component was violated when a prison forced a non-smoking prisoner with a serious medical need to share a cell with a prisoner who smoked, but only after the plaintiff had documented that he suffered from ETS allergy, sinus problems, and dizziness and that the prison medical staff had recommended that he have a non-smoking cell partner.[107] Note that whether your prison has adopted a smoking policy and how that policy is administered is relevant to the subjective standard of deliberate indifference.[108]

4. Other Environmental Health and Safety Cases

Other environmental and safety conditions have been found to violate the Eighth Amendment. Inadequate ventilation and deprivation of outdoor exercise has been found to be a violation of the Eighth Amendment.[109] In addition, excessive heat,[110] excessive cold,[111] polluted water,[112] toxic or noxious fumes,[113] exposure to sewage,[114] lack of fire safety,[115] inadequate food or unsanitary food service,[116] inadequate

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currently present); Smith v. Carpenter, 316 F.3d 178, 188 (2d Cir. 2003) ("[A]n Eighth Amendment claim may be based on … exposing an inmate to an unreasonable risk of future harm and ... actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation.").

105. Lehn v. Holmes, No. 99-919-GPM, 2005 U.S. Dist. LEXIS 22653, at *11–13 (S.D. Ill. Sept. 28, 2005) (noting that prisoner's current symptoms, headaches, and burning eyes would be insufficient to meet the objective standard in a claim for current injury but are sufficient in a claim for future harm).

106. Goffman v. Gross, 59 F.3d 668, 671–72 (7th Cir. 1995) (finding that prison officials were not deliberately indifferent when they refused to give a prisoner a non-smoking cellmate because the prisoner had not shown a serious medical condition made worse by exposure to second-hand smoke—even though he only had one lung because of lung cancer); Grant v. Coughlin, No. 91 Civ. 3433 (RWS), 1992 U.S. Dist. LEXIS 8003, at *9 (S.D.N.Y. June 9, 1992) (*unpublished*) (holding that irritation of the throat and lungs caused by ETS was not a serious medical condition).

107. Talal v. White, 403 F.3d 423, 427–28 (6th Cir. 2005). *But see* Henderson v. Sheahan, 196 F.3d 839, 846 (7th Cir. 1999) (finding that plaintiff did not show a serious medical need when he alleged the "relatively minor" injuries of "breathing problems, chest pains, dizziness, sinus problems, headaches and a loss of energy").

108. Helling v. McKinney, 509 U.S. 25, 33–37, 113 S. Ct. 2475, 2480–82, 125 L. Ed. 2d 22, 32–33 (1993) (holding that a prisoner whose cellmate smoked five packs of cigarettes per day could have a cognizable claim under the 8th Amendment and that the subjective element of the claim (deliberate indifference) should be evaluated in light of prison policies on smoking); *see* Shepherd v. Hogan, No. 04-4047-pr, 2006 U.S. App. LEXIS 12477, at *4 (2d Cir. 2006) (*unpublished*) (holding that a prisoner sharing a room with a chain smoker for a month, a situation that was inappropriate under prison procedures and which the prison grievance committee condemned, was sufficient grounds for a reasonable jury to find a constitutional violation).

109. Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) (finding it to be cruel and unusual punishment to deprive a prisoner of outdoor exercise for six months).

110. Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004) (determining that the probability of heat-related illness is high enough to state an 8th Amendment claim).

111. Gaston v. Coughlin, 249 F.3d 156, 164–65 (2d Cir. 2001) (finding exposure to freezing and sub-zero temperatures due to a broken window sufficient to claim an 8th Amendment violation); Palmer v. Johnson, 193 F.3d 346, 352–53 (5th Cir. 1999) (finding confinement outdoors overnight sufficient for a constitutional violation); Dixon v. Godinez, 114 F.3d 640, 643–45 (7th Cir. 1997) (holding that prison officials' deliberate indifference to cold temperatures in prisoner's cell and prisoner's extended exposure to cold temperatures raise an 8th Amendment claim).

112. Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989) (holding that an allegation of polluted drinking water was not a frivolous claim); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (finding that black worms in drinking water could constitute a claim).

113. Johnson-El v. Schoemehl, 878 F.2d 1043, 1054–55 (8th Cir. 1989) (finding that pesticides sprayed into housing units states an 8th Amendment claim); Cody v. Hillard, 599 F. Supp. 1025, 1032 (D.S.D. 1984) (finding that inadequate ventilation of toxic fumes in inmate workplaces raises an 8th Amendment claim), *aff'd in part and rev'd in part on other grounds*, 830 F.2d 912 (8th Cir. 1987) (en banc). *But see* Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (finding no 8th Amendment violation where prisoner suffered migraine headaches as a result of noise and fumes during three week long housing unit renovation).

114. DeSpain v. Uphoff, 264 F.3d 965, 977 (10th Cir. 2001) (finding that exposure to flooding and human waste states an 8th Amendment claim); McCord v. Maggio, 927 F.2d 844, 847 (5th Cir. 1991) (finding that backup of sewage states an 8th Amendment claim).

115. Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985) (holding that substandard fire prevention and safety hazards violate the 8th Amendment).

116. Phelps v. Kanoplas, 308 F.3d 180, 185–87 (2d Cir. 2002) (finding nutritionally inadequate diet, when prison

lighting or constant lighting,[117] exposure to insects, rodents and other vermin,[118] exposure to asbestos,[119] and exposure to the extreme behavior of severely mentally ill prisoners[120] have all been found to violate a prisoner's Eighth Amendment rights.

5. A Prisoner's Right to Psychiatric Care

This Section gives you a short summary of your right to psychiatric (mental health) care, including your right to refuse treatment. For more information, you should read Chapter 29 of the *JLM,* "Special Issues for Prisoners with Mental Illness."

You have the same right to mental health care as physical health care. Most courts recognize that there is no difference between a prisoner's right to physical treatment and a prisoner's right to mental health treatment.[121] Your right to mental health care may, however, only include treatment that is necessary and will not cost an unreasonable amount of money or take an unreasonable amount of time.[122] However, some courts have held that an increased level of care is necessary for mental health patients, requiring, for example, a minimum number of acute-care and intermediate-care beds and specialized physicians and clinicians on staff at all times. In 2007, a California court issued a *remedial order* to ensure adequate resources were provided to inmates with mental disorders.[123] In response, the state plans to build a new 44,000-square-foot, 50-bed mental health crisis facility at the California Men's Colony.

If you believe your right to mental health care has been violated, you can make an Eighth Amendment claim of deliberate indifference against prison officials. For example, the relatives of a Georgia prisoner who had committed suicide sued the state for deliberate indifference.[124] The prisoner had a history of mental illness and took anti-depressants, but the prison psychiatrist stopped his medications. When a prison official learned the prisoner was thinking about suicide, the official did not do anything. The court found that these events could be considered deliberate indifference to the prisoner's health in violation of the Eighth Amendment.

(a) Right to Refuse Psychiatric Treatment

You also have a limited right to refuse mental health treatment. In *Washington v. Harper*, the Supreme Court used a *rational-basis test*[125] to decide if a prison could require a convicted prisoner to undergo psychiatric treatment. The Court held that if a government's action is mainly about prison administration

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officials should have known such a diet would cause pain, could constitute an 8th Amendment violation).

117. Gates v. Cook, 376 F.3d 323, 334–35 (5th Cir. 2004) (finding that inadequate lighting raises an 8th Amendment claim); Keenan v. Hall, 83 F.3d 1083, 1090–91, (9th Cir. 1996) (finding that constant illumination raises an 8th Amendment claim).

118. Gates v. Cook, 376 F.3d 323, 334–35 (5th Cir. 2004) (finding that mosquito infestation in combination with filthy cells and too much heat raises an 8th Amendment claim); Gaston v. Coughlin, 249 F.3d 156, 166 (2d Cir. 2001) (finding that mice constantly entering cell, combined with freezing temperatures and intermittent exposure to sewage water, raised an 8th Amendment claim).

119. Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990) (finding exposure to asbestos actionable). *But see* McNeil v. Lane, 16 F.3d 123, 125 (7th Cir. 1994) (holding that exposure to "moderate levels of asbestos" did not violate the 8th Amendment).

120. Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) (noting that exposure to the constant screaming and feces-smearing of mentally ill prisoners "contributes to the problems of uncleanliness and sleep deprivation, and by extension mental health problems, for the other inmates").

121. *See* Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (denying the existence of an underlying distinction between the right to treatment for mental and physical ills); *see also* Inmates of the Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979) (holding that seriously mentally ill prisoners have a right to adequate treatment and that psychiatric/psychological treatment should be held to the same standard as medical treatment for physical ills).

122. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) (creating a three-part test for the provision of mental health services: (1) the prisoner's symptoms must evidence a serious disease or injury; (2) such a disease or injury must be curable or able to be substantially alleviated; and (3) there is potential for substantial harm to the prisoner by reason of delay or denial of care).

123. Coleman v. Schwartzenegger, No. CIV S-90-0520, 2007 U.S. Dist. LEXIS 40586, at *11–13 (E.D. Cal. May 23, 2007) (*unpublished*).

124. Greason v. Kemp, 891 F.2d 829, 834 (11th Cir. 1990) (holding that grossly indifferent psychiatric care could be a violation of the 8th Amendment where prisoner subsequently committed suicide).

125. The "rational-basis test" means that the prison's action must be reasonably related to a legitimate government goal. Black's Law Dictionary 592 (3d pocket ed. 2006).

issues and is reasonably related to legitimate prison interests, then the action is proper. "[G]iven the requirements of the prison environment, the *Due Process* Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, *if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest*."[126]

If you refuse to take the prescription drugs that the prison doctor gives you for mental illness, the prison must go through certain procedures before forcing you to take the medication. Specifically, the Constitution's Due Process Clause demands are met by:

> [A] medical finding, that a mental disorder exists which is likely to cause harm if not treated ... [and] that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, [which] ensures that the treatment in question will be ordered only if it is in the prisoner's medical interest.[127]

In other words, before an institution can give you medication against your will, a psychiatrist must prescribe medication, and a second psychiatrist should approve the decision that (1) you need the medication and (2) your mental disorder is likely to be dangerous if untreated.

In *Washington v. Harper*, the Court held the state's policy of medicating unwilling patients *was* constitutional because it met these requirements.[128] In *Washington,* the decision to administer drugs against the patient's will had to be made by a committee including a neutral psychiatrist and a neutral psychologist, neither of whom were currently treating the prisoner. The prison superintendent could accept or reject the committee's decision, and the prisoner had the option to ask a court to review the committee's decision.[129]

You are also entitled to certain due process protections, including a hearing, before prison authorities can transfer you to a psychiatric hospital.[130] In *Vitek v. Jones*, the Supreme Court held it unconstitutional to require transfer to behavior modification treatment without a legitimate reason.[131]

In addition, you should be aware that different psychiatric programs are used to treat prisoners convicted of sex offenses. Courts remain divided over whether a hearing is required when prison officials seek to classify a prisoner who has not been convicted of a sex offense as a sex offender when there is the possibility of then withholding parole because the prisoner did not complete a therapeutic program.[132] See Chapter 32 of the *JLM* for more information on mandatory sex offender programs.

6. Right to Dental Care

The right to adequate medical care has been extended to include dental care in some cases.[133] The Second Circuit has held that "[a] cognizable claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, ... the deterioration

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126. Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–40, 108 L. Ed. 2d 178, 201–02 (1990) (emphasis added).

127. Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990). Note that the Due Process Clause does not require these *exact* steps, although these steps are adequate to satisfy due process.

128. Washington v. Harper, 494 U.S. 210, 228, 110 S. Ct. 1028, 1040, 108 L. Ed. 2d 178, 202 (1990).

129. Washington v. Harper, 494 U.S. 210, 229, 110 S. Ct. 1028, 1040, 108 L. Ed. 2d 178, 203 (1990).

130. Vitek v. Jones, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 566 (1980) (determining that before a prisoner is transferred to a mental facility, he should receive written notice, legal counsel, a hearing before an independent decisionmaker with the opportunity to present and confront witnesses, and a written decision).

131. Vitek v. Jones, 445 U.S. 480, 493–94, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565 (1980); *see also* Clonce v. Richardson, 379 F. Supp. 338, 348–50 (W.D. Mo. 1974) (finding that defendant is entitled to a pre-transfer hearing before being moved to a behavior modification treatment program).

132. *See* Neal v. Shimoda, 131 F.3d 818, 831 (9th Cir. 1997) (requiring a hearing when classifying a prisoner as a sex offender if that prisoner has not been convicted of a sex offense); *but see* Grennier v. Frank, 453 F.3d 442, 445–46 (7th Cir. 2006) (finding that the "sex offender" label alone does not require a hearing).

133. *See, e.g.*, Board v. Farnham, 394 F.3d 469, 480–82 (7th Cir. 2005) (finding that breaking off teeth rather than extracting them and denial of toothpaste for protracted periods support an 8th Amendment claim); Hartsfield v. Colburn, 371 F.3d 454, 457–458 (8th Cir. 2004) (finding that six weeks' delay in seeing a dentist, resulting in infection and loss of teeth, raised an 8th Amendment claim); Farrow v. West, 320 F.3d 1235, 1244–47 (11th Cir. 2003) (holding that prisoner with only two lower teeth who suffered pain, continual bleeding, swollen gums, and weight loss had a serious medical need, and that a delay of 18 months before prisoner received dentures raised a factual issue concerning deliberate indifference); Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995) (finding that a three-week delay in dental care, coupled with knowledge of the prisoner's suffering, can support a finding of "deliberate indifference").

of the teeth due to a lack of treatment, ... or the inability to engage in normal activities."[134] Recently, as a result of a federal *class action* lawsuit, the California Department of Corrections and Rehabilitation ("CDCR") agreed to provide dental care for all prisoners as set forth in a new Dental Policies and Procedures manual and an Implementation Plan.[135]

Like inadequate medical care, dental care is also governed by the deliberate indifference/serious needs analysis.[136] To prove an Eighth Amendment claim of inadequate dental care, you have to show both deliberate indifference, like in other inadequate medical care claims,[137] *and* that the denial caused you "substantial harm."[138]

In practice, courts often note that there is a difference between preventive dental care, such as cleanings or fluoride treatments, and dental emergencies, such as cavities. In *Dean v. Coughlin*, the court held that prison officials had violated the Eighth Amendment when they refused to provide serious dental treatments such as fillings and crowns.[139] However, the court also found that prisoners had no right to preventive care.[140] If you are interested in preventive care, it is constitutional for prisons to require that you pay for such care yourself.[141]

But, note that in some circumstances, limiting care to pulling teeth that could be saved may be unconstitutional.[142] In *Chance v. Armstrong*, the court held that when the institution decided to pull the prisoner's teeth instead of repair them only because this option was cheaper, the action violated the Eight Amendment because afterwards the prisoner was in great pain for six months, could not chew properly, and lost his teeth.[143]

D. Medical Care for Female Prisoners

1. Accessing Medical Care

Like male prisoners, female prisoners have a constitutional right under the Eighth Amendment to adequate medical care.[144] Female prisoners should read *this entire* Chapter, not only this Part, to

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134. Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998).

135. Perez v. Tilton, 2006 No. C 05-05241 JSW, 2006 U.S. Dist. LEXIS 63318, at *2 (N.D. Cal. Aug. 21, 2006) (*unpublished*).

136. *See, e.g.*, Board v. Farnham, 394 F.3d 469, 481–82 (7th Cir. 2005) (finding that there could be deliberate indifference when a prisoner asked for dental supplies fifteen times and was repeatedly ignored); Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (holding that extreme pain and swelling caused by infected teeth would have been obvious to a layperson and thus submission of verifying medical evidence was unnecessary); Farrow v. West, 320 F.3d 1235, 1244–47 (11th Cir. 2003) (finding that some medical conditions are so grave, that even a few hours' delay in treatment could constitute deliberate indifference); Harrison v. Barkley, 219 F.3d 132, 137–39 (2d Cir. 2000) (finding that refusal to treat prisoner's tooth cavity led to a sufficiently serious need as it was a degenerative condition that could cause acute infections and pain).

137. *See* Clifton v. Robinson, 500 F. Supp. 30, 35 (E.D. Pa. 1980) (holding that since prisoner claiming denial of dental care did not allege "substantial harm," claim failed to show "deliberate indifference").

138. *See* Hunt v. Dental Dept., 865 F.2d 198, 200 (9th Cir. 1989) (holding that a three-month delay in replacing dentures caused gum disease and possibly weight loss, constituting substantial harm).

139. Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985), *vacated in part and remanded on other grounds,* 804 F.2d 207, 216 (2nd Cir. 1986).

140. Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985). Specifically the court held: "[A] prisoner is entitled to treatment only for conditions that cause pain, discomfort, or threat to good health, not treatment to ward off such conditions." With regard to preventative dentistry, the court noted that "[a]lthough [it] would probably save the clinic time in the long run, the Constitution does not require wise dentistry, only dentistry which responds to inmates' pain and discomfort." Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985); *see also* Grubbs v. Bradley, 552 F. Supp. 1052, 1129 (M.D. Tenn. 1982) (holding that delaying a prisoner's access to routine and preventive dental care is not "deliberate indifference").

141. *See* Hogan v. Russ, 890 F. Supp. 146, 149 (N.D.N.Y. 1995) ("Defendants did not deny plaintiff the ability to obtain specialized medical attention [with a periodontist]. They merely stated that it was not prison policy to pay for such specialized care and that such care would be made available to plaintiff at his own expense."); Taylor v. Garbutt, 185 F.3d 869, 869 (9th Cir. 1999) (finding that prison regulation requiring a co-payment for dental services that the prisoner requested does not violate the 8th Amendment).

142. Chance v. Armstrong, 143 F.3d 698, 703–04 (2d Cir. 1998) (finding that pulling teeth because it was cheaper than saving them violated the 8th Amendment).

143. Chance v. Armstrong, 143 F.3d 698, 703–04 (2d Cir. 1998).

144. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (holding that deliberate indifference to the serious medical needs of prisoners is "unnecessary and wanton infliction of pain" and therefore

understand prison health care rights. This Part of the Chapter only explains special medical issues and procedures for women, like gynecological examinations, abortion, and pregnancy.

Though state and federal laws guarantee you a right to the medical services described in this Part,[145] prisons do not always provide these services, so it is important to know your rights. You should consult your institution's regulations regarding medical care as well as federal and state law. For New York, the regulations about prison health care are found in Part 7651 of Title 9 (Executive) of the Codes, Rules and Regulations.[146] If your institution or the corrections department in your state does not have such regulations, you should find out if your institution has a health care manual or your state's corrections department has an operations manual. In Texas, each correctional facility must have a written Health Services Plan describing procedures for regularly scheduled sick calls, emergency services, long-term care, and other medical services.[147] In California, health care provisions are found in Chapter Nine of the Department Operations Manual of the California Department of Corrections.[148]

Many female prisoners have an increased risk of chronic health problems, such as HIV, hepatitis, asthma, gynecological diseases, nutrition problems, and convulsive seizure disorders.[149] Federal law requires all federal prisoners to receive a medical examination within twenty-four hours after arriving in prison.[150] You should be tested for sexually transmitted diseases ("STDs") and tuberculosis ("TB") during this exam. Some courts have ruled that certain state prisons must also perform these tests.[151] Many states have TB screening plans, which require screening of prisoners in facilities of certain sizes or after a prisoner has been held for a certain period of time.[152] Read Chapter 26 of the *JLM,* "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison," for more information. While prisons have a duty to perform these exams, many female prisoners do not receive a medical exam after being admitted.[153] After this first examination, you should be able to receive check-ups and diagnostic tests, but, again, some prisons do not follow the law.[154]

2. Abortion

According to *Roe v. Wade*, every woman has the right, as part of her right to privacy, to decide whether to have an abortion or to go forward with a pregnancy.[155] However, states are allowed to place restrictions or limitations on a woman's right to an abortion, like requiring parental consent for minors, as long as they do not place an "undue burden" on a woman's right to choose.[156] Courts decide what kind of obstacles might count as an undue burden.

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banned by the 8th Amendment).

145. *See* 28 C.F.R. § 522.20 (2009) (requiring federal prisons to conduct health screenings on new prisoners); 28 C.F.R. § 549.10 (2009) (requiring federal prisons to manage and treat infectious disease); N.Y. Correct. Law § 137(6)(c) (McKinney 2003 & Supp. 2009) (directing that prisoners in solitary confinement must have a daily health check).

146. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 7651.1–7651.33 (1998).

147. 37 Tex. Admin. Code § 273.2 (West 2009).

148. Cal. Dept. of Corr., Department Operations Manual, ch. 9, *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html (last visited Sep. 24, 2009).

149. *See* Amnesty Int'l, Not Part of My Sentence: Violations of the Human Rights of Women in Custody (1999), *available at* http://www.amnesty.org/en/library/info/AMR51/019/1999/en; *see also* Amnesty Int'l USA, Abuse of Women in Custody: Sexual Misconduct and the Shackling of Pregnant Women *available at* http://www.amnestyusa.org/Womens_Human_Rights/Abuse_of_Women_in_Custody/page.do?id=1108288&n1=3&n2=39&n3=720 (last visited Sep. 24, 2009).

150. *See* 28 C.F.R. § 522.20 (2009) (requiring federal prisons to conduct health screenings on new prisoners).

151. *See, e.g.*, Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (noting that lack of screening for infectious diseases resulted in serious threat to prisoners' well-being); Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 208 (D.P.R. 1998) (holding that failure to screen incoming prisoners for infectious diseases including TB is unconstitutional); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 867 (D.D.C. 1989) (holding lack of syphilis and TB testing to be one of the systemic failures showing deliberate indifference).

152. *See, e.g.*, 37 Tex. Admin. Code § 273.7 (West 2009).

153. *See* Amnesty Int'l, Not Part of My Sentence: Violations of the Human Rights of Women in Custody (1999), *available at* http://www.amnesty.org/en/library/info/AMR51/019/1999/en.

154. *See* Women Prisoners v. District of Columbia, 968 F. Supp. 744, 747 (D.D.C. 1997) (holding that female prisoners had a right to diagnostic evaluations similar to those provided for men).

155. Roe v. Wade, 410 U.S. 113, 153–54, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177–78 (1973).

156. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876–77, 112 S. Ct. 2791, 2820–21, 120 L. Ed. 2d. 674, 714–15 (1992) (explaining the sort of restrictions that could constitute an "undue burden").

If you are a pregnant federal prisoner, federal regulations require that prison officials offer you medical, religious, and social counseling before you have an abortion.[157] You may accept or decline this counseling, and officials should allow you to make the final decision on whether or not to have an abortion.[158] Once you have received the offer of counseling, and have notified the prison in writing that you chose to have an abortion, the prison must arrange for the abortion.[159]

If you are a state prisoner, your rights will mostly depend on the abortion laws in your state. In the State of New York, abortions are allowed if a doctor has a "reasonable belief that [the abortion] is necessary to preserve [your] life" or the abortion occurs in the first "twenty-four weeks ... of [the] pregnancy."[160]

Some states, like California and New York, have codes that say that female prisoners have the same right to an abortion as any other woman in the state.[161] In other states, there may be additional restrictions on prisoners seeking abortions. You should first look at your state code or prison regulations. Few courts have ruled on the issue of whether prisons may treat female prisoners differently than other women in the state when it comes to the right to get an abortion. In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Third Circuit held that female prisoners have the same right to an abortion as non-prisoner women in the same state.[162] The court found that requiring a woman to get a court-ordered release for an elective abortion was an undue burden on her constitutionally-protected right to have an abortion, as well as a violation of her Eighth Amendment right to medical treatment. The court classified an elective abortion as a "serious medical need" where denial or undue delay in providing the procedure could render the prisoner's condition "irreparable."[163] The court also found that a prison is not required to pay for a prisoner's abortion, but if you request an abortion and are entitled to one under state law, then a prison official is required to transport you to a clinic.[164]

Some courts have deemed restrictions on elective abortions unconstitutional in violation of the Fourteenth Amendment, but not in violation of the Eighth Amendment.[165] In *Roe v. Crawford*, the Eighth Circuit considered the constitutionality of a Missouri Department of Corrections ("MDC") policy prohibiting transportation of pregnant prisoners off-site for elective, non-therapeutic abortions. The Court found that the MDC policy was unconstitutional under the Fourteenth Amendment, and that women prisoners do not lose their right to abortion care once incarcerated.[166] However, in a different case, the Fifth Circuit upheld a prison policy requiring prisoners to get a court order for abortions because the policy was implemented reasonably and was "rationally connected to the legitimate penological objectives [prison security] served."[167]

Note that if you ask for an abortion but never get one because of prison officials' negligence, you probably do not have a constitutional claim. In *Bryant v. Maffucci*, for example, a pretrial detainee requested an abortion, but because of administrative inefficiency and unreasonable delays by prison officials the abortion was scheduled too late to be performed.[168] The court found that the prison officials were not deliberately

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157. 28 C.F.R. § 551.23(a)–(c) (2009).

158. 28 C.F.R. § 551.23(a) (2009).

159. 28 C.F.R. § 551.23(c) (2009).

160. N.Y. Penal Law § 125.05(3) (McKinney 2009).

161. Cal. Penal Code § 4028 (West 2000); N.Y. Comp. Codes R. & Regs. tit. 14, § 27.6(c) (2009).

162. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 343–45 (3d Cir. 1987) (holding abortion restrictions were not justified by state's interest in childbirth because this interest does not further rehabilitation, security, or deterrence).

163. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987).

164. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 341 (3d Cir. 1987). *But see* Victoria W. v. Larpenter, 369 F.3d 475, 487 (5th Cir. 2004) (deeming a prison policy that required prisoners to obtain court orders before they could leave the prison for elective medical procedures "rationally connected to the legitimate penological objectives served").

165. Roe v. Crawford, 514 F.3d 789, 796–7, 801 (8th Cir. 2008) (holding that refusal to provide a prisoner access to an elective, non-therapeutic abortion does not constitute and 8th amendment violation, but that "an elective abortion… is a liberty interest protected under the Fourteenth Amendment").

166. Roe v. Crawford, 514 F.3d 789, 801 (8th Cir. 2008).

167. Victoria W. v. Larpenter, 369 F.3d 475, 487 (5th Cir. 2004). Note that, because the right to have an abortion is a constitutional right, any prison policy that restricts that right must be "reasonably related to legitimate penological interests."

168. Bryant v. Maffucci, 923 F.2d 979, 980–81 (2d Cir. 1991) (citing N.Y. Penal Law § 125.05(3) (McKinney 1990) (amended 2004)).

indifferent, only negligent, so their conduct was not in violation of the Eighth Amendment.[169] Similarly, in *Gibson v. Matthews*, the Sixth Circuit found that prison officials were merely negligent when they incorrectly estimated the due date of a pregnant prisoner and thus denied her access to abortion facilities.[170]

3. Pregnancy

A woman prisoner's treatment during pregnancy is important.[171] Prisons should (but might not) have policies and procedures regarding risk assessment and treatment of pregnant prisoners, diet and nutrition, prenatal care, and counseling.[172]

In New York State, a pregnant prisoner has a right to "comprehensive prenatal care ... which shall include, but is not limited to, regular medical examinations, advice on appropriate levels of activity and safety precautions, nutritional guidance, and HIV education."[173] Shortly before the prisoner is about to give birth, she should be moved from the jail or prison to some other location "a reasonable time before the anticipated birth of [her] child," and provided with "comfortable accommodations, maintenance and medical care."[174] She will be returned to the prison or jail "as soon after the birth of her child as the state of her health will permit."[175] In California, a pregnant prisoner in a local detention facility has a right to receive necessary medical services from the physician of her choice, but she must pay for any private doctors.[176] California has recently amended its state regulations concerning pregnant prisoners. These rules provide for routine physical examinations as well as mandatory nutritional guidelines to be followed by prison facilities when caring for pregnant inmates.[177] In particular, the use of leg and waist restraints is subject to stringent requirements.

In a federal case in Wisconsin, a woman prisoner charged prison nurses with violating her Eighth Amendment rights by failing to bring her to the hospital when she was in labor. The prisoner gave birth in her prison cell while changing her clothes.[178] The court denied summary judgment and held that a reasonable jury could conclude that the nurses had shown "deliberate indifference" toward the pregnant prisoner because the nurses ignored the prisoner's request to go to the hospital and they "only examined [her] through the small tray slot in the cell door, rather than conducting a more comprehensive exam."[179]

Pregnant prisoners have also had some success in lawsuits alleging negligence against prisons. One court found a prison liable for the wrongful death of a premature baby born to a prisoner because the prison was negligent. Prison officials did not follow the prison's procedures, failed to diagnose the labor despite complaints of bleeding and abdominal pain, and did not bring the prisoner to a hospital until it may have been too late to prevent the birth.[180]

Shackling pregnant prisoners in labor is unfortunately still common, and many departments of corrections and the Federal Bureau of Prisons allow the use of restraints during labor.[181] This may be changing, however. California has banned shackling prisoners by the wrists or ankles during labor, delivery,

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169. Bryant v. Maffucci, 923 F.2d 979, 986 (2d Cir. 1991) (holding that negligent failure to provide an abortion did not violate detainee's rights).

170. Gibson v. Matthews, 926 F.2d 532, 536–37 (6th Cir. 1991).

171. Books can help you learn to care for yourself while pregnant. One good resource is *What To Expect When You're Expecting* by Heidi E. Murkoff and Sharon Mazel (Workman Publishing Company 2008) (1984). If you do not have access to any books like this one, consult a medical professional at your institution regarding questions you might have about your pregnancy. You can also find information online at websites like "What to Expect," *available at* http://www.whattoexpect.com (last visited Sep. 24, 2009).

172. Nat'l Comm'n on Corr. Health Care, Women's Health Care in Correctional Settings (2005), *available at* http://www.ncchc.org/resources/statements/womenshealth2005.html.

173. N.Y. Comp. Codes R. & Regs. tit. 9, § 7651.17(a) (1997).

174. N.Y. Correct. Law § 611(1) (McKinney 2003 & Supp. 2009).

175. N.Y. Correct. Law § 611(1) (McKinney 2003 & Supp. 2009).

176. Cal. Penal Code § 4023.6 (West 2000).

177. Cal. Penal Code §§ 3403, 3406, 3424 (West 2000).

178. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1007 (E.D. Wis. 2003).

179. Doe v. Gustavus, 294 F. Supp. 2d 1003, 1009 (E.D. Wis. 2003).

180. Calloway v. City of New Orleans, 524 So. 2d 182, 187 (La. Ct. App. 1988).

181. Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. Times, Mar. 2, 2006, *available at* http://www.nytimes.com/2006/03/02/national/02shackles.html?ex=1298955600&en=afd1d2d6614d34d6&ei=5088 (last visited Sept. 26, 2009).

and recovery.[182] Similarly, New York does not use restraints on prisoners during delivery.[183] One court has struck down a practice of shackling women in their third trimester with leg shackles, handcuffs, a belly chain, and a "black box." The court held these practices violated the Eighth Amendment; leg shackles alone provide sufficient security during the third trimester and even these must be removed during labor and for a short period thereafter.[184] The Eighth Circuit also recently ruled that that a reasonable jury could find that a prison corrections officer violated the Eighth Amendment by shackling a prisoner after she went into labor.[185] According to the court, a jury could infer that the officer "recognized that the shackles interfered with [the prisoner's] medical care, could be an obstacle in the event of a medical emergency, and caused unnecessary suffering at a time when [the prisoner] would have likely been physically unable to flee."[186] The court also wrote in a footnote that a jury could determine the officer was aware of the risks involved in labor because they are obvious.[187] The prisoner was not shackled as she gave birth but was again placed in restraints after delivery.

E. Your Right to Informed Consent and Medical Privacy

1. Informed Consent

Before you are treated, you should ask your doctor or other prison health staff what to expect from a medical procedure and its risks and alternatives. Depending on your state, you may have both a statutory and constitutional right to this information. *Informed consent* means that before you agreed to your particular medical treatment, your doctor told you the purpose of the procedure, its possible side effects, and other possible treatments.[188]

In New York, if you did not agree to the medical procedure or were never fully told of the treatment's risks and alternatives, you can bring a state law claim against your doctor or other prison officials for lack of informed consent.[189] To prove that you did not give your informed consent (and that, therefore, your doctor or prison officials have violated state law), you will have to show (1) that your doctor did not tell you about the risks of the treatment and the alternative treatments available; (2) that a reasonable patient in your position would not have agreed to the treatment if he had been fully informed; and (3) that the lack of consent caused your injury.[190] You must have been injured as a result of lack of informed consent in order to have such a claim succeed.

You may also be able to bring a similar constitutional claim. In *Pabon v. Wright*, the Second Circuit held that prisoners' constitutionally protected liberty interest in refusing medical treatment under the Fourteenth Amendment includes the related "right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment."[191] In order to succeed on this claim, you must meet a different test. Specifically, you will have to show (1) that government officials failed to

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182. Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. Times, Mar. 2, 2006, *available at* http://www.nytimes.com/2006/03/02/national/02shackles.html?ex=1298955600&en=afd1d2d6614d34d6&ei=5088 (last visited Sept. 26, 2009).

183. "No restraints of any kind shall be used when [an incarcerated] woman is in labor, admitted to a hospital, institution or clinic for delivery, or recovering after giving birth." N.Y. Correct. Law § 611(1) (McKinney 2003 & Supp. 2009) (amended by 2009 N.Y.S.B. 1290).

184. Women Prisoners v. District of Columbia, 877 F.Supp. 634, 668–69 (D.D.C 1994), *vacated in part and remanded on other grounds,* 93 F.3d 910, 920–23 (D.C. Cir. 1996); *see also* Women Prisoners v. District of Columbia, 968 F. Supp. 744 (D.D.C. 1997) (describing settlement after appellate proceedings).

185. Nelson v. Corr. Med. Servs., 583 F.3d 522, 529–30 (8th Cir. 2009).

186. Nelson v. Corr. Med. Servs., 583 F.3d 522, 530 (8th Cir. 2009).

187. Nelson v. Corr. Med. Servs., 583 F.3d 522, 530 n.5 (8th Cir. 2009).

188. To learn more about informed consent issues for prisoners with mental illness, see Part C(1) of Chapter 29 of the *JLM,* "Special Issues for Prisoners with Mental Illness."

189. N.Y. Pub. Health Law § 2805(d) (McKinney 2007).

190. Foote v. Rajadhyax, 268 A.D.2d 745, 745, 702 N.Y.S.2d 153, 154 (3d Dept. 2000) (granting prisoner a new trial to show that she had not consented to a root canal).

191. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (finding a constitutionally protected interest, but affirming the grant of summary judgment to prison officials because of qualified immunity); *see* White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990) ("Prisoners have a right [under the 14th Amendment] to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment."); *see also* Benson v. Terhune, 304 F.3d 874, 884–85 (9th Cir. 2002) (explaining that the recognition of the right to medical information is a "reasonable application of Supreme Court precedent").

provide you with the kind of information that a reasonable patient would need to make an informed decision; (2) that you would have refused the medical treatment if you had been so informed; and (3) that the officials failed to provide you with information with *deliberate indifference to your right to refuse medical treatment*.[192] However, a prison official can still forcibly give you medical treatment even if you do not consent as long as the official reasonably determines that it "furthers a legitimate penological purpose."[193]

2. Medical Privacy

Prisoners have constitutional privacy rights protecting their medical information.[194] Prisoners are entitled to confidentiality of information about their medical condition and treatment[195] and about their choice to refuse medical treatment, meaning that they can restrict how that information gets distributed.[196] But like all prisoners' rights, prisoners' privacy rights are limited by the needs of prison administration and depend on the circumstances.[197]

The courts have "long recognized the general right to privacy in one's medical information: 'There can be no question that ... medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.'"[198] The Third Circuit has held that prisoners have a Fourteenth Amendment privacy interest in their medical information because it is among those rights that "are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system."[199] Similarly, in *Powell v. Schriver*, the Second Circuit held that prisoners do have a constitutional right to keep previously undisclosed medical information confidential as long as the disclosure "is *not* reasonably related to a legitimate penological interest."[200]

In 1996, Congress passed the Health Insurance Portability and Accountability Act ("HIPAA"), which contains significant protection for prisoners' medical privacy rights.[201] Under the final HIPAA Privacy rule,

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192. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006).

193. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006).

194. Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) ("[T]he right to confidentiality includes the right to protection regarding information about the state of one's health … [because] … there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."); *see* Hunnicutt v. Armstrong, No. 04-1565-pr, 152 Fed. Appx. 34, 35-–36, 2005 U.S. App. LEXIS 22220, at *3–4 (2d Cir. Oct. 13, 2005) (*unpublished*) (finding that prisoner stated a constitutional privacy claim where prisoner alleged prison publicly discussed his mental health issues in front of other prisoners and "allowed non-health staff access to [prisoners'] confidential health records").

195. Doe v. Delie, 257 F.3d 309, 315–17 (3d Cir. 2001) (noting that a right to privacy in medical information extends to prescription medications and is "particularly strong" for HIV status); Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) (finding a right to privacy in transsexuality); *see* O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) ("Medical information in general, and information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind."); Hunnicutt v. Armstrong, No. 04-1565-pr, 152 Fed. Appx. 34, 35–36, 2005 U.S. App. LEXIS 22220, at *2–4 (2d Cir. Oct. 13, 2005) (*unpublished*) (finding an allegation that a prisoner's mental health consultations occurring in a housing unit within other prisoners' hearing stated a constitutional privacy claim).

196. White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990) (holding that a prisoner who was allergic to penicillin had the right to refuse treatment when a doctor would not disclose whether the proposed treatment contained penicillin); *see* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224, 242 (1990) (finding a general right to refuse medical treatment by relying on previous holdings regarding prisoners' right to refuse psychotropic medications and prisoners' liberty interest in avoiding transfer to a mental hospital and unwanted behavior modification treatment).

197. *See generally* Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 403 (1984) (explaining that prisoners do not retain a right of privacy in their prison cells protecting them against unreasonable searches because otherwise it would be impossible to run the prison).

198. Doe v. Delie, 257 F.3d 309, 315 (3d Cir. 2001) (quoting United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980)).

199. Doe v. Delie, 257 F.3d 309, 315–17 (3d Cir. 2001) (quoting Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974)).

200. Powell v. Schriver, 175 F.3d 107, 112–13 (2d Cir. 1999) (emphasis added) (holding that "the gratuitous disclosure of a [prisoner's] confidential medical information as humor or gossip" is not reasonably related to penological interests and violates the prisoner's constitutional right to privacy). The court noted that "disclosure of an inmate's HIV-positive status could further legitimate penological interests" when, for example, a prison needs to segregate HIV-positive prisoners or when prison officials need "to warn prison officials and inmates who otherwise may be exposed to contagion." Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999).

201. 45 C.F.R. §§160, 162, 164 (2009).

identifiable health information pertaining to "inmates" has been deemed "protected health information," called "PHI." A hospital providing prison health care may disclose PHI to a "correctional institution" or a law enforcement official having lawful custody of a prisoner only if the correctional institution or law enforcement official represents that disclosing such protected health information is necessary for: (1) the provision of health care to such individuals; (2) the health and safety of such individual or other prisoners; (3) the health and safety of officers, employees, or others at the correctional institution; (4) the health and safety of such individuals and officers or other persons responsible for the transport of prisoners or their transfer from one institution, facility, or setting to another; (5) the health and safety of law enforcement on the premises of the correctional institution; or (6) the administration and maintenance of the safety, security, and good order of the correctional institution.[202]

A prison hospital's disclosure is permitted to entities outside the hospital if the correctional institution or law enforcement official represents that the protected health information is necessary for any of the purposes listed above. Furthermore, a prison hospital may reasonably rely upon any such representations from public officials regarding the health of a prisoner. However, when a prisoner is released from custody—including probation, parole, and supervised release—that person is no longer categorized as an "inmate," and these permitted use and disclosure provisions no longer apply.[203]

You should also note that some courts have held prison officials liable for disclosing a prisoner's confidential medical information, not because they violated the prisoner's privacy rights but because by disclosing the information the officials put the prisoner in danger. In *Anderson v. Romero*, for example, the court indicated that prison employees would violate a prisoner's Eighth Amendment rights if, "knowing that an inmate identified as HIV positive was a likely target of violence by other inmates yet indifferent to his fate, [the employees] gratuitously revealed his HIV status to other inmates and a violent attack upon him ensued."[204]

F. Actions You Can Bring When You Are Denied Medical Care

Now that you know your rights, it is important to be able to enforce them. This Part describes the actions you can bring when your right to adequate medical care is violated. Remember that in almost every instance, your case will be helped by attempting to go through your institution's complaint process. For more information on doing so, see Chapter 15 of the *JLM*, "Inmate Grievance Procedures."

1. Remedies for State Prisoners

(a) 42 U.S.C. § 1983 Actions

Section 1983 is a federal statute that allows you to enforce federal constitutional rights. When your right to adequate medical care is violated by persons acting under state authority (for example, prison guards, doctors, and/or administrators), you may use Section 1983 to bring a suit in federal court. For a discussion of Section 1983 actions, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

(b) Tort Actions

As discussed in Part B of this Chapter, the federal constitutional standard established by *Wilson* and *Farmer* cannot be proven by claiming only negligence.[205] If the facts of your case are not enough to prove a constitutional violation, but only show negligence, you may want to consider bringing a tort action against state officials instead of a constitutional claim. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," to learn how to do so.

To succeed on a negligence claim you must prove three things:

(1) "Duty of Care"—that the defendants had a duty of care towards you;

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202. 45 C.F.R. §164.512(k)(5)(i) (2009).

203. 45 C.F.R. §164.512(k)(5)(iii) (2009) (stating that there is "no application [of this section] after release [from custody]," since "an individual is no longer an inmate when released on parole, probation, supervised release, or otherwise is no longer in lawful custody.").

204. Anderson v. Romero, 72 F.3d 518, 523 (7th Cir. 1995).

205. *See* Sanderfer v. Nichols, 62 F.3d 151, 155 (6th Cir. 1995) (finding that a failure to check medical records that contained a history of hypertension amounts to "negligence at most," even though the prisoner died because medication worsened his hypertension and led to a heart attack).

(2) "Breach of Duty"—that the defendants failed to meet that duty; and
(3) "Injury"—that you were injured as a result of that failure.[206]

There are several ways to prove that the prison has a duty of care towards you. First, as discussed above, *Estelle v. Gamble* held that prison officials have a duty to provide adequate medical care.[207] Second, a state statute may declare, or require, a prison's duty of care. Many states have statutes that require prison officials to provide adequate medical care. For example, in New York, Section 70(2)(c) of the New York State Correction Law directs Department of Correctional Services officials to maintain and operate correctional facilities "with due regard to ... [t]he health and safety of every person in the custody of the Department."[208] There are also common law (law made through judge's opinions, rather than by statute) claims of medical malpractice and negligence actions that you may bring.

The most common method of proving that a defendant breached a duty is to have an expert provide testimony that the defendant did not use the usually accepted procedures. For example, in *Stanback v. State*, the plaintiff's expert testified that an x-ray of plaintiff's knee would have revealed his torn ligament. Yet, prison doctors only offered ace bandages, braces, and painkillers and did not x-ray the knee for over three and one-half years.[209] Expert testimony is not always necessary. In *Rivers v. State*, the court stated that "[a] medical expert's testimony is not required where a lay person, relying on common knowledge and experience, can find that the harm would not have occurred in the absence of negligence."[210] In other words, if an ordinary person could have used common sense to find out that negligence must have occurred, you do not need an expert witness. Thus, no expert testimony was necessary in *Rivers* to prove that a doctor was negligent when he performed a hernia operation on a prisoner's right side, even though the patient required the operation on his left side and the hernia was visible on the left side.[211] As previously noted in Part B of this Chapter, there are differences between medical malpractice and medical negligence claims. The need for an expert is linked to this distinction: if you do decide to file a medical malpractice claim, you may need an expert witness to support your claim that a reasonable medical practitioner would not have caused the injury you claim was caused.

Finally, you must prove that the breach of duty was the direct cause of your injury. This element is not ordinarily difficult to prove, but if you interfere with your treatment in any way, you may fail to prove direct causation. For example, in *Brown v. Sheridan*, the plaintiff lost his case when the court found that he did not receive immediate treatment because of his own failure to disclose the nature of his injury, and that defendants "took reasonable steps to ascertain and monitor plaintiff's condition."[212] The court noted that the prisoner did not openly display symptoms of his injury, and refused to cooperate with psychiatric care that that could have aided defendants in discovering and treating his injury sooner.[213] Also, in *Marchione v. State*, the plaintiff, who was given medication for hypertension and became permanently impotent as a result, lost on his negligence claim because he did not report his symptoms in time.[214] At trial, medical experts found that the impotence would have occurred if not treated within eight hours after the onset of

206. Brown v. Sheridan, 894 F. Supp. 66, 69–72 (N.D.N.Y. 1995) (finding that prison officials were not negligent for failing to treat a prisoner's broken leg because the officials were not told by the prisoner of his injury and it was not unreasonable for the officials to not have discovered the injury: "the record shows that these [officials] took reasonable steps to ascertain and monitor plaintiff's condition, and that when plaintiff disclosed his injury to them he received prompt medical attention.").

207. Estelle v. Gamble, 429 U.S. 97, 103–06, 97 S. Ct. 285, 290–92, 50 L. Ed. 2d 251, 259–61 (1976). Note that the Court in *Estelle v. Gamble* finds that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," and that a proper claim for breach of this duty must include allegations of "acts or omissions sufficiently harmful to evidence deliberate indifferences to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976).

208. N.Y. Correct. Law § 70(2)(c) (McKinney 2003 & Supp. 2009).

209. Stanback v. State, 163 A.D.2d 298, 298–99, 557 N.Y.S.2d 433, 433–34 (2d Dept. 1990).

210. Rivers v. State, 142 Misc. 2d 563, 567, 537 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1989), *rev'd on other grounds*, 159 A.D.2d 788, 552 N.Y.S.2d 189 (3d Dept. 1990).

211. Rivers v. State, 142 Misc. 2d 563, 567, 537 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1989), *rev'd on other grounds*, 159 A.D.2d 788, 552 N.Y.S.2d 189 (3d Dept. 1990).

212. Brown v. Sheridan, 894 F. Supp. 66, 72 (N.D.N.Y. 1995).

213. Brown v. Sheridan, 894 F. Supp. 66, 71 (N.D.N.Y. 1995).

214. Marchione v. State, 194 A.D.2d 851, 855, 598 N.Y.S.2d 592, 594–95 (3d Dept. 1993).

symptoms. Although the prisoner noticed the symptoms by ten o'clock in the morning, he did not indicate his situation was an emergency and delayed making a specific report of his symptoms until the evening.[215]

An advantage to filing a state tort claim is that you only need to establish negligence, a lower standard than deliberate indifference. A disadvantage to filing a state tort claim is that you can only get money *damages*, while Section 1983 provides both *declaratory relief* (a judgment that is binding on both parties in the present and the future) and *injunctive relief* (a court order that prohibits or commands action to undo some wrong or injury) in addition to money damages. Furthermore, a negligence action may only be filed in state court while a Section 1983 claim can be filed in either federal or state court.

(c) Article 78 Proceedings in New York State

In New York, there is a legal procedure called an Article 78 proceeding that allows you to challenge a decision made by a state official.[216] If you are denied medical care, you can bring a complaint under Article 78 to require the prison to provide that care. In an Article 78 proceeding, you can recover only limited money damages.[217] To be successful, you must be able to show that the prison authorities were deliberately indifferent to your serious medical needs.[218] The *statute of limitations* requires that the proceeding be brought within four months of the denial or you cannot bring the claim.[219] Administrative remedies must be exhausted before beginning an Article 78 proceeding. See Chapter 22 of the *JLM* for more information on Article 78 proceedings in New York, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

2. Remedies for Federal Prisoners

(a) *Bivens* Actions Under 28 U.S.C. § 1331

A *Bivens* action is the federal prisoner's equivalent to a state prisoner's Section 1983 action.[220] In a *Bivens* action, you must prove that the doctor or official showed deliberate indifference to your serious medical needs. For more on *Bivens* actions, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

(b) Federal Tort Claims Act

Under the Federal Tort Claims Act ("FTCA"),[221] you can obtain relief if the prison doctor or official was negligent.[222] In other words, you can sue the federal government if something a government employee did or

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215. Marchione v. State, 194 A.D.2d 851, 855, 598 N.Y.S.2d 592, 595 (3d Dept. 1993).

216. N.Y. C.P.L.R. 7801 (McKinney 2008).

217. Money damages are limited to those "incidental to the primary relief sought," and must be such "as [the plaintiff] might otherwise recover on the same set of facts in a separate action … in the supreme court against the same body or officer in its or his official capacity." N.Y. C.P.L.R. 7806 (McKinney 2008).

218. Estelle v. Gramble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) (holding that a prisoner needs to show "deliberate indifference to serious medical needs" in order to show a violation of the 8th Amendment); Moore v. Leonardo, 185 A.D.2d 489, 490, 586 N.Y.S.2d 37, 37–38 (3d Dept. 1992) (finding prisoner failed to show deliberate indifference when facility's medical staff met with prisoner 23 times and gave treatment); DeFlumer v. Dalsheim, 122 A.D.2d 872, 873, 505 N.Y.S.2d 919, 920 (2d Dept. 1986) (finding prisoner did not meet standard when he complained officials gave him plastic frame glasses instead of metal frame ones); Bryant v. Brunelle, 284 A.D.2d 936, 936, 726 N.Y.S.2d 315, 315–16 (4th Dept. 2001) (finding prison officials were not deliberately indifferent for refusing to provide prisoner with orthopedic shoes and inserts and for granting an exam by a different podiatrist than requested).

219. N.Y. C.P.L.R. 217(1) (McKinney 2003).

220. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); *see also* Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (holding that prisoner wishing to bring a *Bivens* suit must try administrative remedies first); 42 U.S.C. § 1997e(a) (1996) (federal statute stating that no remedy is available until administrative remedies are exhausted).

221. 28 U.S.C. §§ 1346(b) (1997), 2671–80 (2000).

222. United States v. Muniz, 374 U.S. 150, 150–52, 163–64, 83 S. Ct. 1850, 1852, 1858, 10 L. Ed. 2d 805, 808–09, 815–16 (1963) (allowing suit under the FTCA in two cases: one based on prisoner's claim that the negligence of prison employees was responsible for the delay in diagnosis and removal of the tumor which caused prisoner's blindness, and another based on prisoner's claim that prison guards were negligent for failing to prevent an assault on the prisoner by other inmates that resulted in injury); Clay v. Martin, 509 F.2d 109, 111–12, 114 (2d Cir. 1975) (permitting action under the FTCA for alleged negligence in medical experimentation on prisoner); Cain v. United States, 643 F. Supp. 175, 175–76, 181 (S.D.N.Y. 1986) (denying U.S. government's motion to dismiss suit alleging syphilis experimentation on prisoner without his consent).

failed to do while working for the government harmed you.[223] Courts look to see whether the behavior would be a tort in the state where the alleged behavior occurred. If it is a tort in that state, you can sue the federal government.

If the injury was caused by intentional behavior, however, a claim cannot be brought under the FTCA.[224] For example, an allegation of assault and battery (considered purposeful behavior under the law) could not be brought as an FTCA claim. If the act or omission that caused your injury arose from a *discretionary* duty, you cannot sue under the FTCA.

If you do meet FTCA suit requirements, you must bring it against the United States, not the federal employees who caused your injury. If you name employees as defendants, the court will dismiss your suit.[225]

(c) Choosing Between a *Bivens* Suit and an FTCA Action

If you are a federal prisoner, you may have the choice of bringing either a *Bivens* suit or an FTCA claim. While it is easier to bring a successful FTCA action because it allows suit for mere medical malpractice, there are several advantages to bringing a *Bivens* action not available under the FTCA. First, while you cannot bring an FTCA action for an intentional tort, you can bring a claim for an intentional tort in a *Bivens* suit against an individual. Second, under the FTCA you can only sue the federal government, while in a *Bivens* action you can sue the individuals who mistreated you. Third, under the FTCA you can only receive compensatory damages (money equal to the cost of repairing or compensating the actual injury you suffered), while in a *Bivens* suit you may receive punitive damages (extra money awarded as a penalty against the wrongdoer). Fourth, in an FTCA action, you cannot later sue the individuals who injured you, but in a *Bivens* action, if you are unable to collect on the judgment against the individual employees, you can bring a suit against the government. Finally, a judge hears an FTCA suit, but a jury hears a *Bivens* suit.

If your injury occurred because of a violation of your constitutional rights and also from a tort, you can bring both an FTCA and a *Bivens* action. If you do not wish to bring both, you can choose between them.

G. Conclusion

The Constitution and state law protect your right to adequate medical care. Part B explained what you need to prove to show you have been denied adequate medical care in violation of the Eighth Amendment. You must show that you suffered serious harm because you failed to receive medical treatment (the objective test),[226] and that the prison official who denied you treatment "[knew] of and [disregarded] an excessive risk to [your] health or safety" (the subjective test).[227] Part C talked about how courts treat certain common prisoner health complaints. Part D explained specific health rights for female prisoners. Part E explained your right to receive information before you are treated and your right to keep your medical records confidential. Part F talked about the different ways you can go to court if your rights have been violated. Because this Chapter focused on federal and New York State law, you will need to research the law in your own state if you are in a prison outside of New York. Also, read Chapters 26, 28, and 29 of the *JLM* for more information on your rights with respect to infectious diseases, disabilities, and mental illness.

If you believe you are not receiving adequate medical care, the *first* step is to assert your rights through your institution's grievance procedure. If your problem is not addressed, you will have preserved your right to bring a later suit in court. You can only bring your claim in federal court, or state court in New York (an Article 78 proceeding), *after* you are unsuccessful or do not receive a favorable result through the inmate grievance procedure. Read Chapter 15 of the *JLM* to learn about Inmate Grievance Procedures.

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223. For the FTCA, conduct is within the scope of "employment" where there is a "reasonable connection between the act and the agent's duties" and where "the act is 'not manifestly or palpably beyond the [agent's] authority.'" Yalkut v. Gemignani, 873 F.2d 31, 34 (2d Cir. 1989) (quoting Niert v. Overby, 816 F.2d 1464, 1466 (10th Cir. 1987)).

224. You can bring a *Bivens* action for intentional torts. You may also bring a state tort claim. See *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about state tort claims.

225. *See* Lee v. Carlson, 645 F. Supp. 1430, 1434 (S.D.N.Y. 1986) (dismissing FTCA claim where prisoner alleged liability against 13 defendants in their individual capacities because, under the FTCA, prisoners can sue only the federal government and not individuals).

226. Wilson v. Seiter, 501 U.S. 294, 304–05, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991). *See also* Rhodes v. Chapman, 452 U.S. 337, 345–48, 101 S. Ct. 2392, 2398–99, 69 L. Ed. 2d 59, 68–69 (1981) (holding that an objective standard must be used in determining whether prisoners suffered harm in violation of the 8th Amendment).

227. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

A JAILHOUSE LAWYER'S MANUAL

Chapter 24: Your Right To Be Free From Assault by Prison Guards and Other Prisoners

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CHAPTER 24

YOUR RIGHT TO BE FREE FROM ASSAULT BY PRISON GUARDS AND OTHER PRISONERS*

A. Introduction

The United States Constitution and state laws protect prisoners from certain acts of violence and harassment, including attacks, rapes, and other forms of assault. If you believe that a guard or another prisoner has assaulted you, this Chapter can help explain your legal options. Part B of this Chapter describes your legal *right* not to be assaulted, and explains what you need to prove in order to sue under the Eighth Amendment. Part C discusses legal protections against sexual assault and rape. Part D outlines special issues for gay, homosexual, and/or effeminate prisoners. Part E explains how to protect your right to be free from physical and sexual assaults.

Before starting your research, keep in mind that there are two types of laws that protect your rights in prison: (1) federal constitutional law and (2) state law. Federal constitutional law comes from the United States Constitution, which protects prisoners from certain assaults. The most important constitutional protections against assault are in the Fifth, Eighth, and Fourteenth Amendments. This Chapter will explain these Amendments in more detail and help you figure out if anyone has violated your rights under them. For example, this Chapter will help you figure out if prison officials have violated your Eighth Amendment right to be free from cruel and unusual punishment in prison.[1] For a full list of the Constitution's amendments, see Part A of Chapter 16 of the *JLM*.

To help explain your constitutional rights, this Chapter will describe cases decided by the U.S. Supreme Court. These cases apply to you no matter where you are imprisoned. This Chapter will also describe cases decided by *circuit courts of appeals*, which are the federal appeals courts. Unlike Supreme Court cases, these cases do not set the law for the entire country; instead, they only apply in the particular group of states that make up the circuit. Therefore, before reading further, you may want to first look up which circuit your state is in. For instance, if you are in New York State, you are in the Second Circuit. Once you know what circuit you are in, you can use the cases from that circuit to understand and make an argument based on federal constitutional law. You can also use cases from other circuits to help support your argument, but a court in your circuit will not be required to follow these cases. If you are confused, you should read Chapter 2 of the JLM, "Introduction to Legal Research," for more information on how the judicial system is organized.

In addition to federal constitutional law, this Chapter describes New York State law. This means if you are in a prison outside of New York, you will need to research the specific laws of your state. You can still use this Chapter to understand federal constitutional law and how state laws work in general, but don't forget that the laws in your state might be different. For diagrams of the state and federal court systems, see the inside front and back covers of the *JLM*.

To summarize: if a guard or another prisoner has assaulted you in prison, you may be able to make a (1) federal constitutional law claim (that is, a claim that your constitutional rights were violated) and/or (2) a state law claim (that is, a claim that a state law was violated). The specific state law claim that you bring will depend on the state where you are imprisoned.

Regardless of where you are imprisoned, you must bring a *civil* law claim. You cannot bring *criminal* charges against your attacker, since only the government can bring charges under criminal law.[2] Note, however, that you do not have to wait for the government to criminally charge your attacker. If you have

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1. The 8th Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

2. *See* Lewis v. Gallivan, 315 F. Supp. 2d 313, 316 (W.D.N.Y. 2004) (dismissing prisoner's claim that the county sheriff and district attorney had failed to investigate and criminally prosecute two corrections officers for threatening him: "[T]he law is well settled that no private citizen has a constitutional right to bring a criminal complaint against another individual" and "[t]here is … no constitutional right to an investigation by government officials" (quoting Stone v. Dept. of Investigation of N.Y., No. 91 Civ. 2471, 1992 U.S. Dist. Lexis 1120, at *7 (S.D.N.Y. Feb. 4, 1992)).

been assaulted and you want to sue your attacker in court, you can bring a civil suit even before the government charges your attacker with a crime, and even if the government never charges your attacker at all.

State civil law includes many different areas of law. The area of state civil law you would use to file a claim after a prison assault is called *tort* law.[3] Specifically, an assault is considered an *intentional* tort—which means a wrongful act one person does to another. Tort law has developed in each state as a part of the common law (laws made by judges when they decide cases) rather than statutory law (laws passed by the state legislature). This means that if you want to sue your attacker based on state law, you will need to read the cases decided in state courts to understand the laws that will apply to your case. In some states, the common law of torts has been codified, meaning that the state legislature has organized the judicial case law on torts into legislative *statutes*.[4] You should check to see whether your state legislature has codified tort law. If it has, you can find the definition of assault in the state statute. Tort law has ***not*** been codified in New York State. If you are confused about tort law, you should read Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

If you determine your rights have been violated under federal constitutional or state law, before you can go to court, you will first need to follow the administrative grievance procedures your prison has set up. Filing a grievance is explained in Chapter 15 of the *JLM*, "Inmate Grievance Procedures." If the grievance system does not help you, or if it does not help you enough, you can then *file* a suit in court. If you go to court, you must choose which court to go to and what type of lawsuit to bring. You can (1) bring an action under Section 1983 of Title 42 of the United States Code (42 U.S.C. §[5] 1983) in state or federal court, (2) file a tort action in state court (in the New York Court of Claims[6] if you are in New York), or (3) file an Article 78[7] petition in state court if you are in New York. More information on all of these types of claims can be found in other chapters of the *JLM*, including Chapter 5, "Choosing a Court and a Lawsuit;" Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law;" Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions;" and Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you decide to file a federal court claim, you *must first* read *JLM*, Chapter 14 on the Prison Litigation Reform Act ("PLRA"). If you do not follow the steps required by the PLRA, you might lose your right to sue (and possibly your good-time credit also).

B. Your Right to be Free from Assault

This Part of the Chapter is organized into five different sections. Part B(1) explains the legal definition of assault and which prison assaults are considered unlawful. Part B(2) discusses how the Eighth

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3. Note that if you are a prisoner in a *federal* institution, you will need to sue for simple tort violations using the Federal Tort Claims Act ("FTCA"). The FTCA is a law that allows you to sue the federal government for negligent or harmful actions by its employees. Without the FTCA, you could not sue the federal government in tort because the federal government would be "immune" from this kind of suit (incapable of being sued). It is important to note that "[u]nder the FTCA, courts apply the law of the state where the accident occurred." Robinson v. U.S. Bureau of Prisons, 244 F. Supp. 2d 57, 64 (N.D.N.Y. 2003). *See also* 28 U.S.C. §§ 1346(b)(1) (2006) (stating that government officials can be sued "in accordance with the law of the place where the act or omission occurred"); Part E(4) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

4. The general principles of tort law have also been organized into a "Restatement" by the American Law Institute. The Restatement is a useful resource for learning about tort law in general but is not itself binding law.

5. Remember that "§" is the symbol for "section." For example, § 1983 means "Section 1983." Therefore, "§ 1983" refers to a specific section, Section 1983, of a law (here a law in the United States Code).

6. The New York Court of Claims is a specific New York State court that only hears claims for damages against the State of New York. If the person who injured you was a state official or employee, and you decide to file a tort action in state court in New York, you should file your claim in the New York Court of Claims. The Court of Claims can only award money damages; it cannot issue an *injunction.* See Part C(4) of Chapter 5 of the *JLM*, "Choosing a Court & Lawsuit," for more information on the Court of Claims. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more explanation of tort actions.

7. An Article 78 petition refers to a petition using Article 78 of the New York Civil Practice Law. You cannot use Article 78 to seek damages for assault or other injury. Instead, you can use an Article 78 petition to go to court to challenge decisions made by New York State administrative bodies or officers, like the Department of Correctional Services or prison employees, if you think the decision was illegal, arbitrary, or grossly unfair. See Part C(6) of Chapter 5, "Choosing a Court & Lawsuit," and Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more about Article 78 proceedings.

Amendment, which forbids cruel and unusual punishment, protects you against assaults by both prison guards and other prisoners. Part B(3) outlines your rights against harassment. Part B(4) explains why you should not use force to resist, even if you think an order, assault, or search by prison officials is illegal. Finally, Part B(5) explains how state laws and state constitutions protect you from assault.

1. The Legal Concept of Assault

Many people confuse the legal term assault with the legal term battery. They do not mean the same thing in legal language. Battery means a violent physical attack.[8] Assault means any act—including a threat, verbal abuse, or harassment—that makes a person fear he will be physically attacked.[9] For example, an assault and battery charge means you are charged with both making someone afraid that you will attack him (assault) as well as actually physically attacking him (battery). Both assault and battery are torts.

Outside prison, most threats, unwanted touching, and uses of force are torts and are therefore illegal. But in prison, tort law *privileges* (allows) prison staff to use some force that would not be allowed outside. Therefore, most courts will not find that prison officials violated your rights if they only verbally threatened or harassed you. Courts will generally only find that an assault violated your rights (that the act against you was illegal and an actionable tort) if you were *physically attacked*. For more on torts and assault under state tort law, see Part B of Chapter 17 of the *JLM* on tort actions.

Constitutional law is similar to tort law in this respect. Verbal threats by prison staff generally do not violate the Constitution.[10] But if the verbal abuse comes with a *believable threat of serious physical harm*, courts might find a constitutional violation.[11] Even then, under the Prison Litigation Reform Act ("PLRA"), you cannot sue for compensatory damages[12] (and, in some circuits, punitive damages[13]) in federal court for

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8. Battery is "[t]he use of force against another, resulting in harmful or offensive contact." Black's Law Dictionary 173 (9th ed. 2009).

9. Assault is "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear … of an immediate battery … [or] [a]n attempt to commit battery [with] the specific intent to cause physical injury." Black's Law Dictionary 130 (9th ed. 2009).

10. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that verbal sexual harassment by a prison guard did not violate a constitutional right); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (holding that prison official's use of vulgarity (bad language) did not violate a constitutional right); Collins v. Cundy, 603 F.2d 825, 828 (10th Cir. 1979) (holding that sheriff's laughing at prisoner and threatening to hang him did not state a constitutional claim); Maclean v. Secor, 876 F. Supp. 695, 698 (E.D. Pa. 1995) ("It is well established that verbal harassment or threats … will not, without some reinforcing act accompanying them, constitute a constitutional claim."); Murray v. Woodburn, 809 F. Supp. 383, 384 (E.D. Pa. 1993) ("Mean harassment … is insufficient to state a constitutional deprivation."); Prisoners' Legal Ass'n v. Roberson, 822 F. Supp. 185, 189 (D.N.J. 1993) ("[V]erbal harassment does not give rise to a constitutional violation enforceable under § 1983."); Govan v. Campbell, 289 F. Supp. 2d 289, 300 (N.D.N.Y. 2003) ("A claim under '42 U.S.C. § 1983 is not designed to rectify harassment or verbal abuse.'" (quoting Gill v. Hoadley, 261 F.Supp.2d 113, 129 (N.D.N.Y. 2003))); Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir. 2004) ("[H]arassment and verbal abuse … do not constitute the type of infliction of pain that the Eighth Amendment prohibits."); Graves v. N.D. State Penitentiary, 325 F. Supp. 2d 1009, 1011–12 (D.N.D. 2004) (finding that even though a guard's racially derogatory language was "offensive, degrading, and reprehensible," "the use of racially derogatory language will not, by itself, violate the 14th Amendment 'unless it is pervasive or severe enough to amount to racial harassment'" (quoting Blades v. Schuetzle, 302 F.3d 801, 805 (8th Cir. 2002))).

11. *See* Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding prisoner stated a § 1983 8th Amendment excessive force claim for psychological injuries when plain-clothed corrections officers surprised plaintiff on the street while he was out on work release and, without identifying themselves, threatened at gunpoint to kill him before taking him back to jail; the court held the "brandishing of a lethal weapon" was "not an idle and laughing threat" but was malicious and sadistic and, though plaintiff was not physically injured, his alleged psychological injury was not *de minimus* because "convicted prisoners have a constitutional 'right to be free from the terror of instant and unexpected death' at the hands of their keepers" (citations omitted)); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) (finding the allegation that a guard drew a weapon, made racial epithets, and threatened to shoot a black prisoner in the back to prevent him from exercising free speech stated a § 1983 claim); *see also* Hudson v. McMillian, 503 U.S. 1, 17, 112 S. Ct. 995, 1004, 117 L. Ed. 2d 156, 172 (1992) (Blackmun, J., concurring) (stating a "guard placing a revolver in an inmate's mouth and threatening to blow [the] prisoner's head off" was an unnecessary and wanton infliction of pain—although psychological, not physical pain—amounting to an 8th Amendment excessive force violation); Douglas v. Marino, 684 F. Supp. 395, 398 (D.N.J. 1988) (upholding a constitutional claim where a prison employee threatened to kill a prisoner while gesturing with a butcher's knife, since "this was not a 'mere threat with words alone [but] … words along with action, the action being the threatening use of a weapon").

12. Compensatory damages are money damages that reimburse you for the actual injury you suffered in an effort

mental or emotional injury unless you were also physically injured.[14] See *JLM*, Chapter 14, "The Prison Litigation Reform Act," for information on the PLRA's physical injury requirement.

(a) You Must Prove That Your Attacker Intended to Touch or Harm You

(i) State Torts and Intent

Because assault and battery are torts and each state has its own state tort law, state courts use different tests to determine whether someone's use of force against you is wrongful (whether that person has committed the torts of assault and battery against you).[15] All states require you to show that the defendant *intended* to act against you in some way. Some states require you to prove that the defendant intended to touch you in an offensive or violent way.[16] Other states require you to show that the defendant acted unlawfully[17] or that the defendant behaved with willful disregard for your rights.[18] In New York, courts use the "intentional touching" *standard*.[19]

All state courts believe the use of force in prison by prison officials is sometimes necessary for safety reasons and to maintain order. Therefore, courts often think that a prison official's intentional use of physical force on a prisoner is *not* wrongful, even if the same use of force outside prison would be illegal.

In New York, to prove the tort of battery (physical assault), you must show the defendant intentionally acted, but you do not have to show the officer intended to harm you.[20] Let's say a prison official handcuffed you very tightly, permanently hurting your wrists and hands. To prove this was battery, you must show the guard intended to handcuff you, but you do not have to show the guard intended to hurt you when he handcuffed you.

(ii) Constitutional Torts and Intent

It is much more difficult to prove that an assault, in addition to being a tort under state law, also violated your constitutional rights under the Eighth Amendment's prohibition of cruel and unusual punishment. To prove that an assault against you violated your constitutional rights, you must show your attacker both intended to handcuff you *and* intended to hurt you. Under state tort law, if you were injured

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to "make you whole again" or to put you in the same position as you were before the injury occurred. These types of damages might include reimbursement for medical expenses or money in recognition of pain and suffering.

13. Punitive damages are damages awarded in addition to compensatory damages, and are meant to punish a defendant who was reckless or acted with intent.

14. The PLRA prohibits all federal civil actions (constitutional ***and*** tort claims) brought in federal court by prisoners (convicted felons, misdemeanants, and pretrial detainees) for ***mental or emotional*** injury suffered while in custody ***where there was no related physical injury***. 42 U.S.C. § 1997e(e) (2006). The Federal Tort Claims Act has a similar limitation for convicted felons (but not pretrial detainees or misdemeanants): no convicted felon can "bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 28 U.S.C. § 1346(b)(2) (2006). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act" for more information.

15. As described in the Introduction to this Chapter, the tests used by courts today come from past judicial decisions—called the common law—that some states have now made into statutes.

16. *See*, *e.g.*, Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997) ("To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen.").

17. *See*, *e.g.*, Glowacki v. Moldtronics, Inc., 636 N.E.2d 1138, 1140, 264 Ill. App. 3d 19, 22 (Ill. App. 2d Dist. 1994) (dismissing plaintiff's battery action after plaintiff failed to allege either that defendants were involved in illegal activity or that defendants acted with specific intent to harm when they exposed her to chemicals at work).

18. *See*, *e.g.*, Ashcraft v. King, 228 Cal. App. 3d 604, 613, 278 Cal. Rptr. 900, 904 (Cal. App. 2d Dist. 1991) ("In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' for the plaintiff's rights.").

19. *See*, *e.g.*, Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997) ("To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen."); Allegany Co-Op Ins. Co. v. Kohorst, 254 A.D.2d 744, 744, 678 N.Y.S.2d 424, 424 (4th Dept. 1998) ("'Accidental results can flow from intentional acts. The damage in question may be unintended even though the original act or acts leading to the damage were intentional.'" (quoting Salimbene v Merchants Mut. Ins. Co., 217 A.D.2d 991, 994, 629 N.Y.S.2d 913, 915–916 (4th Dept 1995))).

20. *See*, *e.g.*, Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp., 245 A.D.2d 241, 242, 666 N.Y.S.2d 636, 637 (1st Dept. 1997) ("To establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen.").

when prison staff intentionally touched you, you could bring a successful claim of assault and battery—even if you cannot prove that the official specifically meant to hurt you. But, if you can show the official intended to harm you, you could include both the constitutional violation and the state torts of assault and battery in your suit.

(b) Suing the Prison if You Were Assaulted by Other Prisoners

(i) State Tort of Negligence

If you were physically attacked by another prisoner and believe that prison officials were partly responsible for the attack, you may also be able to file a lawsuit against the prison and/or the prison officials. But here, you cannot claim assault and battery (because the prison officials did not actually attack you).[21] Instead, you can use the law of *negligence*.[22] Negligence is a separate tort from assault and battery under state tort law; it means that a person did not act reasonably to fulfill his duty toward you.[23] If another prisoner is attacking you, prison officials have a duty to try to stop the attack. If they do not, you could sue them for negligence. To prove the prison officials' negligence in such a situation, you must show the court that the officials "failed to exercise [or use] reasonable care" in allowing the attack to happen[24]—in other words that the officials *did not act like reasonably careful people* to prevent the attack. You will need *evidence* that: (1) the officials knew (or reasonably should have known) that you would be harmed or that there was a substantial risk that you would be harmed;[25] and (2) the officials did not act to prevent it.[26]

Winning a negligence claim against prison officials for a prisoner-on-prisoner assault is difficult.[27] Courts only find negligence in limited situations, for example: when the attacker is a prisoner who officials knew or should have known was drunk or violent;[28] when the *plaintiff* (the prisoner bringing the suit) was

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21. If an officer participated in the attack, however, you can also claim assault and battery against the participating officer (in addition to your claim of negligence against the other officers who you believe allowed the attack to happen).

22. See Part B(2) of Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more on negligence and negligent torts.

23. Negligence is "the failure to exercise the standard of care a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; a tort grounded in this failure, usually expressed in terms of the following elements: duty, breach of duty, causation, and damages." Black's Law Dictionary 1133–34 (9th ed. 2009).

24. The Restatement (Second) of Torts defines the general rule: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control." Restatement (Second) of Torts, § 320. The Restatement of Torts is published by the American Law Institute and presents the general principles of tort law.

25. *See* Sanchez v. New York, 99 N.Y.2d 247, 255, 784 N.E.2d 675, 680, 754 N.Y.S.2d 621, 626 (2002) (holding that "the State owes a duty of care to inmates for foreseeable risks of harm; and that foreseeability is defined not simply by actual notice but by actual *or constructive* notice—by what the 'State knew or had reason to know' [or] … what the State 'is or should be aware' of …. The requisite foreseeability is as to a 'risk of harm' … or 'risk of inmate-on-inmate attack'"; actual notice or "proof of specific notice of time, place or manner of the risk" is *not* required); *see*, *e.g.*, Flaherty v. State, 296 N.Y. 342, 346, 73 N.E.2d 543, 544 (1947) (denying plaintiff prisoner's claim after finding it was not foreseeable that a fellow prisoner with whom the plaintiff had been arguing would pour acid on the sleeping plaintiff).

26. *See, e.g.,* Sanchez v. New York, 99 N.Y.2d 247, 252, 784 N.E.2d 675, 677, 754 N.Y.S.2d 621, 623 (2002).

27. *See, e.g.*, Wilson v. New York, 303 A.D.2d 678, 679, 760 N.Y.S.2d 51, 52 (2d Dept. 2003) ("While the State's duty to an inmate encompasses protection from the foreseeable risk of harm at the hands of other prisoners … the State is not an insurer of an inmate's safety. The State will be liable in negligence for an assault by another inmate only upon a showing that it failed to exercise adequate care to prevent that which was reasonably foreseeable.").

28. *See*, *e.g.*, Littlejohn v. New York, 218 A.D.2d 833, 833–34, 630 N.Y.S.2d 407, 408 (3d Dept. 1995) (holding that the State has a duty to use reasonable care to protect prisoners from foreseeable risks of harm and affirming judgment for prisoner where prisoner's face was slashed by a "known dangerous prisoner," who prison officials knew was violent and had many prior assaults); Kemp v. Waldron, 125 Misc. 2d 197, 199, 479 N.Y.S.2d 440, 441 (Sup. Ct. Schenectady County 1984) (finding that prisoner, who was assaulted by two fellow prisoners, adequately stated a claim against the sheriff for negligence because the sheriff knew the fellow prisoners were dangerous and violent), *aff'd*, 115 A.D.2d 869, 497 N.Y.S.2d 158 (3d Dept. 1985).

exposed to a mentally ill prisoner;[29] when the plaintiff was exposed to an armed prisoner;[30] when the plaintiff was exposed to a prisoner overseer or "trustee";[31] when the plaintiff was exposed to a prisoner who had a grudge against him or who had threatened him;[32] or when the prison does not have enough supervisory staff on duty.[33]

(ii) Constitutional "Tort" of Deliberate Indifference

If another prisoner assaulted you, you may be able to make a federal constitutional claim of deliberate indifference as well as a state tort claim of negligence. But, remember that constitutional violations are harder to prove than state tort claims. Deliberate indifference refers to prison officials' actions or inactions that are worse than negligence (carelessness) and are so bad they violate the Eighth Amendment's ban on cruel and unusual punishment. You will have to prove that the prison officials *actually knew that you were going to be attacked but did nothing or too little to stop the attack* (were "deliberately indifferent" to the danger), not just that the officials were negligent and "should have known" you were in danger. Part B(2)(a)(ii) below explains more about how to show prison officials' deliberate indifference.[34]

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29. *See*, *e.g.*, Bartlett v. Commonwealth, 418 S.W.2d 225, 227, 228 (Ky. Ct. App. 1967) (finding that the trial court erred in refusing to admit evidence showing that two prisoners who murdered a 15-year-old prisoner in a state juvenile facility had records of violence and mental and emotional disability; noting the general rule that the keeper of a prison must exercise ordinary care for the protection of his prisoner if there is reasonable grounds to foresee danger to the prisoner); Dunn v. Swanson, 7 S.E.2d 563, 564, 217 N.C. 279, 280–81, (1940) (finding cause of action against sheriff and county jail official for negligence in locking a prisoner in the same cell with a violently insane man who killed him by beating him with a leg torn from a table, which was left in the cell by the jailer and sheriff). *But see* Mobley v. State, 1 A.D.2d 731, 732, 147 N.Y.S.2d 414, 417 (3d Dept. 1955) (finding no negligence in state's failure to segregate or more closely guard an allegedly dangerous prisoner once diagnosed with psychosis, where there was no showing that the state had notice that the prisoner was so much more dangerous than the other prisoners that it was improper to allow him to perform ordinary tasks in the prison or mix with the other prisoners), *rehearing and appeal denied*, 1 A.D.2d 928, 150 N.Y.S.2d 561 (3d Dept. 1956), *appeal denied* 1 N.Y.2d 643 (1956); Hann v. State, 137 Misc. 2d 605, 611, 521 N.Y.S.2d 973, 977 (N.Y. Ct. Cl. 1987) (finding that it was not foreseeable that prisoner with history of assaultive behavior and who was recently released from psychiatric hospital would attack fellow prisoner).

30. *See*, *e.g.*, Huertas v. State, 84 A.D.2d 650, 650, 444 N.Y.S.2d 307, 308–309 (3d Dept. 1981) (finding negligence where, immediately before fatal assault, assailant left his work area with iron bar visible under his clothes, in plain view of five correction officers); Jackson v. Hollowell, 714 F.2d 1372, 1373 (5th Cir. 1983) (finding prison officials liable when prisoner was struck by a ricocheting pellet that was fired by an armed prison trustee using a sawed-off shotgun). Prison trustees are "inmates … armed with loaded shotguns and … entrusted with the responsibility of guarding other inmates." Jackson v. Hollowell, 714 F.2d 1372, 1374 n.2 (5th Cir. 1983).

31. Jackson v. Mississippi, 644 F.2d 1142, 1146 (5th Cir. 1981) (establishing a "constitutional right to be free from cruel and unusual punishment in the form of trusty shooters who were inadequately screened for mental, emotional, or other problems"), *aff'd by* Jackson v. Hollowell, 714 F.2d 1372, 1373, 1374 n.2 (5th Cir. 1983).

32. *See*, *e.g.*, Rangolan v. County of Nassau, 51 F. Supp. 2d 236, 238 (E.D.N.Y. 1999) (upholding judgment that county jail was negligent as a matter of law for housing prisoner in the same "jail pod" as prisoner he had served as a confidential informant against and who subsequently beat him badly), *vacated in part on other grounds*, 370 F.3d 239 (2d Cir. 2004); Ashford v. D.C., 306 F. Supp. 2d 8, 16–19 (D.D.C. 2004) (finding prisoner did state a common law negligence claim where prisoner was severely stabbed by a fellow prisoner against whom he had a permanent separation order after being transferred to a new prison not aware of the separation order).

33. Negligence is seldom found in such a case. For an unusual example, see Bourgeois v. United States, 375 F. Supp. 133, 135 (N.D. Tex 1974) (holding that under the Federal Tort Claims Act, federal prison officials were negligent in, among other things, failing to provide adequate supervisory personnel when a prisoner was injured after a fellow prisoner threw a "Molotov cocktail" into his cell). *But see* Robinson v. U.S. Bureau of Prisons, 244 F. Supp. 2d 57, 65 (N.D.N.Y. 2003) (noting that, to determine the foreseeability of an attack, courts may look at evidence "including staffing levels, the ability of staff to monitor the inmates, past behavior of inmates and prison staff, state regulations regarding the staffing of correctional facilities and the monitoring of inmates, and expert testimony regarding the staffing levels at issue"); Colon v. State, 209 A.D.2d 842, 844, 620 N.Y.S.2d 1015, 1016 (3d Dept. 1994) (reversing court of claims judgment for prisoner who claimed the prison failed to provide adequate supervision after being attacked by a fellow prisoner in a prison engine repair shop during a supervisor's brief absence; instead finding the State provided reasonable supervision and that "unremitting supervision … was unnecessary and the fact that [the prison official was] not present at the time of the incident, in and of itself, is insufficient to support a finding that the State failed to exercise reasonable care").

34. *See* Farmer v. Brennan, 511 U.S. 825, 829, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994) (announcing that deliberate indifference requires showing "the official was subjectively aware of the risk"); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995) ("Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983.").

(c) Body Searches and Sexual Attacks As "Assault"

Assaults occurring in prison can include more than just violent physical attacks. Forced sexual contact and illegal body cavity searches interfere with your body and may also be assaults and batteries.[35] Courts use the same civil and constitutional tort laws (including the Eighth Amendment) to decide claims of sexual assault. Part C of this Chapter explains some special legal protections you have against sexual assault.

In contrast to assaults, courts usually use the Fourth Amendment, not the Eighth Amendment, to decide claims of illegal searches. The Fourth Amendment protects your right to be free from unreasonable searches and seizures.[36] Some illegal body cavity searches, however, may also violate the Eighth Amendment if a court feels the search is so unreasonable that it constitutes cruel and unusual punishment.[37] But remember that most courts will ***not*** find any constitutional violations as long as the official who searched you was acting to further some legitimate penological interest (an interest related to running the prison, such as maintaining security or discipline) and the pain you suffered was only a side effect, not the main purpose of the search.[38] See Part B(3) of Chapter 25, "Your Right to Be Free From Illegal Body Searches," for more information on when searches may violate the Eighth Amendment.

(d) When is Assault Prohibited by the Law?

As this Chapter explained above, not all physical touching or physical force is unlawful assault. The difference between lawful and unlawful assault is particularly important for prisoners. Actions that would be considered unlawful outside prison may be allowed as "lawful force" in prison. For example, prison officers may use lawful force against prisoners to maintain order and ensure rules are obeyed.[39]

Also, because corrections officers are government actors, they can use the defense of qualified *immunity*[40] when sued under Section 1983. This means even if you can prove you were assaulted, the officials may not be *liable* because of qualified immunity. For a detailed discussion of qualified immunity and Section 1983, see Part (C)(3)(c) ("Qualified Immunity") and Part B ("Section 1983") of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

2. Protection from Assault Under the Eighth Amendment

This Section is about the right of convicted state and federal prisoners to be free from assault under the Eighth Amendment,[41] which prohibits "cruel and unusual punishment."[42] Under the Eighth Amendment,

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35. *See, e.g.*, Hammond v. Gordon County, 316 F. Supp. 2d 1262, 1303 (N.D. Ga. 2002) (holding female plaintiff had sufficient evidence to claim assault and battery against male prison official who placed the plaintiff "in apprehension of an unlawful touch when guard pointed a gun at plaintiff and attempted to engage in sexual conduct with her"; also recognizing second plaintiff's claim for intentional infliction of emotional distress when another guard penetrated her vagina with his fingers).

36. The 4th Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

37. *See*, *e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1522–23 (9th Cir. 1993) (finding that random, non-emergency clothed body searches of women prisoners by male guards violated the 8th amendment); Tribble v. Gardner, 860 F.2d 321, 325 (9th Cir. 1988) (finding prisoner's claim that a rectal probe may have been punitive could proceed, where prisoner's clothing, hair, hands, and other body cavities were not searched and prisoner's recent X-ray revealed no contraband in his rectum); Dellamore v. Stenros, 886 F. Supp. 349, 351 (S.D.N.Y. 1995) (finding that plaintiff subjected to body cavity search without a medical practitioner present stated a colorable claim under the 8th Amendment).

38. *See* Del Raine v. Williford, 32 F.3d 1024, 1038–42 (7th Cir. 1994) (finding that while rectal searches may inflict pain, if the official has a legitimate reason to conduct them, they do not violate the 8th Amendment).

39. N.Y. Correct. Law § 137(5) (McKinney 2003 & Supp. 2009) ("When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees *shall use all suitable means* to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape." (emphasis added)).

40. Qualified immunity is defined as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights." Black's Law Dictionary 818 (9th ed. 2009).

41. This Chapter explains how the 8th Amendment's right to be free from cruel and unusual punishment can protect you from assaults and body searches. But, the 8th Amendment protects prisoners in other ways too, like from general prison conditions such as overcrowding and uncleanliness (*see* Part B(2)(d) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law"), and lack of proper medical care (*see* Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care").

prison officials cannot use excessive physical force against you[43] or deliberately allow you to be seriously injured by someone else.[44]

There are two parts of an Eighth Amendment claim, and you must prove both of them in order to successfully show that an assault against you violated the Eighth Amendment. First you must show what the prison official was thinking or knew at the time of the assault (this is assault's *subjective* component, explained in Part B(2)(a)). You must also show what injuries (if any) you received from an assault by a prison official, or show how a prison official's actions caused you to be in "substantial risk of serious harm" of being attacked by another prisoner (this is assault's *objective* component, explained in Part B(2)(b)).

To summarize, to show that an assault against you violated the Eighth Amendment, you must prove that the force used against you had two components (parts):

(1) A subjective component: prison officials must have acted with a sufficiently culpable (guilty enough) state of mind;[45] and

(2) An objective component: you were injured somehow[46] or placed in substantial risk of serious injury.[47]

(a) Subjective Component—Culpable State of Mind

The subjective component of assault means you must prove what the prison official was *thinking* or *knew* at the time you were assaulted. Courts use two different standards (the *Hudson* and *Farmer* standards) for the subjective component. The standard used depends on who assaulted you: a prison official or another prisoner. If an official hurt you, courts use the *Hudson* standard to look at whether the guard used force as part of his job to keep the prison safe and orderly, or instead whether the guard's force was intended to cruelly hurt you for no legitimate reason. If another prisoner hurt you, courts use *Farmer* to look at whether the prison officials knew about the danger to you but did not stop or act to prevent the assault.[48]

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42. U.S. Const. amend. VIII.

43. *See* Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 165–66 (1992) (holding that excessive force may constitute an 8th Amendment injury even if prisoner is not seriously physically harmed).

44. *See* Farmer v. Brennan, 511 U.S. 825, 833–34, 114 S. Ct. 1970, 1976–77, 128 L. Ed. 2d 811, 822–23 (1994) (holding that prison officials are obligated to protect prisoners from violent attacks by other prisoners); s*ee also* Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) ("[P]rison administrators' indifference to brutal behavior by guards toward inmates [is] sufficient to state an Eighth Amendment claim.").

45. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[T]he core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.").

46. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) ("[T]he extent of injury suffered by a prisoner is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation." (quoting Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–62 (1986))).

47. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (holding that in a claim of failure to protect, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm").

48. Note that if a prison official injured you in the presence of or with the knowledge of other officials, you could sue both the official who harmed you ***and*** the officials and/or supervisors who knew about it and did nothing. The prison officials who knew but did nothing about your assault would be liable under the *Farmer* standard—not the *Hudson* "malicious and sadistic" standard. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) (finding the deliberate indifference standard applied to prison supervisors if "after learning of the violation through a report or appeal, … [the supervisor] failed to remedy the wrong …, created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue …, [or] was grossly negligent in managing subordinates who caused the unlawful … event." (citations omitted)); Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993) (applying the deliberate indifference, or *Farmer*, standard to a claim based on prison official's failure to act); Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."); Vaughan v. Ricketts, 859 F. 2d 736, 741 (9th Cir. 1988) ("[P]rison administrators' indifference to brutal behavior by guards toward inmates [is] sufficient to state an Eighth Amendment claim."); Madrid v. Gomez, 889 F. Supp. 1146, 1249 (N.D. Cal. 1995) (noting supervisors may be liable for "conduct of a completely different nature: abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist").

(i) Assault by a Prison Official—The *Hudson* Standard

If you are suing a prison official who injured you, a court will use the "malicious and sadistic" (evil and cruel) standard the Supreme Court created in *Hudson v. McMillian*[49] to determine whether the official's force against you was so bad ("excessive") as to violate the Eighth Amendment. Under *Hudson*, a prisoner must demonstrate that the prison official's force was not "a good-faith effort to maintain or restore discipline," but rather was used "maliciously and sadistically" to hurt the prisoner.[50]

If officials are using force for legitimate reasons, they are not violating the Eighth Amendment.[51] Prison officials are generally allowed to use force during a riot or other major prison disturbance,[52] and during smaller individual incidents when prisoners behave violently or disruptively.[53] But, if the force has no purpose and is simply meant to harm the prisoner for no legitimate reason, then the official may be found to have used excessive force. [54] In other words, if the force is inflicted with the purpose of causing harm and not with the purpose of restoring discipline, then the official may be found to have used excessive force.

To decide if the prison official intended to act maliciously and to harm you (to determine the official's "state of mind"), courts will look at:

(1) the seriousness of your injuries;[55]
(2) if the force was necessary under the circumstances (why the official used force);
(3) the relationship between the need to use force and the amount of force that was actually used;
(4) the size of the threat as a prison official would reasonably see it; and
(5) efforts made by prison guards to decrease the amount of force used.[56]

You should think about each of these factors when you try to prove that prison officials intentionally used violence against you only to cause you pain. You need to remember that "not every push or shove, even if it may later seem unnecessary," violates your constitutional rights.[57] *Even if force was used, you may not have a successful claim.* Nevertheless, some uses of force may be so excessive that they are unconstitutional, even in emergency or urgent circumstances.[58]

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49. Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).

50. Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–99, 117 L. Ed. 2d 156, 165–66 (1992).

51. Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 998, 117 L. Ed. 2d 156, 165 (1992) ("[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." (quoting Whitley v. Albers, 475 U.S. 312, 320–21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986))); *see also* Skinner v. Cunningham, 430 F.3d 483, 489 (1st Cir. 2005) (finding that prison officials used reasonable force in forcibly extricating the prisoner from his cell after he refused to be handcuffed during a cell search).

52. Whitley v. Albers, 475 U.S. 312, 318–26, 106 S. Ct. 1078, 1083–88, 89 L. Ed. 2d 251, 259–66 (1986) (finding no 8th Amendment violation where prisoner was shot as part of a good-faith effort to restore prison security); *see also* Wright v. Goord, 554 F.3d 255, 269–270 (2d Cir. 2009) (finding that although guard had placed one hand on prisoner's abdomen at the site of his colon surgery, there was no evidence that that placement was sadistic or malicious because prisoner did not testify that guard knew or had reason to know that his abdomen was unusually tender, nor did the record reveal any basis for inferring that guard would have been aware that it was a surgical site).

53. Hudson v. McMillian, 503 U.S. 1, 6, 112 S. Ct. 995, 998–99, 117 L. Ed. 2d 156, 165 (1992) (finding that during a riot or a lesser disruption, "corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates"); *see also* Bellotto v. County of Orange, 248 Fed. Appx. 232, 235 (2d Cir. 2007) (finding that guards did not use excessive force in forcibly restraining and handcuffing female prisoner who was violently banging her head against the wall of her cell and refusing to settle down).

54. *See, e.g.*, Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1394–95 (8th Cir. 1997) (finding an 8th Amendment excessive force violation when a corrections officer struck a non-resisting prisoner in the head and face 20 to 25 times while four other officers restrained his limbs, resulting in serious injury); Locicero v. O'Connell, 419 F. Supp. 2d 521, 428–29 (S.D.N.Y. 2006) (finding that a prisoner adequately stated a claim that his 8th amendment rights were violated when he was seriously assaulted by a prison officer, the prisoner did not provoke the assault, and the prison facility had prior notice of, but failed to act about, the officer's previous use of excessive force).

55. Courts also look at the seriousness of your injuries in deciding the objective component of an 8th Amendment violation. But, the seriousness of your injuries is also important to proving the subjective component because it can help show whether it was reasonable for the guard to think the force he used was necessary. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

56. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

57. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *distinguished on other grounds by* Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

58. *See* Jones v. Huff, 789 F. Supp. 526, 535–36 (N.D.N.Y. 1992) (finding violations of prisoner's 8th Amendment

The Ninth Circuit has held there is no requirement of specific intent to harm or punish a specific individual.[59] This means even if the officer meant to hit someone else, he can still be found liable if he hit you instead. For instance, in *Robins v. Meecham*, a prisoner was injured by birdshot a correction officer had fired at another prisoner.[60] The court held even though the officer did not have a specific intent to harm or punish Robins, the officer did intend to harm a different prisoner, thus satisfying the intent requirement.[61]

Still, it is important to note that if a prison official *intends* to harm a prisoner, but in the end does ***not*** hurt the prisoner, the prisoner will not have a claim.[62] For example, in *Warren v. Humphrey*, a prison official attempted to kick a prisoner in the head but missed.[63] Because he missed, there was no harm and no case.[64] Remember that the Prison Litigation Reform Act would probably also prevent you from making a similar claim because it requires a physical injury, not just a mental injury.[65]

(ii) Assault by Another Prisoner—The *Farmer* Standard

If you are suing a prison official who did not stop or act to prevent another prisoner from attacking you, the court will use the "deliberate indifference"[66] standard from *Farmer v. Brennan*.[67] Prison officials may be found liable under the deliberate indifference standard if they:

(1) knew of a substantial risk of serious harm to the prisoner; and
(2) disregarded the risk by failing to act reasonably to avoid it.[68]

Because prisoners often cannot protect themselves, courts have decided that the government must take reasonable steps to protect prisoners against violence by other prisoners.[69] The Eighth Amendment creates a constitutional right for prisoners to be protected from harm by fellow prisoners.[70] Although courts have mainly applied the "deliberate indifference" standard to cases where a prison official does not prevent a prisoner from assaulting another prisoner, courts have also applied the standard to situations where a

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rights when corrections officers repeatedly used gratuitous force against prisoner, causing injury).

59. *See* Robins v. Meecham, 60 F.3d 1436, 1439 (9th Cir. 1995) ("[T]he Eighth Amendment does not require a specific intent to punish a specific individual. The basic threshold of the Eighth Amendment is that the offending conduct must be wanton.").

60. Robins v. Meecham, 60 F.3d 1436, 1438 (9th Cir. 1995).

61. Robins v. Meecham, 60 F.3d 1436, 1440 (9th Cir. 1995).

62. Warren v. Humphrey, 875 F. Supp. 378, 382 (E.D. Tex. 1995) ("[P]laintiff must allege some injury in order to sustain a claim of being subject to excessive force."); Jackson v. Culbertson, 984 F. 2d 699, 700 (5th Cir. 1993) (finding trivial amounts of force not repugnant to the conscience of mankind do not violate the 8th Amendment's Cruel and Unusual Punishment Clause).

63. Warren v. Humphrey, 875 F. Supp. 378, 380 (E.D. Tex. 1995).

64. Warren v. Humphrey, 875 F. Supp 378, 382 (E.D. Tex. 1995).

65. 42 U.S.C. § 1997e(e) (2006). See Part F of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA's limitations on actions for mental or emotional injury.

66. Note that "deliberate indifference" is also the legal standard for 8th Amendment violations regarding medical care and general prison conditions, in addition to prisoner-on-prisoner assaults.

67. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) ("[A] prison official must have a sufficiently culpable state of mind …. In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety.").

68. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

69. *See* Dace v. Solem, 858 F.2d 385, 388 (8th Cir. 1988) ("[T]he Constitution requires prison officials to protect prisoners from inmate attack while in custody."); *see also* Berry v. City of Muskogee, 900 F.2d 1489, 1496–99 (10th Cir. 1990) (finding where prisoner was strangled to death in prison by two men who he had identified as helping him commit the crime for which he was serving time, officials could have known of the danger based on the prior relationship); Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 562–63 (1st Cir. 1988) (finding officials were deliberately indifferent to the safety needs of a psychiatrically disturbed prisoner who was killed in an overcrowded prison); Gangloff v. Poccia, 888 F. Supp. 1549, 1555 (M.D. Fla. 1995) (finding that prison officials have a duty to protect prisoners from one another); Fisher v. Koehler, 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988) ("Although the state is not obliged to insure an assault-free environment, a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates.").

70. *See* Smith v. Marcantonio, 910 F.2d 500, 501 (8th Cir. 1990) (stating that a prisoner's right to be protected from harm by other prisoners is "beyond dispute"); *see also* Farmer v. Brennan, 511 U.S. 825, 833–34, 114 S. Ct. 1970, 1976–77, 128 L. Ed. 2d 811, 822–23 (1994) ("[P]rison officials have a duty ... to protect prisoners from violence at the hands of other prisoners .... [G]ratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objectiv[e], any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.").

prison official does not prevent another official from attacking a prisoner.[71] Thus, *Farmer* deliberate indifference lawsuits are also known as "failure-to-protect" claims.[72] You can go to court to claim prison officials are being deliberately indifferent to unsafe conditions or a threatened assault against you, *even if you have not yet been assaulted*.[73]

The Supreme Court in *Farmer v. Brennan* held that prison staff show deliberate indifference when they fail to take reasonable safeguards despite their actual knowledge of an excessive or substantial risk[74] to a prisoner's safety.[75] If you were assaulted by another prisoner (or prison guard) and believe prison officials' deliberate indifference allowed the assault to happen, you will have to prove to the court that:

(1) There was a substantial risk to your safety; and
(2) The prison officials knew of this risk to your safety; and
(3) The prison officials did not try to prevent the assault; or
(4) The prison officials did nothing to stop the assault; or
(5) The prison officials tried to prevent or stop the assault, but they did not try as hard as they should have (their attempts to prevent the assault were not reasonable).

Remember, courts also use the deliberate indifference standard in claims against supervisors for inadequate supervision and control of subordinates, and against bystanding officers witnessing an assault.[76]

(1) Proving a Substantial Risk to Your Safety

You must first show that there was/is a substantial risk of serious harm to your safety from another prisoner to satisfy the objective component of the *Farmer* test (see Part B(2)(b)(ii), below).

(2) Proving the Prison Officials Knew About This Risk

You must also provide evidence that the official knew of the substantial risk to your safety.[77] You do not have to prove the official definitely knew you were going to be attacked. You only have to show the official knew there was a substantial *risk* that you would be harmed.[78] But you do not have to show that the officials knew you were personally at risk or that the risk came from a particular prisoner.[79]

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71. *See* Buckner v. Hollins, 983 F.2d 119, 123 (8th Cir. 1993) (finding grounds for an 8th Amendment claim when state corrections officer failed to stop an assault by county corrections officer on naked, handcuffed prisoner in cell).

72. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

73. Helling v. McKinney, 509 U.S. 25, 34, 113 S Ct. 2475, 2481, L. Ed. 2d 22, 32 (1993) ("[A] prisoner need not wait until he is actually assaulted before obtaining relief ... [T]he Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering.").

74. Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) ("The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health,' and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." (citation omitted)).

75. Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994).

76. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) (holding correctional officers to a deliberate indifference standard); Madrid v. Gomez, 889 F. Supp. 1146, 1248 (N.D. Cal. 1995) ("Municipalities can be found liable where the failure to train or supervise subordinates evinces deliberate indifference that leads to constitutional deprivations.").

77. *See* Lewis v. Richards, 107 F.3d 549, 553–54 (7th Cir. 1997) (finding no 8th Amendment violation where prisoner failed to present sufficient evidence that officials knew of risk to his safety and consciously disregarded that risk after the prisoner was subjected to three separate sexual assaults); Davis v. Scott, 94 F.3d 444, 446–47 (8th Cir. 1996) (finding no 8th Amendment violation where prison informant was attacked after his return to the general population, because there was no "solid evidence" that anyone in the general population posed an "identifiable serious risk" to his safety).

78. *See* Jensen v. Clarke, 94 F.3d 1191, 1197 (8th Cir. 1996) (finding that prison officials, who knew that violence in the prison was frequent and regular, but did not use available classification information to try to assign compatible prisoners as cellmates, were deliberately indifferent to the increased risk of violence arising from random cell assignments).

79. Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994); *see* Brown v. Budz, 398 F.3d 904, 914–15 (7th Cir. 2005) (holding deliberate indifference can be established by knowledge either of a victim's vulnerability or of an assailant's predatory nature; both are not required); Pierson v. Hartley, 391 F.3d 898, 902–03 (7th Cir. 2004) (holding that a prisoner could recover for assault by a violent prisoner assigned to an open-air dormitory (which allowed unrestricted movement) in violation of prison policy, regardless of whether prison staff knew of the risk to the particular prisoner who was injured); Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) (holding that a transsexual prisoner could recover for assault by a known "predatory inmate" either because leaving her in a unit containing high-security prisoners threatened her safety, or because placing the attacker in protective custody created a

Remember that for Eighth Amendment deliberate indifference claims, saying prison officials should have known of the substantial risk to your safety is not enough[80] (although in that case you still may be able to make a state law negligence tort claim as described in Part (B)(1)(a)(i)). Eighth Amendment deliberate indifference claims require the prison officials to have had *actual knowledge* of the substantial risk to your safety.[81]

You can show that the officials actually knew about this substantial risk by presenting both direct evidence and circumstantial evidence of the threat.[82] Courts consider "[w]hether a prison official had the requisite knowledge of a substantial risk ... [which is] a question of fact."[83] For example, if you have evidence that the threat to your safety was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," or that the official must have known about the risk, then generally such evidence is enough to prove that the official did in fact know about it.[84] You should expect that prison officials will try to prove that they did not actually know about the facts showing you were in danger, or that even if they did know of some risk to your safety, they reasonably believed the risk was insignificant.[85] In addition to your own complaints, you should try to present other evidence that you were in danger in order to show that the prison officials actually knew of the risk to your safety. Your complaints alone may not prove that prison officials knew about the risk because courts do not expect guards to believe every protest or complaint a prisoner makes.[86]

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risk for the other occupants); Marsh v. Butler County, Ala., 268 F.3d 1014, 1027–30 (11th Cir. 2001) (en banc) (finding that prisoners who were assaulted in a county jail stated a claim where the jail had no functioning cell locks or surveillance, prisoners made weapons from pieces of the run-down building, violent prisoners were not disciplined or segregated, there was a lack of mental health screening, and the prisons were generally crowded and understaffed), *overruled in unrelated part as stated by* Hollywood East Artful Designs, Inc. v. Gutentag, 2007 U.S. Dist. LEXIS 52948 at *3 (S.D. Fla. 2007); Hayes v. N.Y. City Dept. of Corr., 84 F.3d 614, 621 (2d Cir. 1996) (prisoner's refusal to name his enemies to prison staff does not by itself determine if staff knew of risk to him); Jensen v. Clarke, 94 F.3d 1191, 1198–1200 (8th Cir. 1996) (affirming injunction based on generalized increase in violence attributed to random assignment of cellmates); LaMarca v. Turner, 995 F.2d 1526, 1535–36 (11th Cir. 1993) (liability can be based on "general danger arising from a prison environment that both stimulated and condoned violence"); Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (risk of harm from systemic medical care deficiencies is obvious); Abrams v. Hunter, 910 F. Supp. 620, 624–25 (M.D. Fla. 1995) (acknowledging potential liability based on awareness of generalized, substantial risk of serious harm from prisoner violence), *aff'd*, 100 F.3d 971 (11th Cir. 1996); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 221 (S.D.N.Y. 1995) (finding a valid claim where prison officials knew of an ethnic "war" among prisoners, that a Hispanic prisoner who had been cut had been transferred to plaintiff's jail, and that plaintiff was part of a group at risk because of his accent and appearance).

80. *See* Riccardo v. Rausch, 375 F.3d 521, 526 (7th Cir. 2004) ("'Deliberate indifference' means subjective awareness. It is not enough, the Court held in *Farmer*, that the guard *ought* to have recognized the risk. Instead, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" (citations omitted)); Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995) ("Mere negligence, however, on the part of a prison official will not give rise to a claim under § 1983.").

81. *See* Carter v. Galloway, 352 F.3d 1346, 1350 (11th Cir. 2003) (per curiam) (dismissing medium-security prisoner plaintiff's claim for assault, after plaintiff was stabbed by his maximum-security cellmate, a known "problem inmate," after plaintiff complained his cellmate was "acting crazy" but had not specifically told prison officials his cellmate had threatened him as "[s]uch a generalized awareness of risk in these circumstances does not satisfy the subjective awareness requirement").

82. Johnson v. Johnson, 385 F.3d 503, 524 (5th Cir. 2004) ("The official's knowledge of the risk can be proven through circumstantial evidence, such as by showing that the risk was so obvious that the official must have known about it."); *see also* Farmer v. Brennan, 511 U.S. 825, 840, 114 S. Ct. 1970, 1980, 128 L. Ed. 2d 811, 827 (1994) (stating that the "concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness."). In other words, a finder of fact, like a judge or a jury, may conclude that an official was aware of the risk if the risk was obvious.

83. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 829 (1994).

84. Farmer v. Brennan, 511 U.S. 825, 842–43, 114 S. Ct. 1970, 1981–82, 128 L. Ed. 2d 811, 829 (1994).

85. *See* Johnson v. Johnson, 385 F.3d 503, 525 (5th Cir. 2004) (noting prison officials defended themselves by trying to show that it was reasonable to believe, based on the information they had at the time, that there was no danger to the prisoner or that it was reasonable to disbelieve the prisoner's repeated complaints of sexual abuse); Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 830 (1994) (stating that prison officials can try to show that they "did not know of the underlying facts" or "believed (albeit unsoundly) that the risk ... was insubstantial or nonexistent.").

86. Riccardo v. Rausch, 375 F.3d 521, 527, 528 (7th Cir. 2004) (stating that "[t]he Constitution does not oblige guards to believe whatever inmates say," and that "a prisoner's bare assertion is not enough to make the guard

(3) Prison Officials Did Not Act Reasonably to Prevent or Stop Assault

Finally, you must prove that the official acted unreasonably or failed to act in a situation where the official knew that you were at a substantial risk of harm.[87] It is important to understand that if a prison official ***does*** take reasonable steps to help you, but you are assaulted anyway, then you will likely lose in court because courts will not find the official acted with deliberate indifference.[88] For example, in the First Circuit case *Burrell v. Hampshire County*, the court found that the prison guards did not act unreasonably after they failed to transfer a prisoner who was proficient in martial arts and who did not have any previous altercations with his assailant.[89]

(4) Examples of *Farmer* Deliberate Indifference Cases

In the Eighth Circuit case *Reece v. Groose*,[90] Reece was in administrative segregation because he had been an informant for the Drug Enforcement Agency and had the reputation among other prisoners of being a "snitch."[91] While he was in segregation, a prisoner assigned to sweep the corridors in the segregation unit attacked Reece by throwing hot water on him.[92] The prisoner who attacked Reece had a prior history of threatening behavior and numerous infractions.[93] The court said that because Reece had the reputation of being a "snitch," and was therefore a target for other prisoners, he faced an obvious substantial risk of harm.[94] Moreover, the court said that if the risk is obvious, you can assume that the prison official knew of the risk.

The Fifth Circuit in *Horton v. Cockrell* held that a prisoner had an Eighth Amendment claim when prison officials failed to protect him from another prisoner.[95] During a two-week period, the prisoner filed three grievances and made at least one oral complaint regarding fears of an attack by a fellow prisoner who had assaulted other prisoners.[96] Because Horton had filed complaints against the other prisoner, who had a history of assaulting others, the court found that officials were probably aware of the risk of assault.

New York courts have also dealt with claims that guards failed to protect a prisoner from other prisoners. In *Knowles v. New York City Department of Corrections*, another prisoner slashed Knowles in the face while they were in the recreation area.[97] Knowles brought an action against prison officials stating they had known of the risk to him and were deliberately indifferent to it.[98] The guards had only patted down the prisoners when they had entered the recreation area, instead of going through the normal strip search procedures.[99] Furthermore, evidence existed that the prison officials knew about a "war" going on between

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subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.").

87. *See* Farmer v. Brennan, 511 U.S. 825, 841–42, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that under the 8th Amendment, prison officials could not be liable for inhumane conditions of confinement unless the official had knowledge of the risk to the prisoner); *see also* Leibach v. State, 215 A.D.2d 978, 627 N.Y.S.2d 463 (3d Dept. 1995) (stating that where an attack was planned in secret, and correction staff was not aware of it, staff was not culpable).

88. Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–83, 128 L. Ed. 2d 811, 830 (1994) (emphasizing that there is no 8th Amendment violation if the official "responded reasonably to the risk, even if the harm ultimately was not averted").

89. Burrell v. Hampshire County, 307 F.3d 1, 8–9 (1st Cir. 2002).

90. Reece v. Groose, 60 F.3d 487 (8th Cir. 1995).

91. Reece v. Groose, 60 F.3d 487, 488 (8th Cir. 1995).

92. Reece v. Groose, 60 F.3d 487, 488 (8th Cir. 1995).

93. Reece v. Groose, 60 F.3d 487, 488 (8th Cir. 1995).

94. Reece v. Groose, 60 F.3d 487, 491 (8th Cir. 1995) (quoting Farmer v. Brennan, 511 U.S. 825, 833, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811, 822 (1994)); *see also* Hamilton v. Leavy, 117 F.3d 742, 745–46 (3d Cir. 1997) (finding possible deliberate indifference under *Farmer* when a prisoner who had been labeled a "snitch" had a history of being violently attacked by other prisoners, and officials failed to take additional protective steps beyond recommending protective custody); Northington v. Marin, 102 F.3d 1564, 1567–68 (10th Cir. 1996) (finding deliberate indifference under *Farmer* when guard spread rumor that prisoner was a snitch knowing that prisoner would thereby face serious risk of assault by other prisoners).

95. Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir. 1995).

96. Horton v. Cockrell, 70 F.3d 397, 399 (5th Cir. 1995); *see also* Williams v. Mueller, 13 F.3d 1214, 1216 (8th Cir. 1994) (finding cognizable 8th Amendment claim when, as two prisoners beat another for 20 minutes, officer stood idly, delayed requesting assistance, and blocked prisoner's attempt to escape assailants).

97. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217 (S.D.N.Y. 1995).

98. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 218 (S.D.N.Y. 1995).

99. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 218–19 (S.D.N.Y. 1995).

Spanish and Jamaican prisoners and that Knowles was among those prisoners at risk due to his physical appearance and accent.[100] The court held that this was enough evidence to create uncertainty about whether or not the guards were deliberately indifferent to Knowles' safety.[101]

In sum, prison officials may be found liable under the *Farmer* deliberate indifference standard if they (1) know the prisoner is facing a substantial risk of serious harm; and (2) disregard the risk by failing to take reasonable measures to avoid it. If they meet these requirements, officials may be liable if they fail to prevent another prisoner or prison official from attacking you. Prison officials may also be liable if there is a policy of permitting and condoning a pattern of excessive force.[102]

(b) Objective Component

In addition to the subjective component discussed above, remember that you also have to prove a second, objective component. To prove this objective component of an Eighth Amendment violation, you must show either that you were actually injured (if assaulted by a prison official)[103] or that the prison official's actions/inaction put you at "substantial risk of serious harm" from another prisoner, whether or not you were actually assaulted.

(c) Seriousness of Harm in Assaults by Prison Officials

To win a lawsuit against a prison official who assaulted you, your injuries must be bad enough that your Eighth Amendment constitutional rights against "cruel and unusual punishment" have been violated.[104] Most often, courts require that you show you were *seriously injured* by the prison official, although a few courts only require an injury, not a serious injury.[105] In deciding if your injuries are bad enough, courts look to society's standards of decency for guidance.[106] In general, society's standards of decency are violated whenever prison officials maliciously, evilly, or cruelly use force to cause harm "whether or not significant injury is evident."[107] But in reality, "not ... every malevolent [cruel] touch by a prison guard gives rise to a federal cause of action."[108]

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100. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

101. Knowles v. N.Y. City Dept. of Corr., 904 F. Supp. 217, 222 (S.D.N.Y. 1995).

102. *See* Matthews v. Crosby, 480 F.3d 1265, 1270–71 (11th Cir. 2007) (holding that a prison warden's knowledge of the violent propensities of some of his prison guards and his failure to act to prevent them from assaulting prisoners could constitute deliberate indifference); Ruiz v. Estelle, 503 F. Supp. 1265, 1302 (S.D. Tex. 1980) (finding 8th Amendment violations where prison officials encouraged staff to indulge in excessive physical violence by rarely investigating reports of violence and failing to take corrective disciplinary action against officers whom they knew to have brutalized prisoners), *aff'd in part, rev'd in part*, 688 F.2d 266 (5th Cir. 1982), *and* 679 F.2d 1115 (5th Cir. 1982).

103. Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (quoting Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 2326, 2329, 1115 L. Ed. 2d 271, 278 (1991)); *see also* Wright v. Goord, 554 F.3d 255, 268–269 (2d Cir. 2009).

104. U.S. Const. amend. VIII.

105. Note that in some circuits a *de minimis* (minimal) injury may be sufficient to establish a claim. *See* Archuleta v. Marshall, No. 00-2033, 2000 U.S. App. LEXIS 17501, at *5 (10th Cir. Jul. 20, 2000) (*unpublished*) ("The extent of the plaintiff's injury is not determinative in assessing whether an Eighth Amendment violation occurred. The inquiry for Eighth Amendment excessive force claims by convicted prisoners is 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" (citations omitted)); Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992) (holding that a prisoner, who had a sprained ankle from being beaten by corrections officers, suffered a serious enough injury to have a successful 8th Amendment claim because such deliberate excessive force claims required no minimum injury), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992); Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir. 1992) ("The 'malicious and sadistic' requirement applies regardless of whether the plaintiff has alleged significant physical injury, for the ultimate constitutional inquiry is directed at whether an unnecessary and wanton infliction of pain has occurred."); *see also* Watford v. Bruce, 126 F. Supp. 2d 425, 427 (E.D. Va. 2001) ("[T]he United States Supreme Court recognized that a *per se* non *de minimis* injury requirement would give prison officials carte blanche ability to 'punish' prisoners physically so long as the injuries inflicted were not severe .... The *Hudson* Court did not specify what type or level of injury is necessary to state a viable claim.").

106. Hudson v. McMillian, 503 U.S. 1, 2, 112 S. Ct. 995, 996, 112 L. Ed. 2d 156, 157 (1992); Estelle v. Gamble, 429 U.S. 97, 102–103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976); *see also* Wright v. Goord, 554 F.3d 255, 268–69 (2d Cir. 2009).

107. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 112 L. Ed. 2d 156, 167 (1992) (internal quotations omitted) (emphasis added).

108. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 112 L. Ed. 2d 156, 167 (1992).

In other words, if your injuries are too small, there is probably no constitutional violation. Courts call injuries they think are too small "*de minimis,*" or state that they occurred as the result of *de minimis* force. *De minimis* refers to the idea that a fact or thing is "so insignificant that a court may overlook it in deciding an issue or case."[109] Some examples of injuries courts have thought were *de minimis* are bumping, discomfort, sore wrists,[110] cuts and swelling to the wrists,[111] being slammed against a wall,[112] and being hit by swinging keys.[113] Some examples of force courts have called *de minimis* are hitting a prisoner once on the head,[114] spraying a prisoner with water,[115] pressing a fist against a prisoner's neck,[116] and bruising a prisoner's ear during a routine search.[117] So, if you go to court, you will most likely have to show the physical force used against you was not minor and that you received serious injuries as a result of this use of force.[118]

Courts do not have an exact definition for the type or degree of harm that you need in order to claim cruel and unusual punishment. Courts usually say that "the unnecessary and wanton infliction of pain" violates the Eighth Amendment,[119] but they look at each case individually. The following cases will show you in more detail what kinds of actions, intentions, and injuries violate your constitutional rights and what kinds do not.

In *Hudson*, the prisoner suffered blows that caused "bruises, swelling, loosened teeth, and a cracked dental palate."[120] The Supreme Court found that the violence against Hudson and his injuries were serious enough to satisfy the "objective component" of the Eighth Amendment. This provided the basis for a constitutional claim. But you should notice that the *Hudson* Court, in finding a constitutional violation, also thought that it was important that the officers intended to humiliate the prisoner.

Soon after the Supreme Court decided *Hudson*, a district court in New York used the *Hudson* guidelines to determine the constitutionality of force used by corrections officers. In *Jones v. Huff*, corrections officers failed to stop other officers from unnecessarily beating a prisoner.[121] The beating badly bruised and injured the prisoner, including a fracture to his left eye. The same officers who did not stop the beating later ripped off the prisoner's clothes because they thought he was stripping too slowly. Even though the prisoner had

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109. Black's Law Dictionary 496 (9th ed. 2009).

110. Fillmore v. Page, 358 F.3d 496, 504–05 (7th Cir. 2004) (holding that incidental bumping, discomfort, and sore wrists were *de minimis* and do not meet the constitutional threshold).

111. Watson v. Riggle, 315 F. Supp. 2d 963, 969–70 (N.D. Ind. 2004) (holding injuries to prisoner's wrists, including a cut and some swelling, caused when guards removed his handcuffs were *de minimis*); *cf.* Liiv v. City of Coeur D'Arlene, 130 Fed. Appx. 848, 852 (9th Cir. 2005) (clarifying that while past cases, such as Wall v. County of Orange, 364 F.3d 1107, 1112 (9th Cir. 2004), have "recognized that excessively tight handcuffing can constitute a Fourth Amendment violation" a finding of such violation requires either actual injury to the wrists, or a complaint to the officers involved that the handcuffs were too tight).

112. Govan v. Campbell, 289 F. Supp. 2d 289, 300 (N.D.N.Y. 2003) (holding that prisoner's claims guard slammed him against the wall and rubbed up against him was "*de minimis*" and insufficient to state a constitutional violation).

113. Norman v. Taylor, 25 F.3d 1259, 1263–64 (4th Cir. 1994) (requiring prisoner to establish more than *de minimis* injury by deputy's swinging of keys at the prisoner to maintain claim of excessive force); White v. Holmes, 21 F.3d 277, 281 (8th Cir. 1994) (requiring prisoner to establish more than *de minimis* injury caused by prison librarian throwing keys at prisoner and flailing her arms at prisoner's head). *But see* U.S. v. LaVallee, 439 F.3d 670, 687–88 (10th Cir. 2006) (rejecting the view that *de minimis* injury is conclusive evidence that *de minimus* force was used).

114. Olson v. Coleman, 804 F. Supp. 148, 150–51 (D. Kan. 1992) (holding that single blow that struck prisoner on the head while he was handcuffed was not excessive use of force), *vacated on other grounds*, No. 92-3281, 1993 U.S. App. LEXIS 10086, at * 3 (D. Kan. April 28, 1993) (*unpublished*).

115. Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that guard's spraying prisoner with water because he started a fire was a *de minimis* use of physical force and was thus too trivial to make out a violation of 8th Amendment rights).

116. Candelaria v. Coughlin, 787 F. Supp. 368, 374–75 (S.D.N.Y. 1992) (finding that guard pressing his fist against prisoner's neck, resulting in no physical injury, was *de minimis* force for 8th Amendment purposes), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

117. Siglar v. Hightower, 112 F.3d 191, 193–94 (5th Cir. 1997) (finding no 8th Amendment violation where plaintiff suffered bruised ear during routine search; court deemed this a *de minimis* use of force).

118. *See, e.g.*, Thomas v. Stalter, 20 F.3d 298, 301–02 (7th Cir. 1994) (finding that excessive force was used when an officer hit a prisoner in the mouth with his fist while the prisoner was held by at least nine other officers); Munz v. Michael, 28 F.3d 795, 799 (8th Cir. 1994) (finding that excessive force was used when marshals kicked and stomped on prisoner in retaliation for vandalizing interior of squad car).

119. Gregg v. Georgia, 428 U.S. 153, 173, 965 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874–75 (1976).

120. Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992).

121. Jones v. Huff, 789 F. Supp. 526, 535–36 (N.D.N.Y. 1992).

originally disobeyed orders, the court found the officers liable for not trying to stop the other officers from beating the prisoner.[122] There were several incidents examined in this case. In one instance, liability was found where an officer kicked a prisoner in the buttocks for no reason.[123] Again, as in *Hudson*, the court found a constitutional violation partly because the officers intended to humiliate the prisoner.

The Eighth Circuit in *Estate of Davis by Ostenfeld v. Delo* found an Eighth Amendment violation where a corrections officer struck a prisoner in the head and face over twenty times while four other officers restrained the prisoner's limbs. The prisoner was seriously injured as a result.[124] The officers committed these acts even though the prisoner obeyed an order to lie face down on the floor and did not resist efforts to restrain him.

In *Hickey v. Reeder*, the Eighth Circuit ruled that the use of a stun gun to force a prisoner to clean his cell violated the prisoner's Eighth Amendment rights.[125] The Fourth Circuit held in *Williams v. Benjamin* that a prisoner sprayed with mace and then restrained on a bare-metal bed frame for over eight hours, without access to medical care or a toilet, had an Eight Amendment claim.[126]

The Fifth Circuit in *Flowers v. Phelps* held that a prisoner who was beaten by corrections officers, resulting in a sprained ankle, suffered a serious enough injury to have a successful Eighth Amendment claim.[127] The court stated that there is no minimum injury required for Eighth Amendment claims of excessive force.[128] In this way, even though a sprained ankle may not seem like a bad injury, in *Flowers* it was serious enough not to be *de minimis*.

The Sixth Circuit has held that minor physical contact is enough to satisfy the objective harm component for a constitutional claim if there is no legitimate reason for the contact. In *Pelfrey v. Chambers*, the Sixth Circuit ruled that the prisoner had a legitimate claim against a corrections officer who pulled a knife on him, grabbed his hands, and cut his hair with the knife.[129] The court said that the corrections officer's acts could not have been meant to further any institutional objective and were designed "to frighten and degrade [the prisoner] by reinforcing the fact that his continued well-being was entirely dependent on the good humor of his armed guards."[130] The court found this action to be a totally unnecessary, malicious, and sadistic use of force to cause harm.[131]

Pelfrey demonstrates that when you bring a claim against a prison official, you might not always need a significant physical injury. In this case, the fear caused by the official was enough, even without any physical injury. After *Pelfrey* was decided, however, the Prison Litigation Reform Act ("PLRA") barred bringing claims in federal civil court for mental or emotional injury not related to physical injury. So if you are bringing a claim in federal civil court for mental or emotional injury not related to physical injury, the PLRA requirements may now prevent you from recovering compensatory damages (and in some courts, punitive damages as well).[132]

(i) Substantial Risk of Serious Harm from Other Prisoners

To prove the objective component in a *Farmer* deliberate indifference claim about a prisoner assault, you must show you faced an objective, "substantial risk of serious harm." You can make a deliberate indifference claim even if you were never injured or attacked, as long as you can show you were at substantial risk of an assault. For a prison official's actions (or failure to act) to violate the Eighth Amendment, "the deprivation

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122. Jones v. Huff, 789 F. Supp. 526, 535–36 (N.D.N.Y. 1992) (finding that kicks and punches were not part of a good-faith effort to restore discipline and could not have been thought necessary since the prisoner was already pinned down by two other officers, and that stripping the prisoner "was done maliciously with the intent to humiliate him").

123. Jones v. Huff, 789 F. Supp. 526, 532, 536–37 (N.D.N.Y. 1992).

124. Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388, 1394–95 (8th Cir. 1997).

125. Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993).

126. Williams v. Benjamin, 77 F.3d 756, 764–65 (4th Cir. 1996).

127. Flowers v. Phelps, 956 F.2d 488, 489–90 (5th Cir. 1992), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).

128. Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir. 1992).

129. Pelfrey v. Chambers, 43 F.3d 1034, 1035 (6th Cir. 1995).

130. Pelfrey v. Chambers, 43 F.3d 1034, 1037 (6th Cir. 1995).

131. Pelfrey v. Chambers, 43 F.3d 1034, 1037 (6th Cir. 1995).

132. See Part F of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for further information on the PLRA and its actual injury requirement.

alleged must be, objectively, 'sufficiently serious,'" and you "must show that [you are] incarcerated under conditions posing a substantial risk of serious harm."[133]

It is important you understand that "not ... every injury suffered by one prisoner at the hands of another ... translates into constitutional liability for prison officials responsible for the victim's safety."[134] In other words, if you never faced a *substantial* risk (or cannot prove you did), then you cannot prove prison officials were deliberately indifferent to that risk. For example, in *Berry v. Sherman*,[135] the Eighth Circuit decided that the plaintiff, a prisoner who was assaulted by his cellmate, did not have an Eighth Amendment failure-to-protect claim because no one, including the victim, had thought the cellmate was dangerous. Therefore, the court rejected the prisoner's lawsuit because he had failed to show a "substantial risk of serious harm."[136]

In *Farmer*, the Court did not explain how serious the risk must be in order to be "substantial."[137] Generally, courts assess whether society considers the risk that the prisoner complains of to be so bad that it violates modern standards of decency to expose anyone unwillingly to such a risk.[138] In other words, the prisoner must show that today's society does not tolerate the risk he faced.[139] Courts do ***not*** consider the general, everyday risk of assault from other prisoners to be a "substantial risk" by itself.[140]

Remember that after you show you faced substantial risk of serious harm, you must show prison officials knew about the risk but were deliberately indifferent (see Part B(2)(a)(ii)(3) and (4)).

3. Harassment by Prison Officials

This Section explains when different types of harassment violate the Eighth Amendment. Harassment can be verbal, physical, or sexual. Harassment may be about race, sex, disability, language, national origin, sexual orientation, etc. New York State defines harassment as "[e]mployee misconduct meant to annoy, intimidate or harm an inmate."[141] Generally, verbal harassment alone does not violate the Eighth Amendment unless you are also physically threatened at the same time. Sexual harassment is any unwanted sexual attention. Generally, sexual comments by themselves are not sufficient to establish an Eighth Amendment violation.[142] If you are being harassed, you should first try to file a grievance through the inmate grievance system, discussed in *JLM*, Chapter 15.

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133. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

134. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

135. Berry v. Sherman, 365 F.3d 631, 631 (8th Cir. 2004).

136. Berry v. Sherman, 365 F.3d 631, 634–35 (8th Cir. 2004); *see also* Riccardo v. Rausch, 375 F.3d 521, 526–27 (7th Cir. 2004) (holding that the prisoner plaintiff had not faced a substantial risk from his cellmate, who later assaulted him, because while the prisoner was at risk of attack from the Latin Kings, his cellmate attacked him not for that reason but out of a personal fantasy: "The risk from which [the prisoner plaintiff] Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner.").

137. Farmer v. Brennan, 511 U.S. 825, 834 n.3, 114 S. Ct. 1970, 1977 n.3, 128 L. Ed. 2d 811, 823 n.3 (1994) (noting that the Court did not reach the question of "[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes").

138. *See* Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) ("the Eighth Amendment's prohibition of cruel and unusual punishments 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society' and so admits of few absolute limitation.").

139. *See, e.g.,* Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) (finding that being exposed to a cellmate who smoked five packs of cigarettes a day created, in theory, a potentially valid claim under the 8th Amendment due to unreasonable health risk).

140. Jones v. Marshall, 459 F. Supp. 2d 1002, 1008 (E.D. Cal. 2006) ("[T]he legal standard must not be applied to an idealized vision of prison life, but to the prison as it exists." (quoting Berg v. Kincheloe, 794 F.2d 457, 462 (9th Cir. 1986))).

141. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(e) (2009).

142. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–38 (10th Cir. 1995) (finding prison official's alleged verbal sexual harassment of prisoner did not violate the 8th Amendment because it was not objectively, sufficiently serious and the prison official did not act with deliberate indifference to the prisoner's health or safety). When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the 8th Amendment. *See, e.g.*, Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration met the objective prong of the 8th Amendment claim). See Parts B(3)(a) and (c) of this Chapter for more information on verbal and sexual harassment.

(a) Verbal Harassment Alone

You cannot have an Eighth Amendment claim for verbal assault only.[143] Courts do not think verbal abuse, including racial and sexual comments, violates the Constitution. For example, the Ninth Circuit held in *Austin v. Terhune* that a prisoner did not have an Eighth Amendment claim where a guard verbally harassed the prisoner in a sexual and racial manner and briefly exposed the guard's genitals.[144] Similarly, the Sixth Circuit in *Johnson v. Dellatifa* decided that a prisoner had no constitutional claim against a guard who banged his cell door, threw food trays, made aggravating and insulting remarks, and behaved in a racially prejudicial manner because harassment and verbal abuse are not Eighth Amendment violations.[145]

(b) Verbal Harassment With Physical Threats

While simple verbal harassment does not violate the Eighth Amendment, courts have held that when these assaults are accompanied by very serious physical threats (most cases involve credible death threats), you may have a claim for psychological injury.[146] However, the PLRA states that prisoners may not bring a federal civil action for mental or emotional injury suffered while in *custody* "without a prior showing of physical injury."[147] The courts have interpreted this to mean that if you can only demonstrate a psychological injury, you will not be able to recover money damages. The court can still *grant* you *injunctive relief* (a court order to prevent officials or prisoners from harassing you) if you can show that this conduct is likely to be repeated in the future.[148] For more information on injunctive relief, see Part L of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

(c) Sexual Harassment

Sexual harassment (or sexual assault) can be "any unwanted sexual attention a woman [or man] experiences ... ranging from leering, pinching, patting, verbal comments, and subtle pressure for sexual activity, to attempted rape and rape."[149] Both men and women can be sexually harassed.[150] Because prison officials have so much power over prisoners, a corrections officer may try to force a prisoner into sexual conduct by threatening him or her with disciplinary action or some other punishment. This can be considered cruel and unusual punishment violating a prisoner's Eighth Amendment rights.

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143. Webster v. City of New York, 333 F. Supp. 2d 184, 201 (S.D.N.Y. 2004) ("Being subjected to verbally abusive language does not rise to the level of a constitutional claim in an Eighth Amendment context."); Minifield v. Butikofer, 298 F. Supp. 2d 900, 904–05 (N.D. Cal. 2004) (holding prisoner did not state a constitutional claim for sexual harassment, where a prison official twice unzipped his pants and told prisoner to grab his penis, because the Ninth Circuit has "specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding the later [sic] to be in violation of the constitution"; also noting the prisoner had not alleged any physical injury, and under the Prison Litigation Reform Act, "[f]ailure to allege and establish an appropriate physical injury is ground for dismissal" (citations omitted)); Jones v. Brown, 300 F. Supp. 2d 674, 681 (N.D. Ind. 2003) (holding pretrial detainee had no constitutional claim, where guard incorrectly told him criminal charges had been dismissed, when in fact they had been referred to the prosecutor and eventually became part of a plea bargain, because verbal abuse and harassment are not sufficient).

144. Austin v. Terhune, 367 F.3d 1167, 1171–72 (9th Cir. 2004) ("Although prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment." (citations omitted)).

145. Johnson v. Dellatifa, 357 F.3d 539, 546 (6th Cir. 2004) ("[T]he allegations, if true, demonstrate shameful and utterly unprofessional behavior [but] they are insufficient to establish an Eighth Amendment violation …. [H]arassment and verbal abuse … do not constitute the type of infliction of pain that the Eighth Amendment prohibits." (citation omitted)).

146. *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (finding alleged death threats accompanied by the brandishing of lethal weapons would, if true, violate the 8th Amendment).

147. 42 U.S.C. § 1997e(e) (2006).

148. *See* Hutchins v. McDaniels, 512 F.3d 193, 196–98 (5th Cir. 2007) (noting that "the physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner's Constitutional rights"); Zehner v. Trigg, 133 F.3d 459, 461–63 (7th Cir. 1997) (finding that in a suit for mental and emotional injuries because of exposure to asbestos, a prisoner cannot sue for monetary damages but can sue for other kinds of relief).

149. Laurie A. Hanson, Comment, *Women Prisoners: Freedom from Sexual Harassment—A Constitutional Analysis*, 13 Golden Gate U. L. Rev. 667, 667 n.2 (1983) (citing Alliance Against Sexual Coercion, Fighting Sexual Harassment 3 (1979)).

150. *See* Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (finding that, in principle, sexual abuse of a male prisoner by a female corrections officer could potentially violate the 8th Amendment).

To decide if an act of sexual harassment or assault violated a prisoner's Eighth Amendment rights, courts look to see if the act offends "evolving standards of decency."[151] In other words, a court will look at what society believes is acceptable and decent behavior to decide whether an attacker's behavior violated that standard. Sexual assault is a clear violation, but comments of a sexual nature by themselves are usually not enough to violate the Eighth Amendment.[152]

If a prison official sexually harassed you, you can file a lawsuit both against that official and the prison. But you should know that it is difficult to make an Eighth Amendment claim for sexual harassment against a correctional institution because you must prove that the administrators showed "deliberate indifference" toward the harassment.[153] In other words, you must show that the prison administrators *knew* or must have known of the risk of harassment, but ignored it. Showing this knowledge is difficult unless you have evidence that you notified administrators of the problem or asked for help.

(d) Reporting Harassment in New York

New York law defines harassment as "employee misconduct meant to annoy, intimidate or harm an inmate"[154] and creates a special procedure for reporting harassment.[155] The procedure says that if you think you are the victim of prison employee misconduct or harassment, you should report the incident to the prison employee's direct supervisor (but be aware that this is not a prerequisite for filing a formal grievance).[156] You should also file a formal grievance with the Inmate Grievance Resolution Committee ("IGRC").[157] The Committee will forward this grievance to the prison superintendent for review.[158] After receiving the grievance, the superintendent will decide within twenty-five calendar days if the employee's conduct was harassment.[159] If you do not get an answer from the superintendent within this time, you can appeal the grievance to the Central Office Review Committee ("CORC").[160]

If you are a victim of sexual harassment, you should use the confidential procedure your prison has in place to bring a formal complaint.[161] If you keep copies of these complaints, you may be able to later show administrators were aware of the problem and were deliberately indifferent to your complaint.

4. Force Used to Carry Out an Illegal Order

If you refuse to follow an order from a prison official, even if that order is illegal, prison officials can use force to make you obey. Courts have held that prisoners must follow orders so that prisons can be administered in a safe and orderly way.[162] Even if you believe an order violates your constitutional rights, courts say you do not have the right to resist the order.[163]

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151. Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958).

152. *See* Adkins v. Rodriguez, 59 F.3d 1034, 1037–38 (10th Cir. 1995) (finding prison official's alleged verbal harassment of prisoner did not violate the 8th Amendment because it was not objectively, sufficiently serious and the prison official did not act with deliberate indifference to the prisoner's health or safety). When other forms of harassment are combined with comments of a sexual nature, they may constitute cruel and unusual punishment in violation of the 8th Amendment. *See*, *e.g.*, Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (holding that allegations of attempted non-routine pat-downs combined with sexual comments and propositions that caused fear and frustration met the objective of the 8th Amendment claim).

153. *See* Daskalea v. D.C., 227 F.3d 433, 441, 343 U.S. App. D.C. 261, 269 (D.C. Cir. 2000) (stating that a municipality can be found liable when it is a policy or custom that inflicts the injury and finding that something constitutes a policy or custom when it arises out of deliberate indifference).

154. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(e) (2009).

155. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8 (2009).

156. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(a) (2009).

157. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(a) (2009).

158. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(b) (2009).

159. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(f) (2009).

160. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.8(g) (2009).

161. Every facility should have a confidential and formal process for filing these complaints in order to prevent retaliation. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(k) (2009). However, be aware that complaints are not always kept "confidential" in reality.

162. Griffin v. Comm'r of Pa. Prisons, No. 90-5284, 1991 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 6, 1991) (*unpublished*) ("Even if plaintiff considered the order illegal, plaintiff should not have refused to follow it because it is critical to the orderly administration of a prison that prisoners follow orders."), *aff'd*, 961 F.2d 208 (3d Cir. 1992).

163. Pressly v. Gregory, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (holding the prisoner could not resist being taken into custody by claiming that it violated his civil rights when his habeas petition was still pending).

In *Jackson v. Allen*, a prisoner resisted prison guards because he thought they were going to use cruel and unusual punishment against him in violation of the Eighth Amendment.[164] The guards used force on him to overcome his resistance. The prisoner won his case against the guards, but only because they used ***excessive*** force. The prisoner's resistance to the guards' order, the court said, was not justified because guards have a legal right to make prisoners obey their orders and use force if necessary. The court stated a prisoner in this situation has the opportunity to recover damages in court for unconstitutional punishment but should not resist the order itself. Again, this assumes the force used was reasonable and necessary under the circumstances.[165] But, the court did say there was one exception to the general rule that prisoners may never resist orders—a prisoner may resist an illegal order to protect himself from "immediate, irreparable and permanent physical or mental damage or death."[166] The court declined to give specific examples of when a prisoner could legally refuse an order but stated such exceptions would be limited to extreme situations.

5. Protection Under State Constitutions and Statutes and Federal Statutes

You have already read how state tort law and federal constitutional law protect your rights against assault. But do not forget that state constitutions and statutes also protect your right to be free from assault. For example, the New York State Constitution, like the federal Eighth Amendment, prohibits cruel and unusual punishment.[167] And, like the federal Fifth and Fourteenth Amendment Due Process Clauses, the New York Constitution prohibits deprivation of your liberty without due process of law.[168]

New York State laws give prisoners additional protections. New York statutes prohibit prison officials from hitting prisoners except under emergency circumstances: "[N]o officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self defense, or to suppress a revolt or insurrection."[169] See Chapter 2 of the *JLM*, "Introduction to Legal Research," for information on how to find similar laws in your state.

In addition, federal statutes can also protect the rights of *federal* prisoners to be free from assault. The Federal Bureau of Prisons owes a duty of care to persons in federal custody, which can be the basis for a suit against prison officials if you are attacked by other prisoners.[170] But, it is state tort law that will determine when this duty is breached, so researching the laws of the state in which the prison sits is still necessary.[171]

C. Sexual Assault and Rape

This Part of the Chapter explains, for both men and women prisoners, the federal and state laws available if you have been sexually assaulted. Sexual assault and rape are both types of assaults. "Sexual assault" means any physical contact of a sexual nature, such as fondling your genitals (your private parts). If you have been sexually assaulted, you can make a claim using the laws described above, in Part B of this Chapter.

If you were attacked by a prison official, you can make an Eighth Amendment claim and a state tort law claim for assault and battery. Remember that even though prison officials have the right to use lawful force to maintain order and security within the prison, they do not have the right to sexually abuse you.[172] Any bodily contact between you and a prison official must be lawful force needed to maintain security and must relate to some penological need (meaning the action must assist the official in running the prison). A guard

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164. Jackson v. Allen, 376 F. Supp. 1393, 1394 (E.D. Ark. 1974).

165. Jackson v. Allen, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

166. Jackson v. Allen, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

167. N.Y. Const. art. I, § 5.

168. N.Y. Const. art. I, § 6.

169. N.Y. Correct. Law § 137(5) (McKinney 2003 & Supp. 2009). See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on how to bring tort actions against state employees.

170. 18 U.S.C. § 4042(a)(2) (2006). *See* United States v. Muniz, 374 U.S. 150, 164–65, 83 S. Ct. 1850, 1859, 10 L. Ed. 2d 805, 816 (1963) (holding that the duty of care owed to federal prisoners is fixed by 18 U.S.C. § 4042, regardless of any conflicting state rules).

171. Parrott v. United States, 536 F.3d 629, 637 (7th Cir. 2008) (finding that Indiana tort law governs whether the duty of care is breached in a suit brought under the Federal Tort Claims Act). See footnote 3 of this Chapter for more information on the Federal Tort Claims Act under which such claims must be brought.

172. *See* Women Prisoners v. D.C., 877 F. Supp 634, 665 (D.D.C. 1994) ("Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'" (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994))), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996).

cannot claim that he is maintaining order or disciplining you for breaking some rule in order to force you to have sexual relations with him or to touch him in a sexual way.[173] If a prison official does this, you can seek the protection of the law.[174]

Even consensual sex (sex that both people agree to) between a prisoner and a prison official is not permitted. Such consensual sex will still violate the Eighth Amendment.[175] Federal law specifically criminalizes ***all*** sexual contact between corrections officers and prisoners in federal prisons, as Part C(2) explains below. Many states, including New York, have similar state laws,[176] as Part C(3) explains.

If you were sexually assaulted by another prisoner, you can claim prison officials were deliberately indifferent to the risk to your safety in violation of the Eighth Amendment (in other words, that prison officials knew you were at risk of harm but did nothing about it).[177] You could also make a state law negligence claim against prison officials.

1. What to Do If You Are Sexually Assaulted

If you are raped or sexually assaulted, you should tell someone immediately and ask to go to the hospital. There you should be tested for sexually transmitted infections, and women should also be tested for pregnancy. The health professional should collect your clothing, fingernail scrapings, pubic hair samples, blood samples, hair strands, and swab samples from the back of your throat and your rectum and/or vagina.[178] If you would like to speak with someone after the sexual assault or rape, the prison may provide counseling.

You may also want to file a report about the sexual assault and press criminal charges. Many prisoners are afraid that prison officials will retaliate against them if they file grievances, especially complaints against staff. You may fear that your complaint will not be kept confidential in your prisoner file and that you will be harassed or threatened. It can be difficult to report a sexual assault or rape, but you should know that any sexual contact by a corrections officer is wrong and you have a right not to be subject to such abuse. It is also wrong for the prison guards to retaliate against you for reporting the assault, although retaliation does happen.

If you bring a civil suit, it is important to know that the court recognizes only physical abuse, not emotional damage. According to Section 803(d) of the Prison Litigation Reform Act ("PLRA"), "no Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[179] This makes the collection of physical evidence of sexual assault even more important. See Chapter 14 of the *JLM* for more information on the PLRA.

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173. *See* Women Prisoners v. D.C., 877 F. Supp 634, 665 (D.D.C. 1994) (noting that although security concerns sometimes trump privacy interests, the evidence did not show any justification for invasion of prisoners' privacy or vulgar sexual remarks), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996).

174. *See* Women Prisoners v. D.C., 877 F. Supp. 634, 665–66 (D.D.C. 1994) (holding that the District of Columbia was liable under § 1983 for 8th Amendment violations), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996); *see also* Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) (stating that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards" (citing Alberti v. Klevenhagan, 790 F.2d 1220, 1224 (5th Cir. 1986))).

175. *See*, *e.g.*, Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (stating "as a matter of law, that an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment"). Note that the holding in *Carrigan* was limited to vaginal intercourse and/or fellatio (oral sex); it did not include other sexual activities.

176. To learn about your state's laws on sexual misconduct in prison, you can go to http://www.justdetention.org/en/custodial_state.aspx (last visited Nov. 7, 2009) to find each state's laws.

177. Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d. 811, 832 (1994) (holding that a "prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it").

178. *See* Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 Am. Family Physician 920 (1998), *available at* http://www.aafp.org/afp/980915ap/petter.html (last visited January 15, 2010).

179. Prison Litigation Reform Act of 1995, 42 U.S.C. §1997e(e) (2006).

2. Eighth Amendment Claims for Sexual Assault

Like any assault, if you were sexually assaulted by another prisoner, courts use the Eighth Amendment deliberate indifference standard to determine if a prison official is liable for failing to prevent the assault.[180]

If you were instead assaulted by a prison official, you can claim that the assault was "cruel and unusual punishment" violating your Eighth Amendment rights. Conduct violates the Eighth Amendment if it violates the "evolving standards of decency that mark the progress of a maturing society."[181] Courts have found that sexual assaults violate the Eighth Amendment because, as explained in *Women Prisoners v. District of Columbia*, for example, "rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"[182]

In making your Eighth Amendment claim, you must show the same two components as for any assault by a prison official: (1) the subjective component that the prison official has a "sufficiently culpable state of mind," and (2) the objective component that the harm is "sufficiently serious."[183] Showing these two components is generally easier when proving sexual assault as compared to alleging a physical assault. Courts recognize that sexual assaults are usually both malicious and harmful. As the Second Circuit in *Boddie v. Schnieder* explained, a claim of sexual abuse may meet both the subjective and objective elements of the constitutional test because sexual abuse can cause severe physical and mental harm and may, on its own, exhibit a sufficiently culpable state of mind.[184]

3. Sexual Abuse of Women Prisoners

While both men and women prisoners have been sexually assaulted and/or raped, women prisoners are particularly vulnerable.[185] Although all prisoners' rights to privacy are very limited because of the nature of prison and incarceration,[186] courts are sometimes more sympathetic to female prisoners because of the greater chance of sexual abuses by prison guards. For example, some courts have found searches of women prisoners by male guards to be unconstitutional, even if searches of male prisoners by female guards would be allowed under the same circumstances.[187] To help prevent sexual abuse of women prisoners, some prisons have tried to hire only female corrections officers for women's prisons.[188] Though federal law prohibits

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180. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (holding that to violate the 8th Amendment, a prison official must have a "sufficiently culpable state of mind" which means one of "deliberate indifference" to prisoner health or safety (citing Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991))).

181. Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992) (quoting Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981)).

182. Women Prisoners v. D.C., 877 F. Supp. 634, 665 (D.D.C. 1994) (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)), *vacated in part on other grounds*, 9 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996).

183. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994). See Part B(2) of this Chapter for more information on the objective and subjective components of 8th Amendment violations.

184. Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997); *see also* Hammond v. Gordon County, 316 F. Supp. 2d 1262, 1301 (N.D. Ga. 2002) (holding that prisoner had satisfied both the objective and subjective components of her 8th Amendment claim by alleging she had sexual intercourse with a prison guard, even though the guard claimed it was consensual; noting that under Georgia state law "an inmate may not consent to certain types of sexual contact with a prison guard" and that sexual intercourse "is objectively sufficiently serious to satisfy the [objective] element" of plaintiff's 8th Amendment claim as well as the subjective element because there is "no legitimate penalogical [sic] purpose that possibly could be served by a jailer's conduct in engaging in a sexual relationship with an inmate .... the conduct at issue is sufficient evidence, in and of itself, of [the defendant's] culpable state of mind").

185. Human Rights Watch, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons (1996), *available at* http://hrw.org/reports/1996/Us1.htm (last visited January 15, 2010) (noting that the female prisoner population is "a population largely unaccustomed to having recourse against abuse; all the more necessary, then, for the state to present the available means of recourse clearly and in an accessible fashion").

186. *See* Hudson v. Palmer, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3200–01, 82 L. Ed. 2d 393, 403–04 (1983) (finding that the interest in ensuring institutional security necessitates a limited right of privacy for prisoners).

187. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1531 (9th Cir. 1993) (holding that prison policy requiring male guards to conduct non-emergency, suspicionless, clothed body searches on female prisoners was cruel and unusual punishment in violation of the 8th Amendment). See Part C(2)(f) of Chapter 25 of the *JLM*, "Your Right To Be Free From Illegal Body Searches," for more information about cross-gender body searches.

188. *See*, *e.g.*, Ind. Code Ann. §§ 36-8-3-19, 36-8-10-5 (LexisNexis 2004). California protects all prisoners from

employment discrimination based on sex,[189] hiring only female employees for female correctional facilities will not violate the law if it produces only a "minimal restriction" on employment[190] or if gender is an essential part of the job. Some courts have found that gender is an appropriate employment qualification where it advances goals of prison security and rehabilitation.[191]

4. Federal Law

While a prison official is permitted to touch a prisoner for security reasons (for example, while performing a legal search), he is *never allowed to have sexual contact with a prisoner*. Section 2243 of Title 18 of the United States Code[192] criminalizes sexual intercourse or any type of sexual contact between persons with "custodial, supervisory or disciplinary" authority and prisoners in federal correctional facilities.[193] Section 2241 makes it a *felony* to use or threaten force to engage in sexual intercourse in a federal prison.[194] This means it is always illegal in a federal prison for prison officials to have sexual contact with prisoners, and it is a felony if the officials use or threaten force. These laws only protect federal prisoners. Laws protecting state prisoners are discussed in the next Subsection.

In 2003, the federal government passed the Prison Rape Elimination Act, the first federal law addressing sexual assault in prisons. The Act calls for the collection of national statistics about sexual assault in federal, state, and local prisons. It also develops guidelines for states on addressing prisoner rape, creates a review panel to hold annual *hearings*, and provides grants to states to fight the problem.[195] With this Act, the federal government recognized that sexual assault in prisons is a major problem.[196]

5. State Law

In many states, including New York and California, any sexual conduct between a prison employee and a prisoner—even with the prisoner's consent—is a form of rape.[197] A New York State statute makes any sexual relations between prisoners and prison employees illegal. Specifically, the law says prisoners cannot legally "consent" to sexual relations with prison employees.[198] Thus, by state statute, New York State prison employees are criminally liable for rape, sodomy, sexual misconduct, or sexual abuse if they have sexual contact with or commit a sexual act with prisoners. In other words, courts will consider any sexual contact

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being searched by officers of the opposite sex. Cal. Penal Code § 4021(b) (West 2008). Michigan provides that if prisoners are subject to body cavity searches by officers of the opposite sex, an officer of the same sex must also be present. Mich. Comp. Laws Ann. § 764.25b(5) (West 2000).

189. 42 U.S.C. § 2000e-2(a)–(d)(2006).

190. *See* Tharp v. Iowa Dept. of Corr., 68 F.3d 223, 226 (8th Cir. 1995) (upholding a policy of assigning female guards to the prison's women's unit where doing so did not lead to termination, demotion, reduction of pay, or missed promotion opportunities); Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (finding that to restrict or disallow female guards from holding positions that involve occasional viewing of male prisoners would require "tremendous rearrangement of work schedules and possibly produce a risk to both internal security needs and equal employment opportunities for the female guards").

191. *See* Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998) (concluding that gender constitutes a bona fide occupational qualification because the state's legitimate penological interests outweigh the employees' interests in holding certain posts); Torres v. Wis. Dept. of Health & Social Serv., 859 F.2d 1523, 1530 (7th Cir. 1988) ("[T]he superintendent … made a professional judgment that giving women prisoners a living environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation … [especially due to the] high percentage of female inmates [that] has been physically and sexually abused by males.").

192. 18 U.S.C. § 2243 (2006).

193. For an example of criminal prosecution of a federal prison guard for violating this statute, see United States v. Vasquez, 389 F.3d 65, 77 (2d Cir. 2004) (affirming conviction of defendant prison guard for five counts of sexual abuse of prisoners and one count of misdemeanor abusive sexual contact, and sentencing of defendant to 21 months imprisonment).

194. 18 U.S.C. § 2241 (2006).

195. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2006). The National Prison Rape Elimination Commission ("NPREC") released an official report and guidelines in mid-2009. NPREC, Report and Standards, *available at* http://www.nprec.us/ (last visited November 9, 2009).

196. The U.S. Department of Justice ("DOJ") also recently released a report examining the DOJ's efforts to deter sexual abuse of federal prisoners by federal corrections officers, and made recommendations to help the DOJ prevent this sexual abuse (including better staff training and increased medical and psychological help for victims of abuse). Dept. of Justice, Office of the Inspector General, The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates (2009), *available at* http://www.justice.gov/oig/reports/plus/e0904.pdf (last visited January 15, 2010).

197. Cal. Penal Code § 289.6 (West 2008; N.Y. Penal Law § 130.05(3)(e)–(f) (McKinney 2004).

198. N.Y. Penal Law §§ 130.05(3) (e)–(f) (McKinney 2004).

between a prison employee and a prisoner a crime, even if the prisoner believed such contact was consensual. Consent is not a valid defense for the prison official's acts.

Other states that criminalize sexual contact between prison employees and prisoners include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.[199] States that have laws that do not refer specifically to prison employees but may also criminalize prison employees' sexual contact with prisoners include Nebraska, North Carolina, Oklahoma, Texas, and Wyoming.[200]

Some states have also taken steps to protect prisoners from retaliation for reporting sexual misconduct by prison staff. For example, California has made it illegal for prison guards to retaliate against prisoners who report them for sexual assault.[201] Of course, even with such laws, retaliation still occurs and is a real concern. But, if your state law prohibits retaliation, the fact that the law forbids this behavior only serves to strengthen your legal claim.

D. Assault on LGBT or Effeminate Prisoners

This Part of the Chapter discusses special issues for gay, homosexual, lesbian, and/or effeminate prisoners (prisoners with feminine characteristics). Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners," explains these issues in more detail. But, you should remember you do not have to wait to be attacked before bringing suit; you can sue before you are assaulted if you feel officials are ignoring a large risk that you will be seriously harmed.

Most LGBT prisoners who have been assaulted by other prisoners make Eighth Amendment deliberate indifference claims under *Farmer*,[202] although in one recent case, a court recognized a Fourteenth Amendment Equal Protection claim as well.[203] To make a claim that you are vulnerable to attack (in order to satisfy a deliberate indifference claim), you have to present evidence that you may be a target of assault.[204] If you are gay or effeminate, it may be easier for you to prove that there is/was a substantial risk to your safety

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199. Alaska Stat. §§ 11.41.425.2, 11.41.427.1 (2008); Ariz. Rev. Stat. Ann. § 13-1419 (2001 & Supp. 2008); Ark. Code Ann. § 5-14-126(a)(1)(A) (2006 & Supp. 2009); Cal. Penal Code § 289.6 (West 2008); Colo. Rev. Stat. § 18-3-404(f) (2004 & Supp. 2009); Conn. Gen. Stat. Ann. §§ 53a-71(a)(5), 53a-73a(a)(1)(F) (West 2007); Del. Code Ann. tit. 11, § 1259 (2007); D.C. Code §§ 22-3013, 22-3014, and 22-3017 (2001 & Supp. 2009); Fla. Stat. Ann. § 944.35(3) (West 2006); Ga. Code Ann. § 16-6-5.1 (2007); Haw. Rev. Stat. Ann. §§ 707-731(1)(c), 707-732(1)(e) (LexisNexis 2009); Idaho Code Ann. § 18-6110 (2004 & Supp. 2008); 720 Ill. Comp. Stat. Ann. 5/11-9.2 (West 2002); Iowa Code Ann. § 709.16(1) (West 2003); Kan. Stat. Ann. § 21-3520 (2007); Ky. Rev. Stat. Ann. § 510.120 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:134.1 (2004); Me. Rev. Stat. Ann. tit. 17-a, § 253(2)(E) (2006 & Supp. 2008); Md. Code Ann., [Crim. Law] § 3-314 (LexisNexis 2002); Mich. Comp. Laws Ann. §§ 750.520c (1)(i–k) (West 2004 & Supp. 2009); Minn. Stat. Ann. § 609.344(1)(m), 609.345(1)(m) (West 2009); Miss. Code Ann. § 97-3-104 (West 2008); Mo. Ann. Stat. § 566.145 (West 1999 & Supp. 2009); Mont. Code Ann. § 45-5-502(5)(a) (2008); Nev. Rev. Stat. Ann. § 212.187 (LexisNexis 2005); N.H. Rev. Stat. Ann. § 632-A:4(III) (2007 & Supp. 2008); N.J. Stat. Ann. § 2C:14-2(c)(2) (West 2005); N.M. Stat. § 30-9-11(E)(2) (2004 & Supp. 2009); N.D. Cent. Code § 12.1-20-06 (1997 & Supp. 2009); Ohio Rev. Code Ann. § 2907.03(A)(6,11) (West 2006 & Supp. 2009); Or. Rev. Stat. §§ 163.452, 454 (2009); 18 Pa. Cons. Stat. Ann. § 3124.2 (West 2000); R.I. Gen. Laws § 11-25-24 (2002); S.C. Code Ann. § 44-23-1150 (2002 & Supp. 2008); S.D. Codified Laws § 24-1-26.1 (2004); Utah Code Ann. § 76-5-412 (2008); Va. Code Ann. § 18.2-64.2 (2009); Wash. Rev. Code Ann. §§ 9A.44.160, 170, 180 (West 2009); W. Va. Code Ann. § 61-8B-10 (LexisNexis 2005 & Supp. 2009); and Wis. Stat. Ann. § 940.225 (West 2005). These laws vary significantly in detail, and you should consult the law of the state in which you are imprisoned. *See* Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* 39–40 (1996), *available at* http://www.hrw.org/legacy/reports/1996/Us1.htm (last visited January 15, 2010).

200. Neb. Rev. Stat. §28-322.03 (2008); N.C. Gen. Stat. § 14-27.7 (2005); Okla. Stat. Ann. tit. 21 § 1114 (2005); Tex. Penal Code Ann. § 22.011 (2004); Wyo. Stat. Ann. § 6-2-303 (2005). *See* The Human Rights Watch Women's Rights Project Report, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons 40 (1996), *available at* http://hrw.org/reports/1996/Us1.htm (last visited January 15, 2010).

201. Cal. Code Reg. Tit. 15, § 3401.5(f) (2003).

202. Farmer v. Brennan, 511 U.S. 825, 828–829, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 820 (1994) (recognizing as actionable an 8th Amendment claim for a prison's "deliberate indifference" to a prominent risk of assault).

203. Johnson v. Johnson, 385 F.3d 503, 532–533 (5th Cir. 2004) (holding that prisoner's sexual-orientation-based equal protection claims were properly pleaded and actionable).

204. *See* Purvis v. Ponte, 929 F.2d 822, 825–27 (1st Cir. 1991) (per curiam) (finding 8th Amendment not violated when prisoner alleged general fear of "gay bashing" and suspicions that homophobic cellmates threatened his safety, because prisoner presented no evidence of likelihood violence would occur and officials had tried 6 different cellmates).

and that prison officials knew of this risk. In other words, your status as gay or effeminate may make it easier to prove that you are a vulnerable prisoner. As long as prison officials know of your status, they know there is a higher risk you will be assaulted.

Even if it might be easier for you to prove you are/were in danger of being assaulted, it is still important to report any threats against you so that prison officials know about specific problems. For example, if you seem vulnerable because you are gay, or because you look young or effeminate, then you should report to prison officials any harassment or threats of rape by other prisoners. When you report harassment or threats to prison officials, you need to have some specific evidence or examples (for example, that a prisoner who has raped other prisoners is threatening you) because suspicions alone are not enough.[205] With such evidence, prisoners who fall into the gay or effeminate categories may be able to make a deliberate indifference Eighth Amendment claim that prison officials should have taken previous threats into consideration in order to prevent an attack. Of course, you will still have to prove that prison officials did not act reasonably to try to prevent the assault.

You should also note you may be eligible for special protection even if you are not gay but are still more vulnerable to physical and sexual assaults by other prisoners because of your appearance.[206] If you fear you will be assaulted, you may request to be placed in special housing or protective custody, which unfortunately usually also means you will lose certain privileges. Prison officials may also put you, without your consent, in protective custody or even solitary confinement because they believe that is the only way to protect you.

1. Special Protection for Gay or Effeminate Prisoners

In general, courts have recognized that gay or effeminate men are often assaulted in prison, especially when placed in the general population,[207] and may need special consideration either at sentencing or after incarceration.[208] Courts are still creating the law in this area, but the Supreme Court has expressly recognized that a sentencing court may consider "susceptibility to abuse" in prison as a factor for a downward departure (a decrease from what the sentence would otherwise be) in extraordinary or unusual circumstances.[209] Where the judge believes there is a serious risk you could be assaulted in prison or where prison officials say that they can protect you only by putting you in protective custody or solitary confinement, you can request better protective custody conditions or a shorter *sentence*. For example, several courts have ordered reduced sentences for prisoners at risk of assault because of their sexual orientation or appearance.[210]

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205. Riccardo v. Rausch, 375 F.3d 521, 527–28 (7th Cir. 2004) ("The Constitution does not oblige guards to believe whatever inmates say … [A] prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.").

206. *See, e.g.*, United States v. Gonzalez, 945 F.2d 525, 526 (2d Cir. 1991) (ruling in favor of decreasing prisoner's sentence because of his feminine appearance).

207. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 848, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811, 832 (1994) (noting that placing a young effeminate man into general population could threaten his safety); Johnson v. Johnson, 385 F.3d 503, 517–19 (5th Cir. 2004) (holding officials must use all possible administrative means to protect prisoners from sexual abuse); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 77, 83–84 (6th Cir. 1995) (holding warden liable for providing inadequate protection against physical and sexual abuse of vulnerable prisoner).

208. United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (holding that shortening the prison sentence for a prisoner was possible by balancing the government's interest in incarcerating criminals with the goal of diminishing the likelihood that the prisoner would be assaulted).

209. Koon v. United States, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996). Note that *Koon*, however, dealt with prisoners who were susceptible to abuse because they were ex-police officers, not because of their sexual orientation or appearance. *See also* United States v. LaVallee 439 F.3d 670, 708 (10th Cir. 2006) (allowing a reduced sentence for police officers because of their clearly demonstrated increased "susceptibility to abuse" in prison).

210. *See, e.g.*, United States v. Lara, 905 F.2d 599, 608–09 (2d Cir. 1990) (reducing a sentence for a gay prisoner after prison officials put him in solitary confinement because solitary confinement was the only way the officials could protect him from assault); United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (approving the trial court's grant of a downward sentencing departure to a nineteen-year-old effeminate looking heterosexual prisoner based on the likelihood of assault by other prisoners, even though no such attack had yet occurred); *cf.* United States v. Parish, 308 F.3d 1025, 1032–33 (9th Cir. 2002) (upholding downward departure because prisoner was particularly susceptible to abuse); United States v. Wilke, 156 F.3d 749, 754–55 (7th Cir. 1998) (departing from sentencing guidelines because of prisoner's sexual orientation and demeanor). Note, however, that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance in determining a prisoner's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050, 135 L. Ed. 2d 392, 418 (1996).

Special treatment for effeminate or gay prisoners was considered by the Second Circuit in *United States v. Lara*.[211] In this case, the prisoner had a youthful appearance and bisexual orientation that made him extremely vulnerable to physical attack. Prison officials were able to protect him only by putting him in solitary confinement, so the court reduced his sentence.[212] A year after *Lara*, the Second Circuit also decided *United States v. Gonzalez*.[213] In *Gonzalez*, the court similarly reduced the sentence of a nineteen-year-old prisoner who was young, effeminate, and likely to be victimized by his fellow prisoners.[214] Unlike in *Lara*, however, the prisoner in *Gonzalez* was ***not*** gay or bisexual but still vulnerable to homophobic attacks since his physical appearance did not conform to traditional notions of masculinity.[215] In other words, as long as a prisoner looks like he might be gay, he is at a greater risk of attack, even if he is not actually gay. The *Gonzalez* court also found that the prisoner could get a shorter sentence even though he had not been attacked; oppressive conditions without an actual attack may be enough to get a shorter sentence.[216]

2. Examples of Legal Claims Brought by LGBT Prisoners.

In *Farmer v. Brennan*, a transsexual[217] prisoner with feminine characteristics was placed in the general male prison population and was later beaten and raped by another prisoner.[218] The Supreme Court held that the prisoner may have had an Eighth Amendment claim and sent the case back to the lower court to determine if prison officials acted with deliberate indifference by failing to protect him.[219]

The Third Circuit in *Young v. Quinlan* held prison officials violated the Eighth Amendment under the deliberate indifference standard when a prisoner, described as small, young, and effeminate, was sexually assaulted by other prisoners, and officials ignored his requests for protection.[220] Similarly, the Sixth Circuit in *Taylor v. Michigan Department of Corrections* held a prisoner (who was small and vulnerable looking, with a youthful appearance, low IQ, and a seizure disorder) had an Eighth Amendment claim for being placed in a sixty-person prison camp barracks where he was raped.[221] The Seventh Circuit also recognized an Eighth Amendment claim in *Pope v. Shafer* when a prisoner was assaulted after officials ignored the prisoner's and internal affairs officers' specific reports of threats against him and refused transfer requests.[222]

In *Greene v. Bowles*, a transsexual prisoner was placed in protective custody to prevent attacks from other prisoners, but was then severely beaten by another prisoner in the protective custody unit.[223] The Sixth Circuit recognized an Eighth Amendment deliberate indifference claim because the warden admitted knowing the attacker was a "predatory inmate," knew the plaintiff had been placed in protective custody because of her status as a vulnerable prisoner, and knew both attacker and plaintiff were being housed in the same unit.[224] Importantly, the Sixth Circuit held vulnerable (transsexual, gay, effeminate, etc.) prisoners who have been attacked can prove prison officials knew of the substantial risk to their safety in two different ways: (1) by proving the officials knew of the plaintiff's vulnerable status and of the general risk to the plaintiff's safety from other prisoners, even if the officials did not know of any specific danger; or (2) by proving that the officials knew that a predatory prisoner, without segregation or other protective measures,

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211. United States v. Lara, 905 F.2d 599 (2d Cir. 1990).

212. United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990).

213. United States v. Gonzalez, 945 F.2d 525 (2d Cir. 1991).

214. United States v. Gonzalez, 945 F.2d 525, 526 (2d Cir. 1991).

215. United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) ("[E]ven if Gonzalez is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him as susceptible to homophobic attacks as was the bisexual defendant before us in *Lara*.").

216. United States v. Gonzalez, 945 F.2d 525, 527 (2d Cir. 1991); *cf.* Koon v. United States, 518 U.S. 81, 111, 116 S. Ct. 2035, 2053, 135 L. Ed. 2d 392, 421 (1996) (finding court did not abuse discretion in granting downward sentencing departure based on convicted police officers' susceptibility to abuse in prison).

217. A transsexual is someone whose anatomical sex does not match his or her gender identity.

218. Farmer v. Brennan, 511 U.S. 825, 830, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

219. Farmer v. Brennan, 511 U.S. 825, 849, 114 S. Ct. 1970, 1985, 128 L. Ed. 2d 811, 833 (1994).

220. Young v. Quinlan, 960 F.2d 351, 362–63 (3d Cir. 1992).

221. Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 77, 84 (6th Cir. 1995).

222. Pope v. Shafer, 86 F.3d 90, 91–92 (7th Cir. 1996).

223. Greene v. Bowles, 361 F.3d 290, 292 (6th Cir. 2004).

224. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004).

presented a substantial risk to others, including the plaintiff.[225] If you are a vulnerable prisoner attacked by a predatory prisoner, this makes it easier for you to prove that prison officials knew of the risk to your safety because you do not have to prove a particular prisoner presented a specific threat to your safety.[226]

In another important case, *Johnson v. Johnson*, an African-American homosexual prisoner sued prison officials after prison gangs sexually assaulted him and bought and sold him as a sexual slave for over eighteen months, despite the plaintiff's requests for protection.[227] The Fifth Circuit said the plaintiff had a deliberate indifference claim because the officials continued to house him with the general population even though he repeatedly requested protection: the prison officials' response—that Johnson must "learn to f*** or fight"—"was not a reasonable response and ... contravene[d] clearly established law."[228] The Court further held that "[a]lthough it is not clear exactly what type of action an official is legally required to take under *Farmer*, ... an official may not simply send the inmate into the general population to fight off attackers."[229]

In his lawsuit, Johnson also claimed that the prison officials' actions violated his Equal Protection rights under the Fourteenth Amendment.[230] Specifically, he claimed that the officials failed to protect him like they protected other prisoners because of his sexual orientation.[231] The Fifth Circuit recognized this claim, noting that "if they actually did deny Johnson protection because of his homosexuality, ... that decision would certainly not effectuate any legitimate [governmental] interest" and would be in violation of the Equal Protection Clause.[232] You should note that the *Johnson* court accepted the plaintiff's sexual-orientation-based equal protection claim ***without*** proof that other non-homosexual prisoners were treated differently, but remember that *Johnson* is a new case and the law is still developing.

E. Legal Remedies Available for Victims of Unlawful Assault

This Part explains what you can do, legally, if you have been the victim of an unlawful assault. Part E(1) explains how you should first complain using your prison's Inmate Grievance Program. Part E(2) describes how you can then file a Section 1983 suit if you believe prison officials or other government employees (including police officers) violated any of your constitutional rights. Part E(3) explains how you can also file a state tort claim. Finally, Part E(4) describes *class actions* (when groups of plaintiffs bring suit together).

Remembering that different laws apply in state and federal prisons is important. If you are in a federal prison, then it doesn't matter what state the prison is in, because federal prisons use federal law. If you are in state prison, you can use both state and federal laws. But, remember each state creates its own laws. Research the laws of your state and how prisoners in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in a state or a federal prison, but the legal claims you make and how you make them will differ depending on whether you are in state or federal court.

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225. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance.").

226. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[A] prison official cannot 'escape liability ... by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.'" (quoting Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994))); *see also* Curry v. Scott, 249 F.3d 493, 507–08 (6th Cir. 2001) (finding where a particular prison guard had a history of racially motivated harassment of African American prisoners, deliberate indifference could be demonstrated by factual record, without threat to particular prisoner), *overruled in part on other grounds by* Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798, 813 (2007).

227. Johnson v. Johnson, 385 F.3d 503, 512 (5th Cir. 2004).

228. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004).

229. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004); *see also* Farmer v. Brennan, 511 U.S. 825, 832–33, 114 S. Ct. 1970, 1976–77, 128 L. Ed. 2d 811, 822–23 (1994) (explaining that jailers must "take reasonable measures to guarantee the safety of the inmates" and "are not free to let the state of nature take its course" (internal quotation and citation omitted)).

230. U.S. Const. amend. XIV, Section 1 ("No State shall … deny to any person within its jurisdiction the equal protection of the laws."). See Part B(2) and Part F(1) of Chapter 30 of the *JLM*, "Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners" for more information on the Equal Protection Clause.

231. Johnson v. Johnson, 385 F.3d 503, 512 (5th Cir. 2004) (noting Johnson's claim that officials told him "'[w]e don't protect punks on this farm'—'punk' being prison slang for a homosexual man").

232. Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); *see* Farmer v. Brennan, 511 U.S. 825, 833, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) ("[G]ratuitously allowing the beating or rape of one prisoner by another serves 'no legitimate penological objective.'" (citation omitted)).

1. Inmate Grievance Program

If you believe your rights have been violated, you should first file an administrative grievance. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for further information. It is very important that you fully complete any administrative grievance processes before filing a lawsuit. If you do not, the court will probably reject your claim because you did not "exhaust" (complete) all administrative remedies first.[233]

2. 42 U.S.C. § 1983

If you think that prison officials have violated your Eighth Amendment rights, you may sue the officials or guards using Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983). Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting "under color of any" state law.[234] You can sue federal officials in a similar suit, called a *Bivens* action.[235]

You can also use Section 1983 to sue local officials as long as you can show that they too acted under "color of state law." (You may be able to sue local officials under state tort law as well.) But note that you can only sue municipalities (towns, cities, or counties) under Section 1983 if your injury was the result of an official municipal policy or custom.[236] This means that to sue a city or a county, you will have to show that the "execution of [the] government's policy or custom ... inflict[ed] the injury."[237] In other words, a local government will be held liable only if an injury can be shown to be a direct result of the local government's official policy, either express or implied.[238] Therefore, a local government is not liable under Section 1983 "for an injury inflicted solely by its employees or agents" who were ***not*** following official local policy or custom,[239] even though the local officials may be individually liable under Section 1983.

You should read Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," to learn more about Section 1983 claims. Part E(1) of Chapter 16 explains *Bivens* actions and Part C(3)(c) gives more information on qualified immunity.

3. Tort Actions

Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," explains how to bring a tort action in New York's Court of Claims.[240] If you were assaulted, you can bring a state law tort action against those who assaulted you, their supervisors, and maybe the state itself.

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233. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 515–23 (5th Cir. 2004) (dismissing prisoner's claims that prison officials had failed to protect him from repeated sexual assaults due to failure to exhaust).

234. 42 U.S.C. § 1983 (2006).

235. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

236. *See, e.g.*, Williams v. Kaufman County, 352 F.3d 994, 1013–14 (5th Cir. 2003) (holding a county could be held liable for unlawful searches of detainees when the relevant policymaker, in this case the sheriff, authorized the policy).

237. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978)). In *Irwin*, a California court found that a complaint, alleging that the City of Hemet's adoption of a policy or custom not to train its jailers in suicide screening and prevention was the proximate cause of a prisoner's suicide, may not be summarily dismissed without determination as to whether or not the city adopted a policy or custom to inadequately train jailers. For an example of such a municipal policy or custom, see Blihovde v. St. Croix County, 219 F.R.D. 607, 613 (W.D. Wis. 2003) (involving claims arising from a policy of strip searches for arrestees entering a jail).

238. Blihovde v. St. Croix County, 219 F.R.D. 607, 618 (W.D. Wis. 2003) ("Even when there is no express policy, a municipality may be liable when there is a 'custom' of unconstitutional conduct." (citing Monell v. Dept. of Social Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978))); *see also* Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 125–27 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force); Walker v. Sheahan, 526 F.3d 973, 977 (7th Cir. 2008) (dismissing a § 1983 claim for lack of evidence of a practice of using excessive force and following a "code of silence").

239. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978)).

240. Remember the New York Court of Claims is a specific state court in New York that only deals with claims against the State of New York. If the person who injured you was a state official or employee and you decide to file a tort action in state court in New York, you should file your claim in the New York Court of Claims. The New York Court of Claims can only award money damages; it cannot issue an injunction. See Part C(4) of Chapter 5 of the *JLM*, "Choosing a Court & Lawsuit: An Overview of the Alternatives," for more information on the Court of Claims and Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for more detailed information on tort actions.

It is very important to read Chapter 17 because there is a *time limit* for filing a lawsuit in the Court of Claims. If you do not file before the deadline, then you cannot sue in the New York State court system. Both New York State prisoners and prisoners from outside New York should read Chapter 17 for more information on how to bring a tort claim in state court.

4. Class Action Suits

Class actions are a type of lawsuit in which many plaintiffs sue together for similar violations of their rights.[241] Courts generally allow class actions where the following conditions are present: (1) there are too many plaintiffs for the court to try each case individually, (2) each plaintiff's case is similar in fact and law, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class,[242] and (5) most of the claims would not be brought otherwise because each plaintiff's individual damages are too small.[243]

If a pattern of excessive force against prisoners exists within a prison, a class action suit may be brought on behalf of all the prisoners against the wardens or administrators in charge of the overall operations of the prison.[244] Defendants in such an action are charged with "abdicating their duty to supervise and monitor the use of force and deliberately permitting a pattern of excessive force to develop and persist."[245] In cases where injunctive relief is sought against prison officials for patterns of excessive force, "the subjective prong of the Eighth Amendment is satisfied by a showing of deliberate indifference" rather than by the *Hudson v. McMillian* standard of maliciousness.[246]

F. Conclusion

This Chapter described the legal meaning of "assault" and explained your right to be free from physical and sexual assault in prison. There are different sources of law offering you protection against guard and prisoner assault, and different ways to obtain redress for rights violations. Remember to complete administrative grievance processes before filing suit. Otherwise, courts might not allow you to proceed.

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241. See Chapter 5 of the *JLM*, "Choosing a Court & Lawsuit: An Overview of the Alternatives" on class actions in general and Part D(1) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more detailed information on § 1983 class actions.

242. *See* Fed. R. Civ. P. 23.

243. *See, e.g.*, Tardiff v. Knox County, 365 F.3d 1, 7 (1st Cir. 2004) (holding that class action status probably is the only feasible means for arrestees to pursue strip search claims); Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 709 (1997) (noting that the policy underlying class actions is to make it possible for individuals with small claims to aggregate those claims in order to vindicate their rights).

244. *See*, *e.g.*, Ingles v. Toro, 438 F. Supp. 2d 203, 208–09 (S.D.N.Y. 2006) (approving settlement of a class action over excessive use of force by New York City prison guards; the city agreed to pay injured prisoners $2.2 million and revise its use-of-force directive and investigatory procedures, install new video cameras to watch guards and prisoners, and train guards in appropriate defensive techniques); Madrid v. Gomez, 889 F. Supp. 1146, 1254–60 (N.D. Cal. 1995) (granting injunction in class action on behalf of all prisoners at Pelican Bay State Prison where pattern of unnecessary and wanton infliction of pain and constitutionally inadequate provision of medical and mental health care was shown as cruel and unusual conditions of confinement as to mentally ill prisoners in a security housing unit); *see also* Mark Mooney, *Inmates Win 1.5M in Rikers Abuse Settlement*, Daily News, Feb. 14, 1996, at 12 (discussing a class action suit by 15 prisoners that involved allegations of abuse by corrections officers and that was settled by New York City for $1.5 million).

245. Madrid v. Gomez, 889 F. Supp. 1146, 1249 (N.D. Cal. 1995).

246. Madrid v. Gomez, 889 F. Supp. 1146, 1250 (N.D. Cal. 1995).

A JAILHOUSE LAWYER'S MANUAL

Chapter 25: Your Right To Be Free From Illegal Body Searches

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CHAPTER 25

YOUR RIGHT TO BE FREE FROM ILLEGAL BODY SEARCHES*

A. Introduction

This Chapter explains your right to be free from involuntary exposure and illegal body searches. This Part, Part A, is the Introduction. Part B explains your rights regarding involuntary cross-gender exposure (when persons of the opposite sex see your body against your wishes) and your privacy rights about your body, in particular the rights of women prisoners. Part C focuses on body searches for both men and women. Finally, Part D explains what you can do and what legal remedies you can use to protect your rights.

This Chapter explains your rights using both federal constitutional law (from the U.S. Constitution) and New York State laws. For all searches, including body cavity searches, courts generally use the Fourth Amendment, which protects you against unreasonable searches.[1] Remember that rules from the U.S. Supreme Court apply to the whole country. If you are in a prison outside of New York, you should research the laws in your state. You should try to use the laws and court decisions of the federal circuit you are in. Reading Chapter 2 of the *JLM*, "Introduction to Legal Research," before you read this Chapter (or any other chapter of the *JLM*) is a good idea because it will help you understand how to research the law and understand which laws apply to you.

If you think your rights are being violated, you should first try to protect your rights through your institution's administrative grievance procedures.[2] You *must* go through the prison grievance process to protect your right to sue in federal court under the Prison Litigation Reform Act ("PLRA"). *Read Chapter 14 of the* JLM *on the PLRA to know what to do—otherwise you might lose your right to sue (and possibly your good-time credit also).*

If the grievance system does not help you, or if it does not help you enough, you can then file a lawsuit. Prisoners who challenge illegal body searches and involuntary exposure usually file claims under 42 U.S.C. § 1983 ("Section 1983"),[3] through a *Bivens* action in state or federal court, or through an Article 78[4] petition in state court (if in New York). Other chapters of the *JLM* have more information on these claims, including Chapter 5, "Choosing a Court and a Lawsuit," Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," and Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you want to learn more about your rights against assaults in prison, see Chapter 24 of the *JLM*, "Your Right to Be Free From Assault."

If you bring a civil suit, it is important to know that the court recognizes only physical abuse, not emotional damage. According to Section 803(d) of the PLRA, "no Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while

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1. The 4th Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

2. See *JLM*, Chapter 15, "Inmate Grievance Procedures," for more information on prisoner grievance procedures.

3. Remember that "§" is the symbol for "section." For example, § 1983 means "Section 1983." Therefore, "§ 1983" refers to a specific section, section 1983, of a law (here the United States Code).

4. An Article 78 petition refers to a petition under Article 78 of the New York Civil Practice Law & Rules. You cannot use Article 78 to seek damages. You can only use an Article 78 petition to go to court to challenge decisions made by New York State administrative bodies or officers, like the Department of Correctional Services or prison employees, and only if you think the decision was illegal, arbitrary or grossly unfair. For instance, a prisoner might file an Article 78 petition to request judicial review of a prison disciplinary determination resulting from what the prisoner believes to have been an illegal search. *See*, *e.g.*, Ocean v. Selsky, 252 A.D.2d 984, 985, 676 N.Y.S.2d 380, 381 (4th Dept. 1998) (challenging prison director's actions in violating the rules for a "pat frisk" using Article 78); *see also* Young v. Coombe, 227 A.D.2d 799, 800, 642 N.Y.S.2d 443, 444 (3d Dept. 1996) (seeking judicial review of Commissioner's determination that prisoner was in violation of prison disciplinary rules by, among other things, not complying with a frisk); Medina v. Portuondo, 298 A.D.2d 733, 734, 749 N.Y.S.2d 291, 293 (3d Dept. 2002) (challenging determination that prisoner violated prison rules by possessing contraband and controlled substances). See Part C(4) of Chapter 5 of the *JLM*, "Choosing a Court and a Lawsuit," and Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more about Article 78 proceedings.

in custody without a prior showing of physical injury."[5] See Chapter 14 of the *JLM* for more information on the PLRA.

Also, because prison officers are government actors, they can use the defense of "qualified immunity"[6] when sued in a Section 1983 action. This means that even if you can prove you were illegally searched, the officials may not be liable because of their qualified immunity defense.[7] For a detailed discussion of qualified immunity and Section 1983, see Part (C)(3) (Qualified Immunity) and Part B (Section 1983) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

B. Involuntary Exposure

This Part discusses your privacy rights regarding your naked body.[8] "Involuntary exposure" is when your naked, or partly naked, body is seen by guards of the opposite sex, such as when you are using showers or toilets. In *Turner v. Safley*, the Supreme Court stated that although prisoners have diminished liberty interests, prison regulations that restrict the rights of prisoners must be reasonably related to legitimate penological (prison-related) interests.[9] Thus, your privacy rights can be limited if the prison gives a reason that is reasonably related to a legitimate prison policy.

It is hard to challenge involuntary exposure situations because prisons must obey federal employment discrimination laws that require male and female employees to be treated the same. Prohibiting guards from viewing nude prisoners of the opposite sex may violate laws requiring equal employment opportunities, because whether the guard is a man or a woman would then become a factor in employment decisions.[10] Most courts have held that prison policies allowing cross-sex viewing of nude prisoners do *not* violate prisoners' rights.[11] The Ninth Circuit in *Oliver v. Scott* held that a male prisoner's Fourth and Fourteenth

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5. Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321 (1996) (codified as 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

6. "Qualified immunity" is defined as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights." Black's Law Dictionary 766 (8th ed. 2004).

7. *See, e.g.*, Way v. County of Ventura, 445 F.3d 1157, 1163 (9th Cir. 2006), *cert. denied*, 549 U.S. 1052, 127 S. Ct. 665, 166 L. Ed. 2d 513 (2006) (holding strip search of arrestee unconstitutional but finding in favor of the County because of the officers' qualified immunity); Lay v. Porker, 371 F. Supp. 2d 1159, 1167 (C.D. Cal. 2004) (holding that a body cavity search of naked male prisoner in the presence of a female officer did violate the prisoner's constitutional rights, but granting summary judgment to the prison because of the prison official's qualified immunity). *But see* Edgerly v. City and County of San Francisco, 495 F.3d 645, 657 (9th Cir. 2007) (finding that qualified immunity did not protect officers who conducted a post-booking strip search without reasonable suspicion).

8. For other privacy rights, see Chapter 19 of the *JLM*, "Your Right to Communicate with the Outside World" (monitoring of telephone calls, inspection of mail), and Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison," on the right to privacy regarding health status.

9. Turner v. Safley, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 78 (1987). This rule has been superseded by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), which adds that the government's policy must be the least restrictive means of achieving its compelling interest. "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution … unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000cc-1 (2000). *See* Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir. 2005) (finding a prison regulation prohibiting male prisoners from having hair longer than three inches to be a substantial burden on prisoners' exercise of religion and in violation of RLUIPA); Washington v. Klem, 497 F.3d 272, 282–83 (3d Cir. 2007) (finding that a prison policy limiting a prisoner to keeping 10 books in his cell did burden his religious exercise, did not further a compelling state interest, and was not the least restrictive means for achieving safety and health interests).

10. *See* Csizmadia v. Fauver, 746 F. Supp. 483, 491 (D.N.J. 1990) (discussing the tension between prisoners' constitutional privacy rights and guards' equal employment rights). *But see* Tharp v. Iowa Dept. of Corr., 68 F.3d 223, 225 (8th Cir. 1995) (finding that assignment of female guards to female prison units did not violate equal employment rights and could been viewed as serving a positive interest for the prison as long as guards were not being denied opportunities for promotion or being discriminated against by these assignments).

11. *See*, *e.g.*, Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (rejecting prisoner's claim challenging assignment of female officers to male housing units); Smith v. Chrans, 629 F. Supp. 606, 611 (C.D. Ill. 1986) (dismissing case when prisoner alleged nothing more than occasional and inadvertent sightings by female prison employees of prisoners in cells or open shower or toilet facilities engaged in basic bodily functions); Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) (finding no 4th Amendment violation where male employee accidentally saw female plaintiff's bare chest while female jailers were searching her upon entry to prison). *But see* Morris v. Newland, No. CIV S-00-2794 GEB GGH P, 2007 U.S. Dist. LEXIS 15725, at *17 (E.D. Cal. Mar. 6, 2007) (*unpublished*) (dismissing claim

Amendment rights were not violated after female prison guards strip searched the prisoner and observed him showering and using the bathroom.[12] Also, the Eighth Circuit in *Timm v. Gunter* held that allowing female guards, like male guards, to pat search male prisoners was a reasonable regulation and did not violate any privacy interests of the prisoners.[13]

But you can expect to have some privacy rights with respect to your naked body. Courts generally do not like prison policies requiring prisoners to be routinely searched or seen by guards of the opposite sex.[14] Courts have held that prisons may accommodate prisoners' privacy interests when such actions are reasonable and do not affect penological interests. But courts have not been clear about which specific prison actions violate your privacy rights.[15] The court in *Hudson v. Goodlander* held that a prisoner's privacy rights were violated by assigning female guards to posts where they could view a male prisoner while he was completely unclothed.[16] The court stated that voluntary restrictions on employment of female correction officers should adequately protect prisoner privacy and could be removed during times of emergency.[17]

Courts have used several methods to balance prisoners' privacy rights and correction officers' right to be free from sex discrimination in employment. One method is to allow guards of the opposite sex only quick and random views of unclothed prisoners. For example, the court in *Johnson v. Pennsylvania Bureau of Corrections* held that a prison's security interests were reasonable when it assigned female officers to various positions throughout the jail since the actual viewings were too limited to amount to a violation of

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that prisoner's 4th Amendment rights were violated by three prison guards watching him shower, but declining to dismiss the prisoner's retaliation claim that the guards had "repeatedly ogled him in retaliation for his having filed inmate grievances regarding female guards being allowed to watch him showering or otherwise undressed"); Cerniglia v. County of Sacramento, No. 2:99-cv-01938-JKS-DAD, 2008 U.S. Dist. LEXIS 32346, at *48 (E.D. Cal. Apr. 18, 2008) (*unpublished*) (finding no violation of a prisoner's right to privacy where prisoner was strip searched in a dayroom where anyone could have seen him, but there was no evidence that anyone actually did).

12. Oliver v. Scott, 276 F.3d 736, 746 (5th Cir. 2002); *see also* Johnson v. Phelan, 69 F.3d 144, 147 (7th Cir. 1995) (noting that limiting the prison guards that could monitor prisoners in the shower or toilets to a specific gender or sexual orientation would be inefficient staff deployment and therefore is not required).

13. Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) ("We are persuaded that allowing such searches on the same basis as same-sex pat searches is a reasonable regulation as applied at [the prison], and thus is not a constitutional violation.").

14. *See* Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) ("As to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked—for example while in the shower or using a toilet in a cell—would provide the basis of a claim on which relief could be granted."); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing prisoners' right to bodily privacy "because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'" (quoting Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981))); Sepulveda v. Ramirez, 967 F.2d 1413, 1415–16 (9th Cir. 1992) (noting that the right to bodily privacy was extended to prisoners in 1985 in the Ninth Circuit and to parolees in 1988); Kent v. Johnson, 821 F.2d 1220, 1226 (6th Cir. 1987) (recognizing that a prisoner has a constitutional claim when the prison fails to reasonably accommodate the interests of prisoners and female employees).

15. *See* Ashann-Ra v. Comm. of Va., 112 F. Supp. 2d 559, 565 (W.D. Va. 2000) (recognizing that routinely or regularly exposing an unclothed prisoner to female guards may constitute a constitutional violation, but noting an evidentiary hearing may be required to make the determination on particular encounters between female officers and naked male prisoners); Oliver v. Scott, 276 F.3d 736, 744–46 (5th Cir. 2002) (upholding under the *Turner* reasonable relationship standard a policy "permitting all guards to monitor all inmates at all times" because it "increases the overall level of surveillance" and finding that bathrooms and showers can be the site of violence); Hill v. McKinley, 311 F.3d 899, 903–05 (8th Cir. 2002) (holding both male and female staff could participate in transfer of unruly naked female prisoner, since not enough female guards were available; however, leaving the prisoner exposed on a restraint board in male officers' presence violated the 4th Amendment); Somers v. Thurman, 109 F.3d 614, 617–23 (9th Cir. 1997) (finding no clearly established 4th Amendment protection against cross-gender strip searches, and dismissing 8th Amendment claim that female officers subjected male plaintiff to visual body cavity searches, watched him shower, pointed at him, and made jokes about him).

16. Hudson v. Goodlander, 494 F. Supp. 890, 891–95 (D. Md. 1980); *see also* Fortner v. Thomas, 983 F.2d 1024, 1029–30 (11th Cir. 1993) (holding that male prisoners suing to prevent female guards from coming into living quarters where they were exposed may be entitled to injunctive relief in light of court's recognition of limited constitutional right to bodily privacy); Arey v. Robinson, No. Y-90-3009, 1992 U.S. Dist. LEXIS 21810, at *32 (D. Md. 1992) (*unpublished*) (finding the design and operation of bathroom facilities violated the prisoner's privacy rights), *aff'd*, 819 F.Supp. 478, 479 (D. Md. 1992).

17. Hudson v. Goodlander, 494 F. Supp. 890, 893–94 (D. Md. 1980).

prisoners' constitutional rights.[18] Other methods approved by the courts include allowing female prisoners to cover the windows of their cells for short periods of time,[19] allowing prisoners to cover their genitals with a towel when guards are present in the restrooms,[20] and providing pajamas for sleeping.[21] Some courts have even held that prisons should change the design of bathroom facilities to protect a prisoner's privacy rights.[22]

C. Body Searches

This Part discusses when and how prison officials are allowed to search your body. Part C(1) introduces the names which courts use for different types of body searches. Part C(2) explains the Fourth Amendment protections against illegal searches for convicted prisoners. Part C(3) explains how the Eighth Amendment also limits certain body searches. Part C(4) talks about privacy rights and DNA testing. Part C(5) describes your privacy rights under state statutes, especially New York law. Part C(6) explains how each prison's own rules can also protect you from illegal searches. Part C(7) explains why, in general, it is better for prisoners not to resist being searched, even if you believe the search is illegal.

Note that both arrestees and pretrial detainees have more constitutional protections against body searches than convicted prisoners. When you research your case, *don't confuse the reasonableness standard for searches of arrestees/pretrial detainees with the reasonableness standard for convicted prisoners.*[23]

1. Types of Body Searches

Remembering that most searches of prisoners are legal is important. Prison officials may legally touch you for security reasons, such as when performing a valid search.[24] But, courts have recognized that sometimes prison officials use searches, especially strip searches and body cavity searches, just to harass or abuse prisoners, and this is not legal. (For more on harassment, see Part B(3) of Chapter 24 of the *JLM,* "Your Right to Be Free From Assault.") The courts, and the Supreme Court, have created some standards to accommodate the needs of both prisons and prisoners.[25] This Section explains five types of searches:

(1) pat frisk search—a search where a prison guard searches your body and clothes while you are still dressed (but you will usually have to remove your hat, shoes, and coat);
(2) strip search—a search where you remove all of your clothing, and the prison official searches your clothes after you take them off (the prison guard does not touch you or search your body cavities);
(3) strip frisk search—a search where the official searches your clothes after you have taken them off and also looks at (but does not touch) your body cavities (all prisoners must bend over to have their anal cavities searched; women must also squat so that the guards can look into their vaginal cavity);
(4) body cavity search—a search that includes contact with any or all of your body cavities; these searches should be performed by trained medical personnel only; and
(5) cross-gender body search—any search performed by someone of the opposite sex.

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18. Johnson v. Pa. Bureau of Corr., 661 F. Supp. 425, 432–34 (W.D. Pa. 1987).

19. *See* Torres v. Wis. Dept. of Health & Social Servs., 859 F.2d 1523, 1524 (7th Cir. 1988) (*en banc*) (permitting female prisoners at women's maximum security prison to cover windows in the doors of their rooms with privacy cards for up to 10 minutes between hours of 6 a.m. and 9 p.m. while they are dressing or using the toilet).

20. Timm v. Gunter, 917 F.2d 1093, 1102 (8th Cir. 1990).

21. Forts v. Ward, 621 F.2d 1210, 1217 (2nd Cir. 1980).

22. Arey v. Robinson, 819 F. Supp. 478 (D. Md. 1992).

23. Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986) (holding strip/body cavity search unconstitutional where authorities had no reasonable suspicion arrestee was concealing contraband); Willis v. Artuz, 301 F.3d 65, 69 (2d Cir. 2002) (holding that law enforcement-related searches of pretrial detainees' cells are subject to the 4th Amendment, but searches of convicted prisoners' rooms are not, because "a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security," such as retribution).

24. Prison officials are allowed to use bodily force to maintain control and security within the prison as long as their actions relate to some penological need, meaning the action helps them manage and maintain control of the prison. *See*, *e.g.*, N.Y. Correct. Law § 137(5) (McKinney 2006) ("When any inmate … shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape."); *See also* Turner v. Huibregtse, 421 F. Supp. 2d 1149, 1152 (W.D. Wis. 2006) (finding inappropriate grabbing and fondling of the prisoner in a harassing manner rather than the touching requisite to a search may violate the prisoner's constitutional rights).

25. *See generally* Hudson v. Palmer, 468 U.S. 517, 526–27, 104 S. Ct. 3194, 3200–01, 82 L. Ed. 2d 393, 403–04 (1984) (establishing such standards); Bell v. Wolfish, 441 U.S. 520, 530, 99 S. Ct. 1861, 1869, 60 L. Ed. 2d 447, 462 (1979) (same).

2. Fourth Amendment Protections

Prisoners usually use the Fourth Amendment, which forbids "unreasonable searches and seizures,"[26] to challenge body searches. Prisoners have some, *but very limited,* privacy rights to their bodies under the Fourth Amendment.[27]

This Section first tells you when courts do allow body searches under the Fourth Amendment. Next, Part C(1)(a) explains the Fourth Amendment's "reasonableness standard," which courts use to decide if a search was lawful. Part C(1)(b) discusses strip search cases, Part C(1)(c) discusses strip frisks, and Part C(1)(d) covers body cavity searches. Finally, Part C(1)(e) explains your limited right not to be searched by someone of the opposite sex (cross-gender body searches).

(a) Reasonableness Standard for Searches of Prisoners

The lawfulness of a body search depends on whether a prison guard acts reasonably in conducting the search. In *Bell v. Wolfish*, the Supreme Court said that body searches are constitutional, but only if performed in a "reasonable manner."[28] Guards must act reasonably when searching prisoners because searches invade prisoners' privacy and can easily become abusive.[29] In other words, courts balance the state's need for the search against how much the prisoner's privacy is invaded.

The courts do not have a rule for what is reasonable in body searches. Instead, they have decided that some practices are unreasonable. To decide if a search is unreasonable (or reasonable) and unnecessarily invasive of prisoners' privacy, *Bell v. Wolfish* requires courts to look at: (1) how the search is performed; (2) the reason for the search; and (3) the place of the search.[30]

Different courts make different decisions using this test, depending on how reasonable a court finds the prison officials' explanation for the search and the conduct during the search. Note that courts will generally believe prison officials when they claim that they needed to search a prisoner for security reasons. Courts usually do not want to second-guess prison safety policies used to maintain prison control.[31] While courts

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26. U.S. Const. amend. IV. But remember that the 4th Amendment does not protect you from searches and seizures of your prison cell, because the Supreme Court has said that prisoners have no legitimate expectation of privacy in their prison cells. *See* Block v. Rutherford, 468 U.S. 576, 591, 104 S. Ct. 3227, 3235, 82 L. Ed. 2d 438, 450 (1984) (holding searches of pretrial detainees' cells were not unconstitutional, because they served the important government purpose of maintaining security in the jail); Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–03 (1984) (holding that the 4th Amendment prohibition against unreasonable searches does not apply to prison cells because "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions."); Willis v. Artuz, 301 F.3d 65, 68–69 (2d Cir. 2002) (holding that prisoners are not protected from cell searches by prosecutors or police even though such searches are not related to prison security). *But see* United States v. DeFonte, 441 F.3d 92, 94 (2d Cir. 2006) (finding that attorney-client privilege extends to documents kept in an inmate's cell, even though there is no reasonable expectation of privacy in them for 4th Amendment purposes).

27. Nicholas v. Goord, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953, 127 S. Ct. 384, 166 L. Ed. 2d 270 (2006) ("[P]risoners retain a right to bodily privacy, even if that right is limited by institutional and security concerns."), *overruled on other grounds by* United States v. Amerson, 483 F.3d 73 (2d Cir. 2007); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) ("We are persuaded to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'"); Peckham v. Wis. Dept. of Corr., 141 F.3d 694, 696 (7th Cir. 1998) (stating some loss of privacy is of course to be expected in prison, however "those convicted of criminal offenses do not surrender all of their constitutional rights"); Samson v. California, 547 U.S. 843, 856, 126 S. Ct. 2193, 2202, 165 L. Ed. 2d 250, 262 (2006) (holding that while suspicionless searches are not precluded, the prisoner's limited privacy right is protected by "California's prohibition on 'arbitrary, capricious or harassing' searches").

28. Bell v. Wolfish, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979).

29. Bell v. Wolfish, 441 U.S. 520, 559–60, 99 S. Ct. 1861, 1884–86, 60 L. Ed. 2d 447, 481–83 (1979).

30. Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884–85, 60 L. Ed. 2d 447, 481–82 (1979).

31. *See* Elliot v. Lynn, 38 F.3d 188, 191–92 (5th Cir. 1994) (deferring to the prison's claim that a state of emergency existed that necessitated the deprivation of privacy where prison officials conducted a massive prison shakedown after an increase in murders and violence, and the strip searches were conducted in front of other prisoners and several non-prison staff persons); Whitman v. Nesic, 368 F.3d 931, 934–35 (7th Cir. 2004) (deferring to prison's claim of security justifications for requiring prisoners to be strip-searched before giving urine samples in a random drug testing program, because "[p]rison officials must be accorded wide ranging deference in matters of internal order and security").

will not allow prison officials to do anything they wish (courts can and have struck down unreasonable policies), a prison official can typically prove the need for a search policy easily.

In general, searches should not be performed abusively[32] or conducted in an unnecessarily public manner.[33] *Who* conducts the search can be important—for example, courts like trained medical personnel to perform body cavity searches. *Where* the search is performed is also a factor—for example, prison officials should not perform strip searches in public without a good reason.[34] *Which prisoners* are being searched is considered critical—courts allow more intrusive searches of maximum security prisoners[35] or "troublemaker" prisoners, such as those previously caught with contraband.[36]

The New York State Department of Correctional Services ("DOCS") uses this reasonableness standard in its guidelines that describe when pat frisks are acceptable. According to Directive 4910, a pat frisk is justified if an official has "an articulable basis to suspect that an inmate may be in possession of contraband."[37] This directive replaced the old standard, which required "reasonable suspicion that an inmate is in possession of contraband." The new language—"articulable basis"—allows prison officials even greater discretion when determining if a pat frisk is necessary. As long as a prison official can give a reason (and it may not have to be a good reason) to suspect that you may be carrying contraband, he can pat frisk you. An official will also pat frisk you before you speak with Department officials or enter the visiting room.[38]

(b) Strip Search

In a strip search, you take off your clothes and a prison official searches them and inspects your naked body. In a strip search, the official does not touch you or search your body cavities. At least one circuit court has held that a strip search does not have to be "deliberate," meaning that it doesn't matter if the officer *intended* to see your naked body, as long as the officer *did* see your naked body.[39] Courts generally allow strip searches if prison officials have a reasonable security interest to justify the search.[40] Strip searches

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32. Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (holding that conducting strip searches while opposite-sex staff were invited to watch, accompanied by sexual harassment and taunting, would be "designed to demean and humiliate" and would thus state an 8th Amendment claim). *But see* Somers v. Thurman, No. 96-55534, 1997 U.S. App. LEXIS 12272, at *31 (9th Cir. 1997) (*unpublished*) ("To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the 8th Amendment test and render it absurd.").

33. Farmer v. Perrill, 288 F.3d 1254, 1260–61 (10th Cir. 2002) (holding that government must provide justification for doing the visual strip searches in public).

34. Farmer v. Perrill, 288 F.3d 1254, 1260–61 (10th Cir. 2002) (affirming denial of summary judgment as to a challenge to visual strip searches en route to the recreation yard conducted in view of other prisoners, and holding that government must provide justification for doing the visual strip searches in public); *see* Smith v. Taylor, 149 F. App'x 12, 14 (2d Cir. 2005) (holding that the presence of more officers at a strip search than prison rules authorized suggested a privacy violation not necessary to serve penological interests).

35. Arruda v. Fair, 710 F.2d 886, 886–88 (1st Cir. 1983) (upholding the practice of subjecting prisoners to body cavity searches upon non-contact visitations, visits to the infirmary and library, and upon leaving cells, finding the practice reasonable given prison officials' need to find smuggled contraband among segregated prisoners in maximum-security prison); Savard v. Rhode Island, 338 F.3d 23, 30–31 (1st Cir. 2003) (holding that maximum-security prison's policy authorizing blanket strip and body cavity searches did not violate prisoner's 4th Amendment rights, because the general interest of internal security in such a prison is compelling); Rickman v. Avaniti, 854 F.2d 327, 328 (9th Cir. 1988) (holding that policy of performing visual strip and body cavity searches on prisoners in administrative segregation unit whenever these prisoners left their cells was constitutional in light of security interests).

36. *See* Brown v. Hilton, 492 F. Supp. 771, 776–77 (D.N.J. 1980) (holding visual anal inspections of prisoners entering a segregated unit were proper for prisoner who was accomplice of two other prisoners caught with contraband).

37. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 2 (2001) (*as revised* Dec. 11, 2006).

38. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 2 (2001) (*as revised* Dec. 11, 2006).

39. Wood v. Hancock County Sheriff's Dept., 354 F.3d 57, 63–65 (1st Cir. 2003) (defining strip searches to be "exposing one's naked body to official scrutiny," and holding that "[t]he critical question is whether viewing the naked body was an objective of the search, rather than an unavoidable and incidental by-product," and finding a strip search does not necessarily involve inspection of prisoner's mouth or underarms). *But see* Stanley v. Henson, 337 F.3d 961, 963–64 (7th Cir. 2003) (finding observed clothing exchange in which prisoner was never fully naked was not a "strip search," because it was an administrative procedure with the purpose of ensuring that contraband was not brought into the jail).

40. *See* Peckham v. Wis. Dept. of Corr., 141 F.3d 694, 695–97 (7th Cir. 1998) (finding strip searches that were for legitimate, identifiable purposes and not for punishment or harassment purposes did not violate prisoner's rights); Thompson v. Souza, 111 F.3d 694, 700 (9th Cir. 1997) (upholding visual strip searches to search for drugs, even though

designed only to harass prisoners, and not justified by any legitimate security concerns, may violate the Fourth or the Eighth Amendment.[41]

Courts vary on how they have interpreted the Fourth Amendment's reasonableness standard for strip searches. In *Arruda v. Fair*, the First Circuit held that a policy requiring strip searches of maximum security prisoners when entering or leaving the unit to go to the library or infirmary and after meeting visitors, was reasonable, even though a guard accompanied prisoners to the infirmary and there was a wire screen in the visiting area because particularly dangerous criminals were involved.[42] Courts also look at the place of the search and the conditions of the search to see if the prisoner's privacy rights were violated.[43] In *Cornwell v. Dahlberg*, the Sixth Circuit held that a male prisoner who was strip searched outdoors after a prison uprising in front of several female correction officers, raised a valid Fourth Amendment claim, because the search could have occurred in a more private place.[44] In *Hodges v. Stanley*, a prisoner complained that a strip search, and an accompanying physical attack prior to his placement in administrative detention, was unconstitutional.[45] Hodges alleged that he had been searched twice in a row, and he questioned the need for a second search. The Second Circuit said that the first search, a mandatory procedure when prisoners were put in administrative detention, was proper. The court found that Hodges stated a constitutional claim because the second search was unnecessary.[46]

(c) Strip Frisk

"Strip frisk" means a visual search of a prisoner's clothes and body, including body cavities.[47] For a male, this involves one or more of the following procedures:

(1) Opening his mouth and moving his tongue up and down and from side to side;
(2) Removing any dentures;
(3) Running his hands through his hair;
(4) Allowing his ears to be visually examined;
(5) Lifting his arms to expose his armpits;
(6) Bending over and/or spreading his buttocks to expose his anus to the frisking officer; or
(7) Spreading his testicles to expose the area behind his testicles.

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this was not an "intended" purpose contained in a written plan); Bruscino v. Carlson, 854 F.2d 162, 165 (7th Cir. 1988) (upholding rectal searches in maximum security federal prison and noting the extreme violence and amount of contraband typically found in such searches); Goff v. Nix, 803 F.2d 358, 366–71 (8th Cir. 1986) (upholding visual body cavity searches on prisoners before and after trips to hospital, visits to prison infirmary, other such contacts with people outside the prison, and exercise period for prisoners in segregation; noting the high level of deference accorded to prison administrators' decisions about such searches); Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001) (noting that prisons have discretion to base searches on the type of crime for which a prisoner is convicted, such as justifying a search on the fact that the prisoner was charged with a violent felony); Brown v. Blaine, 185 F. App'x 166, 169 (3d Cir. 2006) (finding visual strip searches appropriate when conducted under institutional policy that mandated strip searches upon reentry to the restricted housing unit).

41. Harris v. Ostrout, 65 F.3d 912, 916 (11th Cir. 1995) (stating that if strip searches "are devoid of penological merit and imposed simply to inflict pain, the federal courts should intervene," and that strip searches may not be used to retaliate against 1st Amendment-protected activity); Peckham v. Wis. Dept. of Corr., 141 F.3d 694, 697 (7th Cir. 1998) (stating that the 8th Amendment protects prisoners from unconstitutional strip searches). *See also* Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004) (noting that a search must be "calculated harassment unrelated to prison needs" in order to be unconstitutional (citing Meriwether v. Faulkner, 821 F.2d 408, 418 (7th Cir. 1987))).

42. Arruda v. Fair, 710 F.2d 886, 886–88 (1st Cir. 1983).

43. *See*, *e.g.*, Evans v. Stephens, 407 F.3d 1272, 1281 (11th Cir. 2005) (*en banc*) (holding that searches conducted with little respect for arrestees' privacy, without sanitary precautions, and that included threatening and racist language were unreasonable searches). *But see* Franklin v. Lockhart, 883 F.2d 654, 656 (8th Cir. 1989) (noting that a search conducted in front of other detainees may not be an unreasonable violation of detainee's privacy if there are security concerns that outweigh the intrusiveness of the searches).

44. Cornwell v. Dahlberg, 963 F.2d 912, 916–17 (6th Cir. 1992).

45. Hodges v. Stanley, 712 F.2d 34, 35 (2d Cir. 1983).

46. Hodges v. Stanley, 712 F.2d 34, 35–36 (2d Cir. 1983). *See also* Iqbal v. Hasty, 490 F.3d 143, 172 (2d Cir. 2007) (finding that detainee stated a 4th Amendment claim when he alleged that he was subjected to multiple consecutive strip searches and repeated strip and body cavity searches that might be understood to be punishment and not related to legitimate government purposes).

47. Prison officials only *look* at your body cavities in a strip frisk search. If officials *touch* any body cavity, they are conducting a body cavity search.

For females the procedures are the same, except females must squat to show the vagina.[48] It is important to remember courts sometimes use the terms "strip frisk search" and "body cavity search" to mean the same thing, so when a court refers to a "visual body cavity search," it is referring to a "strip frisk" search.

Because strip frisks invade prisoners' privacy more than strip searches, courts usually require prison officials to have individualized suspicion about the particular prisoner being searched to justify strip frisks or body cavity searches.[49] However, some courts now allow random strip frisk searches. For example, the Second Circuit in *Covino v. Patrissi* held that routine strip frisk searches were reasonable and should not be limited to searching prisoners after contact visits.[50] Using the reasonableness standard, the court in *Covino* found that a regulation allowing random visual body cavity searches (which required the prisoner to remove his clothing, lift his genitals, and spread his buttocks for a visual examination) was not unreasonable, because the prisoners were very dangerous and the prison needed to prevent contraband. Therefore, the prison officials' need to conduct these searches was more important than the prisoners' concerns.[51]

When prison officials conduct strip frisk searches to control a dangerous situation, courts usually do not find any constitutional violation.[52] The Eighth Circuit in *Franklin v. Lockhart* held that a policy requiring visual body cavity searches of prisoners on punitive status, in administrative segregation, or in need of protection was justified by security concerns.[53] The Fifth Circuit in *Elliott v. Lynn* held that a visual body cavity search of a prisoner in front of other prisoners and non-searching officers was justified as part of a prison-wide shakedown following an increase in murders.[54] The Ninth Circuit in *Thompson v. Souza* held that a visual strip search of a prisoner's body cavities was reasonably related to the prison's legitimate need to keep drugs out of the prison and therefore did not violate the Fourth Amendment.[55] The court reached this conclusion even though the prisoner was told to run his fingers around his gums after touching his genitalia, the search went beyond prison guidelines and the officials' search plan, and the search happened in front of other prisoners. Courts will therefore probably not find it difficult to hold that a prison's safety concerns override your privacy rights in a strip frisk situation.

(d) Body Cavity Search

A "body cavity search" (or "digital search") is an actual physical examination of the prisoner's anal and/or genital cavities conducted by a professional member of the health services staff. During a digital body cavity search, a guard or prison official places his or her fingers into a prisoner's nose, mouth, anus, and/or vagina. The test for deciding whether digital body cavity searches are reasonable is stricter than the test for any other type of search because body cavity searches are particularly intrusive. The Ninth Circuit has established two requirements which must be satisfied in order for a digital body cavity search to be constitutional under the Fourth Amendment:

(1) There must be a valid penological (prison management) need for the search;[56] and
(2) The search must be "conducted in a reasonable manner," which means the court will look at whether trained staff performed the search in private under hygienic (clean) conditions.[57]

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48. *See* Gomez v. Coughlin, 685 F. Supp. 1291, 1299 n.5 (S.D.N.Y. 1988) (defining "strip frisk" search).

49. *See*, *e.g.*, Vaughan v. Ricketts, 950 F.2d 1464, 1468–69 (9th Cir. 1991) (requiring "reasonable cause" to justify digital rectal searches), *overruled on other grounds by* Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995).

50. Covino v. Patrissi, 967 F.2d 73, 79 n.5 (2d Cir. 1992).

51. Covino v. Patrissi, 967 F.2d 73, 79 (2d Cir. 1992).

52. *See*, *e.g.*, Goff v. Nix, 803 F.2d 358, 367–68 (8th Cir. 1986) (holding visual body cavity searches by prison officials did not violate the 4th Amendment, and prison administrators' decision to conduct such searches as a condition of any movement outside segregation unit or confines of prison was entitled to deference).

53. Franklin v. Lockhart, 883 F.2d 654, 656 (8th Cir. 1989).

54. Elliot v. Lynn, 38 F.3d 188, 191 (5th Cir. 1994).

55. Thompson v. Souza, 111 F.3d 694, 700–01 (9th Cir. 1997).

56. Tribble v. Gardner, 860 F.2d 321, 325 (9th Cir. 1988) (holding that if rectal searches were conducted whenever prisoner is moved into secure housing unit within maximum security prison and for purposes unrelated to security considerations, searches would violate the 4th Amendment); *see also* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (holding that legislation that impinges on prisoners' constitutional rights must be reasonably related to a legitimate penological interest).

57. Vaughan v. Ricketts, 859 F.2d 736, 739–40 (9th Cir. 1988) (holding rectal searches in open hall on an unsanitary table were unreasonable), *overruled on other grounds by* Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995).

The Seventh Circuit in *Bruscino v. Carlson* held that a policy requiring rectal searches of prisoners returning to cells was reasonable because guards found a lot of contraband, including knives and hacksaw blades, from the searches.[58] Furthermore, prison violence had decreased since the searches began.[59] Please note, however, that *Bruscino v. Carlson* involved the U.S. Penitentiary in Marion, Illinois, "the only prison in the U.S. currently designed to hold the most violent and dangerous prisoners in the federal system," which may explain why the court allowed searches to occur frequently.[60] As part of this search, prisoners returning to their cells were often subjected to a rectal search, where a paramedic inserted a gloved finger into the prisoner's rectum and felt around for contraband.

Courts often approve body cavity searches performed by X-ray.[61] The court in *People v. Pifer* held an X-ray search, which discovered a hypodermic syringe in the prisoner's rectal cavity, was reasonable.[62] The court found the prison had significant and legitimate security interests more important than the prisoner's rights. The court said, "an X-ray is far less humiliating, degrading, invasive, annoying and physically uncomfortable than a physical viewing of the anal cavity or physical invasion of the rectal cavity."[63]

The New York Department of Correctional Services (DOCS) rules say body cavity searches may only be done "once all other means have been exhausted" and "when there is imminent danger to an inmate's health or facility safety."[64] A doctor must explain the process to the prisoner before performing a body cavity search.[65] The prisoner should have the opportunity to give up the contraband at this time.[66] A corrections officer of the same sex as the prisoner should be present during the entire exam.[67]

Note that in New York, an X-ray search using the Body Orifice Scanning System ("the BOSS" or "the BOSS chair") is sometimes also called a metal detector search.[68] Whenever you are searched with the BOSS chair, you may be fully clothed.[69] Even if the X-ray search is being used after a strip search or a strip frisk, prison officials must let you put your underclothes back on first.[70] See Part C(5) of this Chapter for more information about these New York State prison rules.

(e) Cross-Gender Body Searches

This Subsection explains your right not to be searched by prison officials of the opposite sex. Part B of this Chapter, "Involuntary Exposure," explained your right not to be seen by prison officials of the opposite sex. You should read both sections because the laws are very similar.

Courts have held prisoners do have some rights not to be searched by guards of the opposite sex.[71] In general, courts have found that prisoners' legitimate expectations of privacy from persons of the opposite sex

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58. Bruscino v. Carlson, 854 F.2d 162, 164–65 (7th Cir. 1988).

59. Bruscino v. Carlson, 854 F.2d 162, 164–65 (7th Cir. 1988).

60. Bruscino v. Carlson, 854 F.2d 162, 163 (7th Cir. 1988).

61. People v. Collins, 8 Cal. Rptr. 3d 731, 744 (Cal. App. 2004) (upholding an intended visual body cavity search of a prisoner); Thompson v. County of Cook, 412 F. Supp. 2d 881, 893 (N.D. Ill. 2005) (denying summary judgment for prison on the question of whether visual body cavity searches and urethral swabbing for all incoming prisoners were proper).

62. People v. Pifer, 216 Cal. App. 3d 956, 962–63, 265 Cal. Rptr. 237, 240–41 (Cal. Ct. App. 1989) (court found that routine X-ray searches of all prisoners being transferred from one prison facility to another were reasonable).

63. People v. Pifer, 216 Cal. App. 3d 956, 961, 265 Cal. Rptr. 237, 242 (Cal. Ct. App. 1989).

64. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 20 (2001) (*as revised* Dec. 11, 2006).

65. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 7 (2001) (*as revised* Dec. 11, 2006).

66. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 7 (2001) (*as revised* Dec. 11, 2006).

67. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 7 (2001) (*as revised* Dec. 11, 2006).

68. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 1–2 (2001) (*as revised* Dec. 11, 2006).

69. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 1–2 (2001) (*as revised* Dec. 11, 2006).

70. State of New York, Department of Correctional Services, Directive No. 4910, Control of and Search for Contraband, at 2 (2001) (*as revised* Dec. 11, 2006) (stating that underclothes means "undershorts for males and bras and panties for females").

71. *See, e.g.*, Mills v. City of Barbourville, 389 F.3d 568, 579 (6th Cir. 2004) ("[W]e have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers

are very limited.[72] Courts must balance a prisoner's limited right to be free from invasions of privacy by members of the opposite sex, with the state's interests in maintaining the security of the prison[73] and in avoiding sex discrimination in prison employment.[74] Most cases addressing gender issues in prisons focus on the right to privacy and try to balance these competing interests.

This balancing test is difficult, so courts have different opinions. One court found a male prisoner had no Fourth Amendment protection against cross-gender strip searches and no Eighth Amendment claim against visual body cavity searches by female guards.[75] But in another case, the Seventh Circuit said specifically that not *all* cross-gender searches are permissible.[76] Prisons should respect a prisoner's constitutional privacy where it is reasonable, taking into account prison security and equal employment for female guards.[77]

Your state may also have laws protecting women prisoners or regulating searches by opposite-sex guards. For example, California law requires that all California prisoners be searched "in a professional manner."[78] Routine clothed searches of male prisoners may be performed by prison officials of either sex, but searches of clothed female prisoners should be performed only by female employees—except in emergency situations.[79] California prohibits opposite-sex guards (other than qualified medical staff) from performing unclothed body inspections "except under emergency conditions with life or death consequences."[80]

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of the opposite sex while naked ... would provide the basis of a claim on which relief could be granted."); Hayes v. Marriott, 70 F.3d 1144, 1147 (10th Cir. 1995) (holding that summary judgment was inappropriate because plaintiff was subjected to a body cavity search "in the presence of over 100 people, including female secretaries and case managers"); Moore v. Carwell, 168 F.3d 234, 237 (5th Cir. 1999) (holding that an allegation of a strip and body cavity search performed by an officer of the opposite sex, absent an emergency or unavailability of a same sex officer, was not frivolous for purposes of the 4th Amendment).

72. *See*, *e.g.*, Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988) (holding that strip searches of male prisoners that occasionally occurred in view of female guards does not violate the 4th Amendment); Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (finding that a pat-down search of a male prisoner, including his groin area, by female guards does not violate the 4th Amendment). *But see* Lay v. Forker, 371 F. Supp. 2d 1159, 1166–67 (C.D. Cal. 2004) (finding that a strip search of a male prisoner in the presence of a female officer violated the 4th Amendment but that the officer was entitled to qualified immunity).

73. Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201–02, 82 L. Ed. 2d 393, 403–04 (1984) ("Determining whether [a prisoner's] expectation of privacy is 'legitimate' or 'unreasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell.").

74. *See, e.g.*, Smith v. Fairman, 678 F.2d 52, 53–55 (7th Cir. 1982) (*per curiam*) (considering the state's "strong interest in avoiding sex discrimination in its hiring practices at the prison" and holding that "requiring plaintiff to submit to a limited frisk-type search by a female guard infringes upon no right guaranteed by the Constitution"); Timm v. Gunter, 917 F.2d 1093, 1102 (8th Cir. 1990) (holding that it was not unreasonable for a prison to authorize female guards to conduct surveillance of all areas, including shower and toilet facilities, and to pat search male prisoners on the same basis as male guards, given the prison's interest in protecting the equal employment rights of prison guards); Berl v. County of Westchester, 849 F.2d 712, 716 (2d Cir. 1988) (finding county liable for employment discrimination under Title VII for refusing to consider two male guards for promotion to female unit of prison), *rev'd on other grounds by* Price Waterhouse v. Hopkins, 490 U.S. 228, 238 n.2, 109 S. Ct. 1775, 1784 n.2, 104 L. Ed. 2d 268, 280 n.2 (1989); Bagley v. Watson, 579 F. Supp. 1099, 1104–05 (D. Or. 1983) (holding that female corrections officers cannot be excluded from positions which involve performing pat-down frisk searches of clothed male prisoners and visual observations of male prisoners in various states of undress); Griffin v. Mich. Dept. of Corr., 654 F. Supp. 690, 702–03 (E.D. Mich. 1982) (finding gender an unacceptable occupational qualification for corrections officers). See Part B of this Chapter for a discussion of similar issues concerning involuntary exposure.

75. Somers v. Thurman, 109 F.3d 614, 617–23 (9th Cir. 1997).

76. Canedy v. Boardman, 16 F.3d 183, 188 (7th Cir. 1994).

77. Canedy v. Boardman, 16 F.3d 183, 188 (7th Cir. 1994) (finding that male prisoner did have a cause of action against strip searches by female guards, because "where it *is* reasonable—taking account of a state's interests in prison security and in providing equal employment opportunity for female guards—to respect an inmate's constitutional privacy interests, doing so ... is a constitutional mandate").

78. Cal. Code Regs. tit. 15, § 3287(b) (2006) (requiring that all searches of prisoners "be conducted in a professional manner which avoids embarrassment or indignity to the prisoner. Whenever possible, unclothed body inspections of prisoners shall be conducted outside the view of others."). Title 15 of the California Codes and Regulations (Crime Prevention and Corrections) contains the provisions concerning prisoner body searches.

79. Cal. Code Regs. tit. 15, § 3287(b)(2)–(3) (2006).

80. Cal. Code Regs. tit. 15, § 3287(b)(1) (2006). The CDCR Department Operations Manual (the DOM) reflects the same policies. CDCR Department Operations Manual §§ 52050.18.2, 52050.18.3 (1989), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/Ch_5_Printed_Final_DOM.pdf.

In New York, DOCS allows female correction officers to routinely pat frisk most male prisoners.[81] For New York State female prisoners, however, DOCS requires that, "whenever possible," female guards should pat frisk female prisoners[82] (see Part C(2)(f)(1) below).

(i) Searches of Women Prisoners by Male Guards[83]

While all prisoners' rights to privacy are limited because of the nature of prison and incarceration,[84] courts are sometimes more sympathetic to female prisoners. Some courts recognize that women have a greater privacy interest in certain situations because female prisoners are particularly vulnerable to sexual abuse by correctional personnel. As a result, some courts have found searches of women prisoners by male guards to be unconstitutional, even if the same searches of male prisoners by female guards would be allowed under the same circumstances.

For example, in *Jordan v. Gardner*, the Ninth Circuit held that past sexual and physical abuse experienced by female prisoners may affect the way they react to searches by male prison guards. Because of this, the court found that female prisoners have a greater privacy interest than males. The court held that random, non-emergency, clothed body searches on female prisoners were cruel and unusual punishment, violating the Eighth Amendment.[85] In *Jordan*, the prison policy allowed both male and female guards to randomly and routinely search clothed female prisoners. During the searches, the guards rubbed, stroked, squeezed, and kneaded the women's bodies, including their covered breasts, buttocks, inner thighs, and crotches. The policy required guards to "push inward and upward when searching the crotch and upper thighs" of the prisoners and to check the crease in their buttocks with a downward motion with the edge of the hand.[86] Many of the female prisoners had been sexually or physically abused by men in the past, and one woman, after being searched, suffered severe distress. The court found that prison officials knew of the risks of mental trauma and acted with deliberate indifference to the harm that the cross-gender clothed body searches were likely to cause. The court said the policy violated the Eighth Amendment because it was "unnecessary" for male guards to search the women (since female guards could do the searches) and "wanton," meaning the searches were malicious and unjustifiable.[87] Other courts have also recognized that female prisoners are entitled to greater privacy protection, though with some limitations.[88]

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81. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 3 (2001) (*as revised* Dec. 11, 2006) ("Pat frisks [of male prisoners] will be performed by officers regardless of sex," although male Muslim prisoners may request a male officer under certain circumstances). In general, cross-gender pat-down searches of male prisoners by female prison guards are constitutionally permissible. *See* Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (permitting routine cross-gender pat-downs because "these searches do not involve intimate contact with an inmate's body"); Smith v. Fairman, 678 F.2d 52, 53 (7th Cir. 1982) (holding female guards may conduct pat-down searches without violating a male prisoner's privacy).

82. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 3 (2001) (*as revised* Dec. 11, 2006).

83. It is very important that you read *all* of Part C of this Chapter, not just this Section. Courts will use the general rules explained in Part C to decide if a search was legal. This Section only explains some additional protections women prisoners have against searches by male prison guards.

84. *See* Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984) (stating that a right of privacy in traditional 4th Amendment terms is fundamentally incompatible with the close and continual surveillance of prisoners and their cells).

85. Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993). Whether the doctrine of this case will be adopted by other circuits or the Supreme Court is questionable. *See* Hovater v. Robinson, 1 F.3d 1063, 1066 (10th Cir. 1993) (holding that a male guard having sole custody of a female prisoner does not create such a risk to her safety that it violates the 8th Amendment). The *Jordan* court's decision was fact-specific to the particular prison in the case, and other courts have indicated that the case did not create a *per se* constitutional violation. *See* Carl v. Angelone, 883 F. Supp. 1433, 1440 (D. Nev. 1995) (finding that although prison director transferred male correction officers out of female prisons based on *Jordan*, there was no *per se* rule of unconstitutionality for cross-gender searches; thus, prisons could not be forced to transfer the men based on their sex).

86. Jordan v. Gardner, 986 F.2d 1521, 1523, 1532 (9th Cir. 1993) (Reinhardt, J., concurring).

87. Jordan v. Gardner, 986 F.2d 1521, 1527–28 (9th Cir. 1993)) (Reinhardt, J., concurring); *see also* Berry v. City of Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (stating knowledge of risk of harm and failure to act to prevent the harm constitute deliberate indifference).

88. *See*, *e.g.*, Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (denying qualified immunity to a male parole officer who walked in on a female parolee urinating as part of a required drug test); Torres v. Wis. Dept. of Health & Social Servs., 838 F.2d 944, 946–47 (7th Cir. 1988), *rev'd in part*, 859 F.2d 1523, 1524–25 (7th Cir. 1988) (suggesting that to protect female prisoners' privacy, prisons could provide them with appropriate sleepwear and allow them to cover

In general, male prison officials are allowed to conduct clothed body frisks of women prisoners (where the outer garments of the prisoner are searched),[89] cell searches,[90] and visual body cavity or strip searches (where prisoners take off their clothes and are visually inspected by a guard).[91] Some states require that only medical personnel, not correctional personnel, may conduct body cavity searches that involve physical intrusion or extraction of a foreign object from a body cavity.[92] Similarly, body cavity searches requiring the use of one's fingers, or a "digital body search," are unreasonable unless medical personnel do these searches in a hygienic manner in a private area.[93] The presence of male officers is also an aggravating circumstance that might make a digital body search unreasonable.[94] The prison official must have a particularly strong reason to conduct a vaginal search of a pregnant woman, whether visual or digital.[95]

Your state may have specific laws to protect you or to regulate searches by opposite-sex guards. California, for instance, prohibits opposite-sex guards from performing unclothed body inspections in non-emergency situations.[96] In New York, DOCS policy requires that, whenever possible, female guards—not male guards—should pat frisk female prisoners.[97] If a male officer has to perform a non-emergency pat frisk

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their windows while dressing or using the toilet); Forts v. Ward, 621 F.2d 1210, 1213 (2d Cir. 1980) (allowing female prisoners to cover the window of their cells for privacy for 15 minute intervals). *But see* Carlin v. Manu, 72 F. Supp. 2d 1177, 1180 (D. Or. 1999) (holding that observation by male guards during strip searches of female prisoners made by female guards was acceptable during an emergency removal to a male prison since the male guards were not touching the female prisoners).

89. *See* Smith v. Fairman, 678 F.2d 52, 53–54 (7th Cir. 1982) (holding female guards may conduct "pat down" searches without violating a male prisoner's privacy).

90. *See* Hudson v. Palmer, 468 U.S. 517, 525–26, 104 S. Ct. 3194, 3199–3200 82 L. Ed. 2d 393, 402–03 (1984) (holding that prisoner has no reasonable expectation of privacy in his cell); Martin v. Lane, 766 F. Supp. 641, 646 (N.D. Ill. 1991) (applying *Hudson* to deny relief under the 4th Amendment to a prisoner whose cell was searched during a lockdown).

91. *See* Bell v. Wolfish, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979) (upholding visual body cavity searches of prisoners against 4th Amendment challenge; the gender of the guards assigned to conduct the searches is not mentioned).

92. *See* DaVee v. Mathis, 812 S.W.2d 816, 824–26 (Mo. Ct. App. 1991) (concluding that while searches involving physical intrusion and removal of foreign objects must be conducted by medical personnel, the search in question did not involve physical contact and was thus reasonably conducted by non-medical personnel); U.S. *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 199 (E.D. Wis. 1974) ("The intrusion of either the vaginal or anal cavities must be made by skilled medical technicians.").

93. *See* Bonitz v. Fair, 804 F.2d 164, 172–73 (1st Cir. 1986) (holding that digital body searches of female prisoners were unreasonable and in violation of the 4th Amendment because non-medical personnel performed the searches in a non-hygienic manner and in the presence of male personnel), *overruled on other grounds by* Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988); U.S. *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (finding that a search "abused common conceptions of decency and civilized conduct" and violated the 5th Amendment even though it was done in a sanitary manner by female officers, because it involved forcing a pregnant woman to bend over painfully, the police officers conducting the search were not medically trained, and the search was not conducted in a medical environment). *But see* Rodriguez v. Furtado, 771 F. Supp. 1245, 1256–57 (D. Mass. 1991) (holding that a body cavity search of a female patient by a doctor in a hygienic and private setting pursuant to a search warrant was reasonable). Some states specifically require medical personnel by statute to perform body cavity searches of prisoners. *See*, *e.g.*, Mich. Comp. Laws Ann. § 764.25b(5) (West 2000).

94. *See* Bonitz v. Fair, 804 F.2d 164, 172–73 (1st Cir. 1986) (searching female prisoners in the presence of male prisoners is one factor that the court considered in finding the search to be unreasonable), *overruled on other grounds by* Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988).

95. *See* U.S. *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (holding that a visual vaginal search of woman who is seven-months pregnant "abuses common conceptions of decency and civilized conduct" when the search is conducted in a non-medical environment by non-medical officers, and it was painful for the woman to bend over).

96. Cal. Code Regs. tit. 15, § 3287(b)(1) (2008). The California Department of Corrections and Rehabilitation Department Operations Manual (the DOM) reflects the same policies. CDCR Department Operations Manual § 52050.16.5 (revised Feb. 29, 2009), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%20Ch%205-Printed%20Final.pdf (last visited Feb. 24, 2010).

97. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 2–3 (2001) (*as revised* Dec. 11, 2006). Pat frisks are required when prisoners are entering the visiting room, when an entire area of the institution is being searched, when an officer has an articulable basis to suspect a prisoner possesses contraband, or as directed by supervisory staff. Pat frisks are also allowed when a prisoner is going or returning to housing, program, and recreation areas and outside work details. *See also* Hamilton v. Goord, No. 97-CV-1363 (S.D.N.Y. June 5, 2000) (order granting stay of litigation so DOCS could take action relating to pat frisks of female prisoners), *available at* http://www.amnestyusa.org/women/custody/newyork.pdf (last visited Feb. 24, 2010).

search of a female prisoner (because, for example, a female officer is not available), he must try to search the prisoner in a public location. In New York, if more than fifty percent of all officers on duty are women, then male guards cannot perform non-emergency pat frisks, unless the pat frisk is based upon a justifiable suspicion that the female prisoner possesses contraband and a female officer is not present and available at the pat frisk location. Women prisoners who have been diagnosed with Post Traumatic Stress Disorder may also request a "Cross Gender Pat Frisk Exemption," which prevents male officers from routinely pat frisking them. However, male guards may still search them under emergency situations, when specifically directed to do so by a supervisor, or when the officer has an articulable basis to believe the female prisoner possesses contraband and a female officer is not available.[98]

Some prisons have tried to hire female prison officers for certain jobs in women's prisons.[99] But the prisons may be sued for employment discrimination, since federal law prohibits employment discrimination based on sex,[100] and courts have held that hiring only female employees for female correctional facilities violates this law.[101] The state's interest in equal employment opportunities for correctional officers is strong compared to a prisoner's privacy interest in her body, as long as the cross-gender interactions are not offensive, disrespectful, or unprofessional.[102] Therefore, prisons have not been as successful as they could have been in ensuring that there are enough women employees to search the female prisoners, so male employees are allowed to search you.

In sum, courts will balance the invasive nature of the search against the prison's penological concerns of security and equal employment opportunities. But prison officials must still try to provide privacy to prisoners if reasonable, and they should also train prison employees to carry out searches in the least intrusive manner possible.[103]

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98. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 3 (2001) (*as revised* Dec. 11, 2006). These policies are the result of a 1998 lawsuit against DOCS by women prisoners who claimed cross-gender pat frisks violated their constitutional rights; the lawsuit settled. *See* Hamilton v. Goord, No. 97-CV-1363 (S.D.N.Y. June 5, 2000) (granting stay of litigation so DOCS could address psychological issues around cross-gender pat frisks), *available at* http://www.amnestyusa.org/women/custody/newyork.pdf (last visited Feb. 24, 2010).

99. *See, e.g.*, Ind. Code Ann. §§ 36-8-3-19, 36-8-10-5 (LexisNexis 2004) (requiring a "prison matron" to be appointed for female prisons). California protects all prisoners from room searches by officers of the opposite sex and ensures that a trained female staff member is available and accessible for the supervision of female prisoners. Cal. Penal Code § 4021(b) (West 2000). Michigan provides that if prisoners are subject to body cavity searches by a person of the opposite sex, another person of the same sex must also be present. Mich. Comp. Laws Ann. § 764.25b(5) (West 2000).

99. 42 U.S.C. § 2000e-2(a)–(d) (2006) ("Title VII").

100. 42 U.S.C. § 2000e-2(a)–(d) (2006) ("Title VII").

101. *See*, *e.g.*, Henry v. Milwaukee County, 539 F.3d 573, 581 (7th Cir. 2008) (finding that a prison policy which required staff overtime shifts to be staffed by same-sex guards and so reduced the number of shifts available to women was not reasonably necessary to achieve the goals of rehabilitation, security, and privacy); Forts v. Ward, 621 F.2d 1210, 1216 (2d Cir. 1980) (holding that male prison guards could not be excluded from night shifts in a women's prison because other measures to ensure prisoner privacy were available). *But see* Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998) (upholding policy excluding male prison guards from certain posts in order to accommodate the privacy of female prisoners and reduce risk of sexual conduct between guards and prisoners when male prison guards still had many other employment opportunities in the system).

102. *See* Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (finding that to restrict or disallow female guards from holding positions which involve occasional viewing of male prisoners would require tremendous rearrangement of work schedules and possibly produce a risk to both internal security needs and equal employment opportunities for female guards, especially when the record indicates that female guards have acted professionally and appropriately); Robins v. Centinela State Prison, 19 F. App'x. 549, 550–51 (9th Cir. 2001) (while generally the search of male prisoners by female officers may not violate the 4th Amendment, a search that is "completely unprofessional and offensive" may be such a violation).

103. *See*, *e.g.*, Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) (upholding cross-gender pat searches when female guards are trained to perform pat searches of male prisoners in a professional manner); Torres v. Wis. Dept. of Health & Social Servs., 859 F.2d 1523, 1524 (7th Cir. 1988) (noting procedures in place to minimize intrusions on the privacy of prisoners). *But see* Cameron v. Hendricks, 942 F. Supp. 499, 503 (D. Kan. 1996) (stating that the availability of less intrusive measures is only one factor in determining the reasonableness of a search and that officials are not required to perform the "least intrusive" search).

3. Eighth Amendment Limitations

Chapter 24 of the *JLM*, "Your Right to Be Free From Assault," explains your rights under the Eighth Amendment, which prohibits cruel and unusual punishment. As this Chapter explains, courts usually view illegal search claims as possible violations of the Fourth Amendment. Sometimes, however, a court may believe a search was so unreasonable that it violates the Eighth Amendment's prohibition against cruel and unusual punishment.[104] (Some illegal searches may also be considered assault and battery.[105])

There is no clear standard about how much pain and suffering is unconstitutional. Courts usually say "the unnecessary and wanton infliction of pain" violates the Eighth Amendment.[106] Prison officials' behavior must meet this standard before a court will find a constitutional violation. But if the official acts only to further some legitimate penological interest and if the pain suffered is a result only incidental to (not the main purpose of) the procedure, then courts will probably say your constitutional rights were not violated.[107] If you believe your Eighth Amendment rights were violated by an illegal search, you should read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," as well as Chapter 24, "Your Right To Be Free From Assault," for more information.

In regard to body searches, the Eighth Amendment is most often triggered by the manner in which the searches are conducted and, at times, by the purpose of the searches. In *Meriwether v. Faulkner*, the prisoner had a sex change operation and claimed that guards made her strip to harass her and to see her unusual physical features.[108] She also claimed that there were no security reasons to search her.[109] The court said that such searches might violate the Eighth Amendment. In addition, in *McRorie v. Shimoda*, the court sustained an Eighth Amendment claim against a prison guard who rammed his baton into the anus of a prisoner during a strip search.[110]

The Seventh Circuit in *Isby v. Duckworth* held that a rectal cavity search conducted in a private room by a doctor, who inserted a gloved and lubricated finger into the prisoner's rectum to check for a weapon, was not abusive, even though the doctor laughed before doing the search while guards held the prisoner down.[111] Similarly, the Ninth Circuit in *Somers v. Thurman* held that a male prisoner did not state an Eighth Amendment claim based on allegations that female guards pointed and joked amongst themselves while observing him showering and while conducting a body cavity search of him.[112] However, the Ninth Circuit in *Dockery v. Bass* held that a prisoner may have an Eighth Amendment claim when officials subjected him to two strip searches, maliciously causing him pain with the excessive use of handcuffs and the forcible insertion of a tube up his anal cavity.[113]

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104. *See*, *e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1524–25 (9th Cir. 1993); Tribble v. Gardner, 860 F.2d 321, 325–26 (9th Cir. 1988) (finding that a rectal probe may have violated the 8th Amendment if it was conducted for purposes unrelated to security considerations, where a prisoner's clothing, hair, hands, and other body cavities were not searched and prisoner's recent X-ray revealed no contraband in his rectum); Dellamore v. Stenros, 886 F. Supp. 349, 351 (S.D.N.Y. 1995) (finding that a plaintiff subjected to a body cavity search without a medical practitioner present stated a claim under § 1983).

105. *See*, *e.g.*, Hammond v. Gordon County, 316 F. Supp. 2d 1262, 1293 (N.D. Ga. 2002) (holding that a female prisoner presented enough evidence to show assault and battery, because she alleged that a guard inserted his fingers into her vagina).

106. Gregg v. Georgia, 428 U.S. 153, 173, 965 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 874 (1976). *See also* Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 1531–32, 170 L. Ed. 2d 420, 432–33 (2008) (upholding the three-drug lethal injection protocol on the grounds that neither the risk of improper administration of the first drug nor the failure to adopt more humane alternatives constitute cruel and unusual punishment).

107. *See* Del Raine v. Williford, 32 F.3d 1024, 1038–42 (7th Cir. 1994) (finding that while rectal searches may inflict pain, if the official has a legitimate reason to conduct them, they do not violate the 8th Amendment). *See also* Gillis v. Litscher, 468 F.3d 488, 492 (7th Cir. 2006) (finding that a behavioral modification program imposed on a prisoner for breaking a rule may have imposed on him "an atypical and significant hardship" in violation of his 8th Amendment rights).

108. Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir. 1987).

109. Meriwether v. Faulkner, 821 F.2d 408, 418 (7th Cir. 1987).

110. McRorie v. Shimoda, 795 F.2d 780, 783 (9th Cir. 1986).

111. Isby v. Duckworth, No. 97-3705, 175 F.3d 1020 (7th Cir. Mar. 11, 1999) (*unpublished*).

112. Somers v. Thurman, 109 F.3d 614, 624 (9th Cir. 1997).

113. Dockery v. Bass, No. 95-17250, 133 F.3d 926 (9th Cir. Dec. 15, 1997) (*unpublished*).

4. DNA Testing

Prisoners can be forced to give DNA samples by state or federal law.[114] Forced DNA testing of prisoners generally does not violate the Fourth Amendment.[115] It is unclear so far if all prisoners can be forced to give DNA samples, not just prisoners convicted of certain types of crimes[116] like sex offenses.[117] Some courts have found that laws requiring DNA sampling of all convicted felons do not violate the Fourth Amendment because the state's interest is more important than the bodily intrusion.[118] See Chapter 11 of the *JLM*, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence," and Chapter 32, "Special Considerations for Sex Offenders," for more information.

5. Statutory Privacy Rights

You may also have privacy rights under state statutes and regulations, in addition to your federal constitutional rights.[119] For example, New York State law requires prisons to give prisoners certain clothing, and to follow specific procedures when giving prisoners urine tests or searching prisoners' religious items.

(a) Clothing

New York State law gives all prisoners the right to the same amount of "facility-issue clothing."[120] Look in your prison library for the New York DOCS Directives (specific prison rules) for more specific information about clothing. Prison officials in New York *cannot* take clothing away as punishment.[121] But they can take clothing away if they think it is dangerous to the prison and/or yourself and is a threat "to the safety,

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114. United States v. Weikert, 504 F.3d 1, 3 (1st Cir. 2007) (upholding a blood draw from a prisoner on supervised release); State v. Martin, 955 A.2d 1144, 1144 (Vt. 2008) (upholding a state law requiring a blood draw from convicted nonviolent felons); United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004) (holding that compulsory DNA profiling of qualified federal offenders was reasonable under the totality of the circumstances, which included the probationer's reduced expectations of privacy, the minimal intrusion occasioned by blood sampling, and the significant societal interests furthered by the collection of DNA information from convicted offenders); Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (*per curiam*) (noting that every circuit court to consider the question of whether statutes compelling collection of DNA samples from felons were violations of the 4th Amendment has held they are not, so the lower court did not err in holding the same thing).

115. Groceman v. U.S. Dept. of Justice, 354 F.3d 411, 413–14 (5th Cir. 2004) (*per curiam*) ("[A]lthough collection of DNA samples from prisoners implicates Fourth Amendment concerns, such collections are reasonable in light of an inmates' diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime … persons incarcerated after conviction retain no constitutional privacy interest against their correct identification."); United States v. Hugs, 384 F.3d 762, 769 (9th Cir. 2004) (finding that a supervised release condition requiring the defendant, a "qualified felon," to cooperate in the collection of DNA does not violate the 4th Amendment).

116. *See* Groceman v. U.S. Dept. of Justice, 354 F.3d 411, 413 n.2 (*per curiam*) (5th Cir. 2004) (noting variety of approaches); Roe v. Marcotte, 193 F.3d 72, 81–82 (2d Cir. 1999) (upholding statute applying to sex offenders but rejecting rationale that would extend to all offenses). *But see* Nicholas v. Goord, 430 F.3d 652, 671 (2d Cir. 2005) (upholding statute applying to assault, homicide, rape, incest, escape, attempted murder, kidnapping, arson, and burglary, and suggesting its rationale applies to all convicted felons); United States v. Amerson, 483 F.3d 73, 83–84 (2d Cir. 2007) (extending the applicability of the DNA collection statute to non-violent probationers under the two-pronged special needs test used in the Circuit when there was a strong governmental interest).

117. *See*, *e.g.*, Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996) (upholding requirement that prisoners convicted of sexual assault provide DNA samples).

118. Padgett v. Ferrero, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (finding felony convictions justified searches, so as to satisfy the 4th Amendment); United States v. Stegman, 295 F. Supp. 2d 542, 550 (D. Md. 2003) (finding DNA analysis was not an unreasonable search or seizure); United States v. Amerson, 483 F.3d 73, 83–84 (2d Cir. 2007) (extending the applicability of the DNA collection statute to non-violent probationers under the two-pronged special needs test used in the Circuit when there was a strong governmental interest and minimal intrusion and invasion of privacy on behalf of the probationers).

119. Prisoners should become familiar with the penal codes of their respective states, as well as the employee manual of their prisons, if possible. The employee manuals will tell you what procedures the guards must follow and may help you challenge the guards' behavior through internal prison grievance procedures.

120. N.Y. Comp. Codes R. & Regs. tit. 9, § 7005.7 (2009). For men, this includes one shirt and one pair of pants. Women receive one shirt and one skirt, dress, or pair of pants. Both men and women should receive two pairs of socks, two sets of underwear, one pair of shoes, and one sweater or jacket for cold weather. Women prisoners are allowed to wear brassieres.

121. N.Y. Comp. Codes R. & Regs. tit. 9, § 7612.6 (2009).

security or good order."[122] If officials want to take away some clothing from you because they think it is dangerous for you to have, they must follow specific procedures.[123] A deprivation order must be authorized by the officer of the day, the deputy superintendent for security services, or a higher official. You must receive a written copy of the order within twenty-four hours. The copy must include the reasons for the order and explain how you can challenge the order. The prison superintendent must also receive a copy. The deprivation order must be reviewed on a daily basis for seven days. If the order is still in effect after seven days, it must be reviewed in writing on a weekly basis. A copy of this review should be sent to you and the superintendent.[124]

(b) Urine Tests

Forcing people to take urine tests or give samples of other bodily fluids is considered a "search"[125] under the Fourth Amendment, and the procedures for urine tests are held to the same standard as other searches. Prison officials may require prisoners to give urine samples for drug testing either with reasonable cause or pursuant to a program designed to prevent selective enforcement or harassment.[126] New York has state regulations about privacy when you take a urinalysis test.[127] The rules have a specific procedure for urine tests. You will be pat-frisked before giving the sample, and someone will watch you give the sample. The person who watches you must be from the security or medical staff, and the person has to be the same sex as you. You should be in a private place where no other prisoners or staff can see you.[128]

(c) Searches of Religious Items

In New York, religious items such as a Native American prisoner's medicine bag can only be inspected in a manner that respects its religious significance. However, a medicine bag may be scanned at any time with a metal or other electronic detector. A prisoner must also hold the medicine bag open for prison officials to look inside if the official has reason to believe that it may contain contraband.[129] See *JLM*, Chapter 27, "Religious Freedom in Prison," for more information on religious rights in prison.

6. Departmental Directives and Privacy Rights

The New York DOCS Directives has specific rules for each state prison. Look in your prison library for a copy of these directives.

These directives have additional rules for searches that may be stricter than the court rules. For example, the directives say that only a physician under the supervision of Central Office physician guidance can conduct body cavity searches.[130] The body cavity search must take place in the examining room. The official must use professional, hygienic techniques and explain the procedure to you. The physician must also give you a chance to yield contraband voluntarily. One corrections officer of your sex must be present to

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122. N.Y. Comp. Codes R. & Regs. tit. 9, § 7612.6(d) (2009).

123. N.Y. Comp. Codes R. & Regs. tit. 7, § 305.2 (2009).

124. N.Y. Comp. Codes R. & Regs. tit.7, § 305.2(b) (2009).

125. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 639, 660 (1989) (holding that the Federal Railroad Administration's policy of drug testing by collecting and testing urine samples and samples of other bodily fluids constitute "searches" under the 4th Amendment).

126. Hurd v. Scribner, No. 06CV0412, 2007 U.S. Dist. Lexis 32651, at *9 (S.D. Cal. May 02, 2007) (*unpublished*) (upholding, in response to habeas petition, discipline taken against a prisoner who refused a drug test); Louis v. Dept. of Corr. Servs. of Neb., 437 F.3d 697, 700 (8th Cir. 2006) (holding in a § 1983 action that prisons requiring tests do not need to allow prisoners to sign and seal their own urine specimens and do not have to conduct a GC/MS test where the test shows a positive result but prisoner denies using drugs); Thompson v. Souza, 111 F.3d 694, 702–03 (9th Cir. 1997) (upholding urine testing of group of 124 prisoners); Lucero v. Gunter, 17 F.3d 1347, 1350 (10th Cir. 1994) (upholding random tests); Forbes v. Trigg, 976 F.2d 308, 314–15 (7th Cir. 1992) (upholding urinalysis of all prisoners in certain jobs).

127. N.Y. Comp. Codes R. & Regs. tit. 7, § 1020.4 (2008).

128. N.Y. Comp. Codes R. & Regs. tit. 7, § 1020.4 (2008); *see also* State of New York, Department of Correctional Services, Directive 4937, Urinalysis Testing, at 2 (2006).

129. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 8 (2001) (*as revised* Dec. 11, 2006).

130. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 6 (2001) (*as revised* Dec. 11, 2006).

witness the examination.[131] These rules are intended to make sure that no one, including health officials, humiliates or harasses you. If anyone does harass you, you may bring a complaint alleging violation of the professional standards set out in the directives.

The New York Directives also say that when you are transferred from one DOCS facility to another, you will be strip frisked and subjected to a metal detector search at the facility from which you are being transferred, but you will not be strip searched or strip frisked at the receiving facility. You may be subjected to a metal detector search at the receiving facility, though. The same policy applies when you are transferred from one Special Housing Unit to another Special Housing Unit. However, there is an exception if an officer has "probable cause" to believe that you are carrying contraband.[132]

When you are strip searched or strip frisked, prison officials must make sure you have some privacy. Only the prison official doing the search should be there, although a supervisor may observe.[133] Additional corrections officers should be present only if there are major disturbances or if it is likely that you will resist the search, and prisoners may be searched in groups if there is a major disturbance at the facility. The prison should limit traffic as much as possible where strip searches are conducted. Officers of the same sex as you must conduct strip searches and strip frisks.[134]

A very important rule about strip searches in New York is that officers must always act professionally. They have to be aware of the sensitive nature of searches and must "conduct such searches in a manner least degrading to all involved."[135] Typically, if you cooperate in a non-body cavity search, the officer may not touch you, except to run fingers through your hair, if necessary.[136] If you believe that a search is conducted improperly, you can use the New York Inmate Grievance Program or an Article 78 proceeding to seek a remedy.[137] If you believe the search also violated your constitutional rights, then you can use the legal remedies in Part E of this Chapter. If you are incarcerated in another state, it is likely that there are similar regulations to protect your rights. See Chapter 2 of the *JLM*, "Introduction to Legal Research," for more information on legal research so that you can find the laws and regulations of the state where you are incarcerated.

D. Should You Resist an Illegal Body Search?

If you are searched in a way that you believe is illegal or against a prison regulation, it is best to allow the search to take place. (Prison officials can use force to make you obey orders, even if those orders may be illegal, so resisting is often not possible.) Courts have held that prisoners must follow orders so that prison rules can be administered safely and in an orderly way.[138] Even if you believe that an order violates your constitutional rights, courts say that you do not have the right to resist the order.[139]

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131. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 7 (2001) (*as revised* Dec. 11, 2006).

132. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 8–9 (2001) (*as revised* Dec. 11, 2006).

133. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 5 (2001) (*as revised* Dec. 11, 2006).

134. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 5 (2001) (*as revised* Dec. 11, 2006).

135. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 5 (2001) (*as revised* Dec. 11, 2006).

136. State of New York, Department of Correctional Services, Directive 4910, Control of and Search for Contraband, at 6 (2001) (*as revised* Dec. 11, 2006).

137. See *JLM*, Chapter 15, "Inmate Grievance Procedures," and Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on inmate grievance procedures and Article 78 proceedings.

138. Griffin v. Comm'r of Pa. Prisons, No. 90-5284, 1990 U.S. Dist. LEXIS 17951, at *11 (E.D. Pa. Dec. 10, 1991) (*unpublished*), *aff'd*, 961 F.2d 208 (3d Cir. 1992) ("Even if plaintiff considered the order illegal, plaintiff should not have refused to follow it because it is critical to the orderly administration of a prison that prisoners follow orders."). *See also* Williams v. Delo, 49 F.3d 442, 446 (8th Cir. 1995) (finding that prisoner's refusal to follow the orders of corrections officials posed a threat to institutional security); Eccleston v. Oregon *ex rel.* Or. Dept. of Corr., 168 F. App'x 760, 761 (9th Cir. 2006) (finding that prison official's use of chemical agent on prisoner who repeatedly refused to follow orders to leave his cell was not cruel and unusual punishment).

139. Pressly v. Gregory, 831 F.2d 514, 518 n.3 (4th Cir. 1987) (citing Wright v. Bailey, 544 F.2d 737 (1976), for the proposition that you cannot resist arrest by stating that the arrest is illegal unless the illegality is clear at the time of the arrest); Jackson v. Allen, 376 F. Supp. 1393, 1394–95 (E.D. Ark. 1974) (holding that, because of the discipline

It is safest for you *not* to resist the prison official, because if you resist you probably will be disciplined and you may be injured. You can later file a lawsuit to help prevent future violations of your rights and to punish the official. Any disciplinary action taken against you for resisting the search will be added to your record, affecting your good-time credit and your chances of parole. If you resist a search and then bring a lawsuit, winning the suit may mean the court will clear your disciplinary record after finding the search violated prison rules.[140] However, resisting a search—even if it is obviously illegal— is more likely to lead to a permanent mark on your disciplinary record. Courts rarely order a disciplinary record to be changed, so it is unlikely that a permanent mark due to your resisting an illegal search can ever be eliminated.[141] Courts want prisoners to challenge violations of their rights in courts, not to refuse to obey orders from prison officials.[142] Do not count on the courts to clear your record, especially if the order you disobey is not clearly contrary to a prison's own rules.

E. Legal Remedies

If you believe your rights have been violated, remember you *must* first file an administrative grievance at your institution. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for further information.[143] You can then file a Section 1983 lawsuit if you believe prison officials or other government employees (including police officers) have violated any of your constitutional rights. In addition, you can file a class action law suit, which involves a group of plaintiffs bringing a lawsuit together.

If you think that prison officials have violated your Eighth or Fourth Amendment rights, you may sue the officials or guards using 42 U.S.C. § 1983. Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional rights while acting "under color of state law."[144] You can sue federal officials in a similar suit, called a *Bivens* action.[145]

You can also use Section 1983 to sue local officials as long as you can show that they too acted under "color of state law." But note that you can only sue municipalities (towns, cities, or counties) under 42 U.S.C. § 1983 if your injury was the result of an official municipal policy or custom.[146] To sue a city or a county, then, you will have to show that the "execution of [the] government's policy or custom ... inflict[ed] the injury."[147] In other words, a local government will be held liable only if an injury can be shown to be a direct

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structure of prisons, prisoners do not have the right to resist an unconstitutional order or punishment unless resistance is necessary to prevent one's own death). *But see* Purcell v. Pa. Dept. of Corr., No. 95-6720, 1998 U.S. Dist. LEXIS 105, at *26–27 (E.D. Pa. Jan. 9, 1998) (finding that, because prisoner might have suffered injury by following order and had medical authorization that led him to believe that he did not have to obey the order, prisoner can proceed with action against prison officials).

140. *See* Dunne v. Reid, 93 Misc. 2d 50, 52, 402 N.Y.S.2d 923, 923 (Sup. Ct. Dutchess County 1978) (ordering prisoner's disciplinary record from resisting search cleared after finding prison officials acted in violation of prison regulations when they tried to search the prisoner in front of other people, despite prison rules that said searches must respect prisoners' privacy).

141. *See*, *e.g.*, Mahogany v. Stalder, 242 F. App'x 261, 263 (5th Cir. 2007) (dismissing prisoner's claim seeking restoration of good-time credits and expungement of disciplinary proceedings from his record).

142. *See* Rivera v. Smith, 63 N.Y.2d 501, 515, 472 N.E.2d 1015, 1022, 483 N.Y.S.2d 187, 194 (1984) ("[T]he recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy."). *But see* Sanchez v. Scully, 143 Misc. 2d 889, 889, 542 N.Y.S.2d 920, 920 (Sup. Ct. Dutchess County 1989) (holding that, given the existence of unambiguous statutory language in support of prisoner's refusal to work in excess of eight hours per day, the record of the subsequent disciplinary proceeding should be expunged from the inmate's record); Dunne v. Reid, 93 Misc. 2d 50, 52, 402 N.Y.S.2d 923, 923 (Sup. Ct. Dutchess County 1978) (finding disciplinary action inappropriate where the prisoner resisted a search that violated the prison's own regulations).

143. *See*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 515–23 (5th Cir. 2004) (describing in detail the requirement that a prisoner exhaust administrative remedies before filing a lawsuit).

144. 42 U.S.C. § 1983 (2006).

145. Prisoners can make constitutional claims against federal officials in federal court under 28 U.S.C. § 1331 by using *Bivens* actions. See Part E(1) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more information on *Bivens* actions.

146. *See*, *e.g.*, Williams v. Kaufman County, 352 F.3d 994, 1013–14 (5th Cir. 2003) (holding that the municipality could be held liable for unlawful searches of detainees because the policy was authorized by the sheriff, the relevant policymaker).

147. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525–27 Cal. Rptr. 2d 433, 442–43 (Cal. Ct. App. 1994) (finding that a complaint alleging that City of Hemet's adoption of a policy or custom not to train its jailers in suicide screening and prevention was the proximate cause of a prisoner's suicide may not be summarily dismissed without determination

result of the local government's official policy, either express or implied.[148] Therefore, a local government is not liable under Section 1983, "for an injury inflicted solely by its employees or agents" who were not following official local policy,[149] even though the local officials may be individually liable under Section 1983. You should read *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," to learn more about Section 1983 claims.

There have also been successful class actions challenging official municipal policies under 42 U.S.C. § 1983. Class actions are a type of lawsuit where many plaintiffs sue together for similar violations of their rights.[150] Most successful class action cases challenging prison search policies have been brought on behalf of non-violent, non-drug misdemeanor arrestees, not convicted prisoners.[151]

It is important to remember different laws apply in state and federal prisons. If you are in a federal prison, it does not matter what state the prison is in. Federal prisons only use federal law. If you are in a state prison, you can use both state and federal laws. But, remember that each state creates its own laws. You must research the laws of your particular state and how prisoners in your state file suits in that state's courts. Federal constitutional rights are protected regardless of whether you are in state or federal prison, but the way you present your case—what legal claims you make and how you make them—will differ.

F. Conclusion

In conclusion, although your rights against involuntary exposure and body searches are substantially limited in prison, it is possible for your rights to be violated under the Fourth Amendment, Eighth Amendment, or under certain state statutory provisions. Whether your rights have been violated will depend in large part on the reasonableness behind the search, or behind the policy leading to the involuntary exposure. It will also depend on what kind of search or exposure is at issue. The more cases you can find with facts similar to your own situation, the better your chances of showing that your rights were violated.

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of fact as to whether or not the city adopted a policy or custom to inadequately train jailers (quoting Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690, 98 S. Ct. 2018, 2035, 56 L. Ed. 2d 611, 635 (1978))). For an example of such a municipal policy or custom, see Blihovde v. St. Croix County, 219 F.R.D. 607, 612 (W.D. Wis. 2003) (describing a county's strip-search policy).

148. Blihovde v. St. Croix County, 219 F.R.D. 607, 618 (W.D. Wis. 2003) ("Even when there is no express policy, a municipality may be liable when there is a 'custom' of unconstitutional conduct." (citing Monell v. Dept. of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 635 (1978))); *see also* Amnesty America v. Town of W. Hartford, 361 F.3d 113, 124–27 (2d Cir. 2004) (reviewing the law of municipal liability in a damage suit for excessive force).

149. Irwin v. City of Hemet, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994).

150. See Chapter 5 of the *JLM*, "Choosing a Court and Lawsuit" for information on class actions in general and Part D(1) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for information on § 1983 class actions.

151. *See*, *e.g.*, Bynum v. District of Columbia, 217 F.R.D. 43, 45–49 (D.D.C. 2003) (certifying a § 1983 class action claiming 4th and 5th Amendment violations, where plaintiffs challenged prison policy of conducting suspicionless strip searches of prisoners returning from court with orders for their release). *Bynum* later settled for $12 million and the District of Columbia agreed to "no longer strip search [detainees] who are entitled to release." Bynum v. District of Columbia, 384 F. Supp. 2d 342, 359 (D.D.C. 2005). *See also* Tardiff v. Knox County, 365 F.3d 1, 7 (1st Cir. 2004) (affirming class certification for non-violent, non-drug arrestees challenging policy of blanket, routine strip searches without reasonable suspicion); Blihovde v. St. Croix County, 219 F.R.D. 607, 613–21 (W.D. Wis. 2003) (affirming amended class definition in a § 1983 class action, alleging plaintiffs, all misdemeanor non-drug, non-violent arrestees, were subjected to strip searches without reasonable suspicion according to a county prison policy in violation of the 4th and 14th Amendments); Nilsen v. York County, 382 F. Supp. 2d 206, 209 (D. Me. 2005) (approving $3.3 million settlement in § 1983 class action over strip searches of non-drug, non-weapon, and non-violent arrestees at county jail; plaintiffs alleged the strip searches were conducted pursuant to county jail policy, without individualized reasonable suspicion in violation of the 4th Amendment; the settlement also required county to maintain a written policy prohibiting the challenged strip searches).

A JAILHOUSE LAWYER'S MANUAL

Chapter 26: Infectious Diseases: AIDS, Hepatitis, Tuberculosis and MRSA in Prisons

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CHAPTER 26

INFECTIOUS DISEASES: AIDS, HEPATITIS, TUBERCULOSIS AND MRSA IN PRISONS*

A. Introduction

This Chapter explains your legal rights about infectious diseases in prison. This Chapter has information both for prisoners who already have an infectious disease (like HIV/AIDS, tuberculosis, hepatitis B, hepatitis C or Methicillin-resistant Staphylococcus aureus (MRSA)), and for prisoners who want to avoid getting an infectious disease. Part B gives you some basic facts about infectious diseases. Section (1)(a) of Part B also describes how women may have different symptoms of HIV/AIDS. Part C explains the general standard used to determine whether a prison policy is constitutional. Part D is about prison medical testing for infectious diseases—whether a prison can force you to get tested or have others tested. Part E discusses disease prevention and segregation issues. Part F discusses the role of confidentiality and what you can expect in terms of keeping your health status private in prison. Part G deals with treatment options and your legal rights to those options. Part H discusses issues of discrimination. Part I discusses sentencing issues. Part J discusses planning for your release, if you have an infectious disease. Finally, Appendix A lists resources for further information, counseling, and support for you and your family.

You should also read other Chapters of the *JLM* to understand your legal rights, especially Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," Chapter 32, "Special Considerations for Sex Offenders," Chapter 28, "Rights of Prisoners with Disabilities," Chapter 23, "Your Right to Adequate Medical Care," and Chapter 35, "Getting Out Early: Conditional & Early Release."

There are more court cases about HIV/AIDS than about tuberculosis, hepatitis B, hepatitis C and MRSA. Because judges always look at the specific facts of each case, try to find cases about your disease. But, you also can try to make comparisons between different diseases because the diseases are very similar, including how they are spread and their effects on prisoners. For example, if you want to use a case about AIDS and argue the law should also apply to hepatitis C, you should try to explain your reasons as clearly as possible.

This Chapter is only a summary of the many issues about infectious diseases in the prison system. You probably will have to do more research elsewhere. This Chapter, for example, only includes HIV/AIDS, tuberculosis, hepatitis (the most common infectious diseases in prison), and MRSA, but there are many other diseases. Scientists are always discovering new information about infectious diseases, so some of this information may not be correct in the future.

B. Background Information on Infectious Diseases

1. HIV and AIDS

HIV, the Human Immunodeficiency Virus, is the virus that causes AIDS.[1] AIDS stands for Acquired Immunodeficiency Syndrome. Over time, the HIV virus weakens your immune system so your body cannot fight off infection properly. You may develop various infections—known as "opportunistic" infections—that take advantage of your body's weakened condition.[2]

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* This Chapter was rewritten by Carrie Ellis based, in part, on previous versions of "AIDS in Prison" and "AIDS, Tuberculosis, and Hepatitis in Prison" by Emily Monroe, Jin Hee Lee, Stephanie I. R. Fidler, Sara Corello, and Paul Farrell Mapelli. Special thanks to Milton Zelermyer Prisoners' Rights Project, The Legal Aid Society of New York; Madeline deLone, Innocence Project; and Jennifer Wynn, Prison Visiting Project, Correctional Association of New York, for their helpful comments.

1. Div. of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., What is HIV?, *available at* http://www.cdc.gov/hiv/resources/qa/definitions.htm (last visited Sept. 26, 2010). The *JLM* knows that many prisoners do not have access to the Internet, but because we want this information to be up-to-date, we cite frequently to different agencies' and organizations' Internet websites.

2. Div. of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., Basic Information about HIV and AIDS, *available at* http://www.cdc.gov/hiv/topics/basic/index.htm.

About half of people with HIV develop AIDS within ten years of getting HIV. How long it takes for HIV to develop into AIDS is different for each person. Medical treatments can slow down how fast HIV weakens your body.[3] As HIV gets worse and becomes AIDS, people become sick with serious illnesses and infections.

Being HIV-positive *does not* mean that you have AIDS. It is very important that you consult a doctor to find out if you are infected with HIV or if you have developed AIDS so that you can receive the proper medical treatment. The only way you can know for certain if you are infected is to be tested.

In 2008, it was estimated that about 1,073,128 people in the United States had been diagnosed with AIDS.[4] The estimated rate of confirmed AIDS in State and Federal prisons was more than two times higher than in the general population.[5] In 2007, it was estimated that about 2,675 prisoners in New York State—excluding New York City—were HIV-positive, and 3,964 prisoners had AIDS.[6]

HIV is most commonly spread by having unprotected anal, vaginal, or oral sex with a person with HIV; sharing needles or injection equipment with a drug user who has HIV; from an HIV-infected mother to her baby, before or during birth or through breast-feeding;[7] and through unsanitary tattooing or body piercing procedures.[8]

You cannot get HIV by working with or being around someone who has HIV, or by sharing a cell with another prisoner who is HIV-positive. You also cannot get HIV from sweat, spit, tears, clothes, drinking fountains, telephones, toilet seats, or through everyday activities like sharing a meal. HIV is also not transmitted through insect bites or stings, donating blood, or through closed-mouth kissing (although there is a very small chance of getting it from open-mouthed or "French" kissing with someone who is HIV-positive because of possible blood contact through open wounds, warts, etc.).[9]

If you are currently HIV-negative, you can help avoid getting HIV by taking the following steps:

(1) Never share needles or syringes if you inject drugs or get a tattoo or body piercing.
(2) Do not share equipment used to prepare and inject drugs ("works").
(3) Use a latex condom—not a lambskin condom—every time you have sex, including anal and oral sex.
(4) Never share razors or toothbrushes because of the risk of contact with someone else's blood.

Taking these precautions can help protect you from contracting the HIV infection.

(a) Women and HIV/AIDS

Symptoms of HIV are often different for women than for men. Because these symptoms are typically not associated with HIV, many women go undiagnosed until the virus progresses to AIDS.[10] Early signs for a woman with HIV include gynecological disorders, especially pelvic inflammatory disease ("PID"), infections causing abnormal pap smears (cervical dysplasia), and chronic yeast infections.[11] HIV-positive women also have a higher risk of developing cervical cancer.[12] If you are HIV-positive, getting a complete gynecological

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3. Div. of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., How long does it take for HIV to cause AIDS?, *available at* http://www.cdc.gov/hiv/resources/qa/definitions.htm (last visited Sept. 26, 2010).

4. Div. of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., Basic Statistics, *available at* http://www.cdc.gov/hiv/topics/surveillance/basic.htm#aidsdiagnoses (last visited Sept. 26, 2010).

5. Office of Justice Programs, U.S. Dept. of Justice, HIV in Prisons, 2007-2008, Publ'n No. NCJ 228307, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf (last visited Sept. 26, 2010).

6. Bureau of HIV/AIDS Epidemiology, N.Y. Dept. of Health, New York State HIV/AIDS Surveillance Annual Report: For Cases Diagnosed Through December 2007, at 46 (May 2009), *available at* http://www.health.state.ny.us/diseases/aids/statistics/annual/2007/2007-12_annual_surveillance_report.pdf (last visited Sept. 26, 2010).

7. Div of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., How is HIV Passed from One Person to Another?, *available at* http://www.cdc.gov/hiv/resources/qa/transmission.htm (last visited Sept. 26, 2010).

8. Div. of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., Can I Get HIV From Getting a Tattoo or Through Body Piercing?, *available at* http://www.cdc.gov/hiv/resources/qa/transmission.htm (last visited Sept. 26, 2010).

9. Div. of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., HIV and AIDS: Are You at Risk?, *available at* http://www.cdc.gov/hiv/resources/brochures/at-risk.htm (last visited Sept. 26, 2010).

10. *See* Louise G. Trubek & Elizabeth A. Hoffman, *Vital Issues in National Health Care Reform: Searching for a Balance in Universal Health Care Reform: Protection for the Disenfranchised Consumer*, 43 DePaul L. Rev. 1081, 1087 (1994).

11. Div.of HIV/AIDS Prevention, U.S. Dept. of Health & Human Servs., HIV/AIDS and Women, *available at* http://www.cdc.gov/hiv/topics/women/overview_partner.htm (last visited Sept. 26, 2010).

12. Nat'l Cancer Inst., What You Need to Know About: Cervical Cancer: Risk Factors, *available at* http://www.cancer.gov/cancertopics/wyntk/cervix/page4 (last visited Sept. 26, 2010) .

exam, including an inspection of the cervix (colposcopy) and a pap smear every six months, is important to detect any problems early. If you believe you may be infected with HIV or AIDS, try to get tested.

Appendix A includes several organizations and sources of information about HIV and AIDS. *If you are HIV-positive, it is important that you be tested for tuberculosis,* which is a very contagious and serious disease, because HIV-positive people have a much higher risk of getting tuberculosis.[13]

2. Tuberculosis

Tuberculosis ("TB") is a disease caused by bacteria that are spread through the air. When you breathe in the bacteria, they usually settle in and attack your lungs,[14] but the bacteria can also move to and attack other parts of your body.[15] Outside of prison, TB does not spread that easily, but in prison, TB spreads much more easily because of overcrowding and poor ventilation. People born outside the United States (especially in Latin America, the Caribbean, Africa, Asia, Eastern Europe, or Russia) are more likely to have been infected with the bacteria.[16] People who have spent time in places where TB is common, like homeless shelters, drug treatment centers, health care clinics, jails, and prisons, are also more likely to have TB infection.[17]

It is important to know that being infected with the TB bacteria is *not* the same as having TB disease. If you have TB infection ("latent TB"), you will have no symptoms and you cannot spread TB to others. But if you do not get medical treatment, your TB infection can develop into TB disease ("active TB").[18] If you have active TB, you can have symptoms like a bad cough lasting more than three weeks, pain in your chest, coughing up blood or phlegm, weakness or fatigue, weight loss, no appetite, chills, fever, or night sweating.[19]

TB is particularly dangerous for HIV-positive people because of their weakened immune systems. In fact, TB is one of the leading causes of death for HIV-positive people.[20] Although ten to fifteen million Americans have latent TB,[21] only about five to ten percent develop active TB disease during their lives.[22] But, people with both HIV and TB bacteria are much more likely to develop active TB than HIV-negative people.[23]

Be sure to consult other sources and prison medical professionals if you think you have TB. Active TB disease can be treated and cured if you get medical care, take prescription medication, and follow doctor's orders.[24]

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13. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., TB and HIV Coinfection, *available at* http://www.cdc.gov/tb/topic/TBHIVcoinfection/default.htm (last visited Sept. 26, 2010).

14. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Basic TB Facts, *available at* http://www.cdc.gov/tb/topic/basics/default.htm (last visited Sept. 26, 2010).

15. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Basic TB Facts, *available at* http://www.cdc.gov/tb/topic/basics/default.htm (last visited Sept. 26, 2010).

16. Ctrs. for Disease Control & Prevention, Travelers' Health- Yellow Book, Chapter 5: Other Infectious Diseases Related to Travel: Tuberculosis, *available at* http://wwwnc.cdc.gov/travel/yellowbook/2010/chapter-5/tuberculosis.aspx (last visited Sept. 26, 2010).

17. Ctrs. for Disease Control & Prevention, Travelers' Health- Yellow Book, Chapter 5: Other Infectious Diseases Related to Travel: Tuberculosis, *available at* http://wwwnc.cdc.gov/travel/yellowbook/2010/chapter-5/tuberculosis.aspx (last visited Sept. 26, 2010).

18. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Basic TB Facts, *available at* http://www.cdc.gov/tb/topic/basics/default.htm (last visited Sept. 26, 2010).

19.Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Basic TB Facts: Signs and Symptoms of TB Disease, *available at* http://www.cdc.gov/tb/topic/basics/signsandsymptoms.htm (last visited Sept. 26, 2010).

20. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., TB and HIV Coinfection, *available at* http://www.cdc.gov/tb/topic/TBHIVcoinfection/default.htm (last visited Sept. 26, 2010).

21. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Fact Sheet – Trends in Tuberculosis (2009), available at http://www.cdc.gov/tb/publications/factsheets/statistics/TBTrends.htm (last visited October 12, 2010).

22. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Fact Sheet – The Difference Between Latent TB Infection and Active TB Disease (2010), *available at* http://www.cdc.gov/tb/publications/factsheets/general/LTBIandActiveTB.htm (last visited October 12, 2010).

23. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., TB and HIV Coinfection, *available at* http://www.cdc.gov/tb/topic/TBHIVcoinfection/default.htm (last visited Sept. 26, 2010).

24. Div. of Tuberculosis Elimination, U.S. Dept. of Health & Human Servs., Tuberculosis (TB): Treatment, *available at* http://www.cdc.gov/tb/topic/treatment/default.htm (last visited Sept. 26, 2010).

3. Hepatitis B and Hepatitis C

Hepatitis is a disease that attacks the liver. There are different types of hepatitis, but the most common types among prisoners are hepatitis B and hepatitis C.

(a) Hepatitis B

In 2007, there were about 43,000 new hepatitis B infections in the United States.[25] About 2,000 to 4,000 people die each year from hepatitis B.[26] The hepatitis B virus, like HIV, is spread by having sex with infected persons without a condom, through sharing needles ("works") when shooting drugs, through needle sticks or sharp exposures on the job, or from an infected mother to her baby during birth.[27] You can avoid getting hepatitis B by taking the same precautions as you would for HIV.

People who have hepatitis B often do not have any symptoms, but can still spread the virus to other people.[28] If you do have symptoms, you may develop yellow eyes and skin, tiredness, loss of appetite, dark urine, abdominal pains, and nausea. There are vaccines to protect you from hepatitis B, but once you get hepatitis B, there is no cure. You should still get medical attention, however, because there are medical treatments to help your symptoms.[29] If you have hepatitis B, you should get tested for HIV and hepatitis C.

(b) Hepatitis C

Hepatitis C virus ("HCV") causes hepatitis C. In 2007, there were an estimated 17,000 new hepatitis C virus infections in the United States, and there were about 3.2 million chronically or permanently infected persons.[30] Almost 80% of infected persons do not show any signs or symptoms of hepatitis C. Many people infected with hepatitis C may not show any symptoms for twenty or thirty years. Hepatitis C symptoms include yellow skin, dark urine, fatigue, abdominal pain, and loss of appetite.[31] Most people (around 70%) with chronic HCV infection have some liver damage. If you have hepatitis C, you should not drink alcohol because alcohol can make your liver damage worse.[32]

While few people outside of prison have HCV, a very high percentage of prisoners are infected with HCV.[33] To avoid getting hepatitis C, you should:

(1) Never shoot drugs (if you cannot stop, never reuse or share syringes, water, or "works");
(2) Never share toothbrushes, razors, or other personal care items;
(3) Avoid getting a tattoo or body piercing if there is a chance that someone else's blood is on the tools or the artist or piercer does not follow good health practices;[34]
(4) Avoid having unprotected sex.

Though the risk of spreading hepatitis C through sexual intercourse is low, it is spread through direct contact with infected blood.[35] If you have hepatitis C, you should be tested for HIV and hepatitis B.

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25. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/B/bFAQ.htm#statistics (last visited Sept. 26, 2010).

26. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/HBV/HBVfaq.htm#overview (last visited October 12, 2010).

27. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/B/bFAQ.htm#overview (last visited Sept. 26, 2010).

28. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/B/bFAQ.htm#overview (last visited Sept. 26, 2010).

29. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis B FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/B/bFAQ.htm#overview (last visited Sept. 26, 2010).

30. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis C FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/C/cFAQ.htm (last visited Sept. 26, 2010).

31. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis C FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/C/cFAQ.htm (last visited Sept. 26, 2010).

32. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis C FAQs for the Public, *available at* http://www.cdc.gov/hepatitis/C/cFAQ.htm (last visited Sept. 26, 2010).

33. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Viral Hepatitis Scientific Information- Specific Settings: Correctional Facilities and Viral Hepatitis, *available at* http://www.cdc.gov/hepatitis/Settings/Corrections.htm (last visited Sept. 26, 2010).

34. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis C General Information (2010), *available at* http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf (last visited Sept. 26, 2010).

35. Div. of Viral Hepatitis, U.S. Dept. of Health & Human Servs., Hepatitis C General Information (2010), *available at* http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf (last visited Sept. 26, 2010).

4. Methicillin-resistant Staphylococcus Aureus ("MRSA")

Staph is a kind of bacteria that can cause various infections, including everything from minor skin problems to serious, fatal infections.[36] Methicillin-resistant *Staphylococcus aureus*, or "MRSA," is a kind of staph not easily treatable with the antibiotics that normally cure a staph infection.[37] Many people carry staph bacteria in their nasal passages without getting sick.[38] Illness can develop if the bacteria enter the skin, often through a scratch, scrape or another minor wound. Most cases of MRSA happen in health-care settings like hospitals, but outbreaks in prisons are becoming more common.[39]

The first symptom of MRSA is usually a skin infection easily mistaken for a pimple, boil or insect bite.[40] The infection may be painful, swollen, red or produce pus.[41] It can develop into a large abscess or blister.[42] MRSA is usually treatable, either by draining the wound or taking antibiotics.[43] Do not drain the wound yourself, since this can cause the infection to spread.[44] The infection may return even after treatment.[45]

MRSA and other staph infections can be spread to other people through direct physical contact or, less commonly, through contact with an infected surface or object.[46] The risk can be lessened by keeping wounds clean, dry and covered.[47] It is also important to keep shared surfaces clean, wash your hands often (especially after touching a wound), and avoid sharing personal items like razors and clothing.[48] If you suspect you have MRSA, it is especially important to seek treatment if you have HIV or another immune system problem, because a MRSA infection may lead to more serious problems.[49]

C. Constitutional Rights In A Prison Setting

The rest of this Chapter discusses your rights to treatment for and protection from infectious diseases in prison. It also explains when and how a correctional facility can limit your rights to treatment and protection. This Part explains the general legal standard that courts use to determine if a prison policy is constitutionally valid. Knowing the rule will help you better understand the court decisions in this Chapter.

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36. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Definition of MRSA, *available at* http://www.cdc.gov/mrsa/definition/index.html (last visited Sept. 26, 2010).

37. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Definition of MRSA, *available at* http://www.cdc.gov/mrsa/definition/index.html (last visited Sept. 26, 2010).

38. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Definition of MRSA, *available at* http://www.cdc.gov/mrsa/definition/index.html (last visited Sept. 26, 2010).

39. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Causes of MRSA Infections, *available at* http://www.cdc.gov/mrsa/causes/index.html (last visited Sept. 26, 2010).

40. Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. Times, Oct. 27, 2007 at B4, *available at* http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt (last visited Sept. 26, 2010).

41. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Symptoms of MRSA, *available at* http://www.cdc.gov/mrsa/symptoms/index.html (last visited Sept. 26, 2010).

42. Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. Times, Oct. 27, 2007 at B4, *available at* http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt. (last visited Sept. 26, 2010).

43. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Treatment of MRSA Infections, *available at* http://www.cdc.gov/mrsa/treatment/index.html (last visited Sept. 26, 2010).

44. Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. Times, Oct. 27, 2007 at B4, *available at* http://www.nytimes.com/2007/10/27/nyregion/27mrsa.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt (last visited Sept. 26, 2010).

45. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Treatment of MRSA Infections, *available at* http://www.cdc.gov/mrsa/treatment/index.html (last visited Sept. 26, 2010).

46. Federal Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections, at 29 (2010), *available at* http://www.bop.gov/news/PDFs/mrsa.pdf (last visited Sept. 26, 2010).

47. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Personal Prevention of MRSA Skin Infections, *available at* http://www.cdc.gov/mrsa/prevent/personal.html (last visited Sept. 26, 2010).

48. Div. of Healthcare Quality Promotion, U.S. Dept. of Health and Human Servs., Personal Prevention of MRSA Skin Infections, *available at* http://www.cdc.gov/mrsa/prevent/personal.html (last visited Sept. 26, 2010).

49. Divya Ahuja, MD, and Helmut Albrecht, MD, HIV and Community-Acquired MRSA, Journal Watch HIV/AIDS Clinical Care (2009), *available at* http://aids-clinical-care.jwatch.org/cgi/content/full/2009/209/1 (last visited Jan. 27, 2010).

In general, correctional facilities can limit your constitutional rights if the prison's actions are "reasonably related to a legitimate penological interest."[50] To decide if a prison policy has a legitimate penological interest, courts look at four factors:

(1) The existence of a valid, rational connection between the prison policy and a legitimate state interest;
(2) The existence of alternative means of exercising the right being limited;
(3) The impact granting the right will have on correction officers, other prisoners, or the allocation of prison resources; and
(4) Whether the prison policy or regulation is an exaggerated response to prison concerns.[51]

These four factors are often referred to as the *Turner* standard, since the Supreme Court first stated this standard in *Turner v. Safley*.[52]

So, if you think a prison policy illegally violates your constitutional rights, you may want to argue that there is no legitimate penological interest which justifies the violation, or at least, that the interest is not "reasonably related" to the actions or policy of the prison officials. You can also try to argue that there are other ways of accomplishing the same governmental goal without compromising your constitutional rights.

D. Legal Rights Concerning Testing For Infectious Diseases

1. Involuntary Testing

Mandatory testing policies vary widely among states. States may also have different policies for different diseases, so a state may require prisoners to take a TB test but not an HIV test, for example. If you are outside New York State, you should check your state's laws to find out what its testing policies are. Courts generally allow prisons to test prisoners for infectious diseases, even without a prisoner's consent, because courts find that the prevention of disease is a legitimate state interest.[53]

(a) HIV Testing

In New York State prisons, you normally cannot be tested for HIV without your consent (you must voluntarily agree to be tested).[54] But, if you are convicted of certain sex offenses, you can be tested for HIV against your will if the victim requests that you be tested.[55] You will learn your test results and the results will also be sent to the victim, and possibly to the victim's immediate family, guardian, physicians, attorneys, and medical or mental health providers. Contacts of the victim may also be notified if there was a risk of HIV transmission.[56] Your test results cannot be used against you in a civil or criminal proceeding related to the events that were the basis of your conviction.[57]

Federal prisons, unlike New York state prisons, can require a prisoner to undergo HIV testing, although federal prisons do not test all prisoners. If you have a sentence of six months or more, and if medical personnel think you might be HIV-infected, they may require you to take an HIV test.[58] If you refuse the test, you might receive an incident report for failing to follow an order.[59] Also, if you refuse testing, you may not be able to file a claim for failure to receive adequate medical care.[60] Additionally, federal prisons conduct

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50. Turner v. Safley, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77–78 (1987) (holding that prison systems' regulations of inmate marriages and inmate-to-inmate correspondence must meet a "reasonable relationship" standard.)

51. Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987).

52. Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

53. *See*, *e.g.*, Rossi v. Portuondo, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000).

54. N.Y. Pub. Health Law § 2781(1) (Consol. 2010) (stating consent must be "written" and "informed" from a person who is capable of consenting; if the person is incapable, someone authorized by law may consent for the person).

55. N.Y. Crim. Proc. Law § 390.15(1)(a) (Consol. 2010) (stating that the sex offense must be an act of "sexual intercourse," "oral sexual conduct," or "anal sexual conduct" as defined by N.Y. Penal Law § 130.00).

56. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (Consol. 2010).

57. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (Consol. 2010).

58. 28 C.F.R § 549.12(a)(1)(2010).

59. 28 C.F.R. § 549.12(a)(3) (2010). See Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings," for more information about the consequences of prison incident reports.

60. Walker v. Peters, 989 F. Supp. 971, 975 (N.D. Ill. 1997) (finding that deprivation of medication cannot be considered deliberate indifference unless prisoner has received a positive HIV test first). See Chapter 23 of the *JLM,* "Your Right to Adequate Medical Care," for more information on the deliberate indifference standard.

mandatory random testing once a year. If you test positive, the prison cannot subject you to disciplinary proceedings based solely on your results, though you may be punished if you have performed an act to transmit the disease.[61] Also, federal prisons test prisoners being considered for release, parole, good conduct time release, furlough, or placement in a community-based program. Refusal to be tested may result in an incident report for refusing an order.[62] If you test positive, the prison cannot deny you participation in activities and programs just because of the result.[63]

Outside of New York, many states have mandatory HIV testing when you enter prison,[64] during custody, and/or upon your release.[65] Despite challenges on the basis of the Eighth Amendment's prohibition against cruel and unusual punishment, the Fourth Amendment's prohibition on unreasonable searches and seizures, the right to privacy, and the Equal Protection Clause of the Fourteenth Amendment, courts tend to uphold involuntary testing on the grounds that it is reasonably related to a legitimate penological interest.[66]

(b) TB Testing

While HIV cannot be passed from person to person by casual contact, TB is spread through the air. So, prison TB testing policies often differ from prison HIV testing policies. In New York state, Department of Correctional Services ("DOCS") policy requires all prisoners entering prison to be tested for tuberculosis. The TB screening includes a chest x-ray and a skin test, where a small amount of purified protein derivative ("PPD") is injected beneath your skin and observed for a reaction. After the initial test, you will be re-tested yearly. If you refuse testing, medical personnel will counsel you as to the benefits of the test. If you still refuse, then you will be placed in medical keeplock (also known as "tuberculin (TB) hold") for up to a year until you have received three negative chest x-rays or you agree to be tested. While in TB hold, you are only allowed one hour of solitary exercise per day and three showers a week. You lose your telephone privileges and can receive visits from lawyers.[67]

Courts have generally upheld the New York state DOCS TB testing policy against challenges claiming violation of the Fourth Amendment protection against unreasonable searches or the Eighth Amendment prohibition against cruel and unusual punishment because they consider the policy to be reasonably related to preventing the spread of tuberculosis in correctional facilities.[68] Additionally, some courts have upheld

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61. 28 C.F.R. § 549.13(c) (2010).

62. 28 C.F.R. § 549.12(a)(1) (2010).

63. *See* 28 C.F.R. § 549.13(b) (2010) (stating that prisoners may be limited in programming if they have an infectious disease which can be transferred through casual conduct, possibly showing that limitations in programming are not allowed based on a prisoner's disease which cannot be passed on through casual conduct (like HIV)). *See also* 42 U.S.C. § 2000cc-1 (2000) (stating generally that the government shall not impose restrictions on the religious activity of prisoners unless the government can show that such restriction furthers a compelling governmental interest using the least restrictive means possible). This is limited to available programs to institutionalized persons which are federally funded. *See also* 42 U.S.C. § 2000d-4a (1964) (defining "program or activity" as "all of the operations of a department, agency, special purpose district, or other instrumentality in a state or local government"). Note that this only applies to religious activity, meaning that this law does not prevent you from being excluded from a non-religious activity if you test positive for HIV, and that you may still be excluded if the government has a compelling interest in doing this.

64. Alabama, Georgia, Idaho, and Missouri are among the states that mandate testing of prisoners entering the prison system. *See* Ala. Code § 22-11A-17 (2006) (subjecting all persons sentenced to confinement or imprisonment for more than 30 consecutive days to mandatory testing); Ga. Code Ann. § 42-5-52.1(c) (1997 & Supp. 2009); Idaho Code § 39-604(1) (2004); Mo. Rev. Stat. § 191.659 (2004).

65. Alabama, Idaho, and Missouri are among the states that test upon release. *See* Ala. Code § 22-11A-17(a) (2006); Idaho Code § 39-604(1) (2004); Mo. Rev. Stat. § 191.659 (2004).

66. *See*, *e.g.*, Dunn v. White, 880 F.2d 1188, 1196–98 (10th Cir. 1989) (finding no 1st, 4th, or 14th Amendment constitutional violations when prisoner alleged he was threatened with disciplinary segregation if he failed to submit to the HIV blood test even though he claimed his religious beliefs did not allow the test).

67. Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual, § 1.18, at 6 (June 21, 2004).

68. *See* Lee v. Frederick 519 F. Supp. 2d 320, 327 (W.D.N.Y. 2007) (finding that prisoner's 8th Amendment rights were not violated when he was placed on TB hold because, while plaintiff did suffer some loss of his freedom of movement, he didn't present evidence that he suffered a serious deprivation of his rights or that defendants acted with the culpable state of mind—unnecessary and wanton infliction of pain); Delisser v. Goord, 2003 U.S. Dist. LEXIS 488, at *4, *16, *18–19, *23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that prisoner, who was placed in TB hold for a total of 52 days for refusing to submit to PPD test and then for refusing to take TB medication, did not suffer a violation of his 8th or 14th Amendment rights); Word v. Croce, 169 F. Supp. 2d 219, 222, 225 (S.D.N.Y. 2001) (finding that where plaintiff alleged violations of the 4th Amendment because she was put on TB Hold, her claims were more appropriately

mandatory TB testing or confinement in TB hold even if the test is against the prisoner's religious beliefs.[69] However, DOCS TB policy states that "[a]ccommodations for those with religious objections to tuberculin skin test may be made if they can be done without putting the health of other inmates and staff at significant risk."[70] According to the policy, if you refuse the PPD test on religious grounds, you are placed in TB hold while the legitimacy of your objection is determined. If the Chief Medical Officer determines that you sincerely hold a religious belief that prohibits PPD testing, he may request that you take a blood test and chest x-ray instead of the skin test. You will remain in TB hold until the results of the blood test, chest x-ray, and physical examination indicate that you do not have latent TB.[71]

If the TB test is against your religious beliefs and you want to challenge the policy as a violation of your First Amendment right to free exercise of religion, you should try to show how the policy is applying the policy to your particular circumstances does not make sense.[72] If you have submitted to the test in the past or are willing to undergo a chest x-ray, you might strengthen your chances of succeeding.[73] You may also be able to argue that being placed on TB hold is a violation of your Eighth Amendment rights, especially if the ventilation system does not somehow prevent the air that circulates in your cell from reaching other prisoners or staff, you might also be able to argue that the keeplock policy does not make sense as applied to you since it does not help protect others' safety.[74]

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brought under the 8th Amendment, and also finding that the TB Hold was not a violation of her Constitutional rights); Davidson v. Kelly, 1997 U.S. App. LEXIS 33796, at *4–5, *8 (2d Cir. Nov. 24, 1997) (*unpublished*) (placing a prisoner in TB hold for three days until he agreed to be tested for TB did not violate the prisoner's 8th Amendment rights because it furthered a legitimate penological interest); Johnson v. Keane, 1994 U.S. Dist. LEXIS 1228, at *3 (S.D.N.Y. Feb. 9, 1994) (*unpublished*) (holding that the Fourth Amendment rights of prisoner, who was confined to his cell after refusing a PPD test on the grounds that he might contract AIDS or be otherwise harmed, were not violated).

69. *See*, *e.g.*, Rossi v. Portuondo, 277 A.D.2d 526, 527, 714 N.Y.S.2d 816, 817 (3d Dept. 2000) (holding that giving prisoners the option of testing or being placed in medical confinement is "reasonably related" to the "legitimate penological interest" of preventing the spread of the disease; therefore, the testing policy did not violate prisoner's First Amendment right to free exercise of religion).

70. Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual, § 1.18, at 25 (June 21, 2004).

71. Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual, § 1.18, at 25 (June 21, 2004).

72. Reynolds v. Goord, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian prisoner who expected to be in tuberculin hold for a year after refusing a TB test showed a clear and substantial likelihood of proving at trial that the prison policy as applied violated his 1st Amendment rights). If you are a federal prisoner, also see Jolly v. Coughlin, 76 F.3d 468, 480 (2d Cir. 1996) (stating that prison officials likely violated the prisoner's religious freedom under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4). If you are a state prisoner, however, RFRA is no longer good law and *Jolly* will not apply to your case. City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). After RFRA was declared unconstitutional as applied to states, some states enacted state laws modeled on RFRA to fill the gap. So if you are a state prisoner, you should check to see if your state has enacted a "mini-RFRA" state law. If you are a state or federal prisoner, you may also be able to make an argument under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which states that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government establishes that the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2). For a discussion of a possible RLUIPA argument, see Johnson v. Sherman, 2007 U.S. Dist. LEXIS 24098, at *14 (E.D. Cal. April 2, 2007) (*unpublished*) ("Preventing the spread of tuberculosis among the closely confined population within the prison by use of the least restrictive means possible greatly outweighs the harm posed to the plaintiff by submitting to the skin test. While the harm to plaintiff's ability to practice his belief is no doubt burdened, the CDCR has a grave responsibility to protect the inmate populations confined within its prisons from the spread of a highly contagious and debilitating disease.")

73. *See* Selah v. Goord, 255 F. Supp. 2d 42, 55 (N.D.N.Y. 2003) (holding DOCS TB policy as applied to petitioner was irrational since he had been tested while incarcerated); Reynolds v. Goord, 103 F. Supp. 2d 316, 337 (S.D.N.Y. 2000) (holding that Rastafarian prisoner who expected to be in tuberculin hold for a year after refusing a PPD test showed a clear and substantial likelihood of proving at trial that the prison policy as applied violated his 1st Amendment rights).

74. Jolly v. Coughlin, 76 F.3d 468, 480 (2d Cir. 1996) (finding a substantial likelihood of an 8th Amendment violation when New York state prison officials placed a prisoner in "medical keeplock" for three-and-a-half years, after the prisoner refused to undergo a TB test for religious reasons). In *Jolly*, the court considered these facts: (1) prisoners who refused to be tested were placed in medical keeplock; (2) medical keeplock did not involve "respiratory isolation" and thus did not reduce the risks of infection; (3) prisoners were allowed to leave their cells only once each week for a 10-minute shower and could leave for meetings with counsel; and (4) plaintiff suffered headaches, hair loss, rashes, and difficulty standing or walking due to his confinement. Jolly v. Coughlin, 76 F.3d 468, 472 (2d Cir. 1996). Although the portion of *Jolly* addressing RFRA violations is no longer good law for state prisoners (see footnote 72), it is still good law

If you are in a federal prison, you must undergo a PPD test and possibly a chest x-ray when you enter the facility.[75] If you refuse both tests, the prison will conduct them without your consent.[76] Refusing to be tested may result in an incident report, although you will not be placed in medical isolation unless there is a clinical indication for such measures.[77]

(c) Hepatitis B and Hepatitis C

New York state does not require HCV testing for all prisoners, but does test all prisoners who are determined to be at high risk.[78] You are considered to be at high risk of HBV or HCV if you have a history of the following: HIV infection, intravenous drug use, intranasal cocaine use, sexually-transmitted diseases, blood transfusions before July 1992, hemodialysis, infusion of clotting factor before 1987, tattoos or body piercing with non-sterile equipment, solid organ transplants, or symptoms of hepatitis.

In New York state, during your initial health screening, you will be offered a hepatitis B vaccine if you are not currently infected but are at high risk, unless your medical history suggests otherwise. You are considered at high risk if you are eighteen years old or younger and not immune, you have had more than one sex partner in six months, you recently had a sexually-transmitted disease, you are male and have had sex with other men, you inject illegal drugs, you have been exposed to blood or blood-contaminated products, you have had household contact with persons suffering from chronic hepatitis B infection, you are a hemodialysis patient, you take clotting factor concentrates (you are a hemophiliac), or you have chronic hepatitis C and are not immune. The vaccine consists of three doses over six months.[79]

If you are in a federal prison, you will be screened to determine if you are likely to be HBV- or HCV-infected. Similar to the federal prison system's TB policy, refusal to submit to the test will result in an incident report for failure to follow an order.

(d) MRSA

The Federal Bureau of Prisons recommends that all prisoners should be checked for skin infections at their initial intake screening and also after returning from a hospitalization.[80] Prisoners at high risk for MRSA infections (including those with HIV, diabetes, or open wounds) are supposed to be screened at all routine medical examinations.[81]

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for both state and federal prisoners for arguments based on 8th Amendment violations.

75. Fed. Bureau of Prisons, U.S. Dept. of Justice, Program Statement P6190.03, Infectious Disease Management, at 9 (June 28, 2005), *available at* http://www.bop.gov/policy/progstat/6190_003.pdf; *see also* Washington v. Cambra, 165 F.3d 920, 1998 U.S. App. LEXIS 30072 (9th Cir. 1998) (*unpublished table decision*).

76. *See*, *e.g.*, Ballard v. Woodard, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (performing a PPD test without a prisoner's consent does not constitute the denial of any federal constitutional rights where the prison had a legitimate interest in "orderly and uniform implementation" of the test); Dunn v. Zenk, No. 1:07-CV-2007-RLV, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. Oct. 1, 2007) (holding that involuntary testing for tuberculosis does not violate prisoner's constitutional rights).

77. Fed. Bureau of Prisons, U.S. Dept. of Justice, Program Statement P6190.03, Infectious Disease Management, at 8 (June 28, 2005), *available at* http://www.bop.gov/policy/progstat/6190_003.pdf.

78. *See* Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual: Health Appraisal, § 1.19 at 2 (Feb. 20, 2004); Memorandum from Lester N. Wright, Departure Comm'r/Chief Med. Officer N.Y. Dept. of Corr. Servs., on Revised Hepatitis C Primary Care Practice Guidelines to Facility Health Servs. 1 (Mar. 25, 2003).

79. *See* Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual, § 1.19 (Feb. 20, 2004) (outlining the procedure for a prisoner's initial health appraisal upon entry); Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual: Standing Orders for Immunizations, § 1.54 (May 11, 2004) (specifying under what circumstances the vaccine should be offered).

80. *See* Federal Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 2 (2005), *available at* http://www.bop.gov/news/PDFs/mrsa.pdf (last visited September 26, 2010).

81. *See* Federal Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 2 (2005), *available at* http://www.bop.gov/news/PDFs/mrsa.pdf (last visited September 26, 2010).

2. Right to Testing upon Request

(a) HIV Testing

Many states provide HIV tests for prisoners upon request. If you are denied a test, you might consider challenging the denial as a violation of the correctional facility's own policy. In New York state prisons, you will be offered a test when you first enter the facility. Also, anonymous testing (where you do not include your identity) is available through the Criminal Justice Initiative ("CJI").[82]

If you are a federal prisoner, you can request HIV testing, but not more than once per year.[83] At least one federal court has failed to recognize a constitutional right to HIV testing, especially in cases where the prisoner cannot allege specific exposure to HIV.[84] But, you may have an Eighth Amendment claim if you belong to a high-risk group and are denied an HIV test, since such a denial would prevent you from getting proper medical care. Additionally, if you meet the prison's specified criteria and are still refused a test, you may also have a claim.[85] You should check to see how the courts in your jurisdiction have decided this issue.

(b) Hepatitis B

If you are in a federal prison, you can request a hepatitis B test after consulting with a Bureau of Prisons' health care provider. However, you cannot be tested more than once per year.[86]

(c) MRSA

If you have a skin infection that may be caused by MRSA, the wound may be tested if your doctor feels it is necessary to determine the proper treatment.[87]

3. Consequences of Testing Positive for HIV in New York

States have different rules about what happens after a prisoner tests positive for HIV. In New York, in order to track HIV/AIDS better and to increase prevention of HIV infection, the state assembly adopted the HIV Reporting and Partner Notification (HIVRPN) law, which became effective in 2000.[88] This law requires doctors and other medical providers (including the laboratories doing the tests) to report to the Department of Health the names of people infected with HIV, HIV-related illness, or AIDS.[89] The information is supposed to remain confidential.[90] However, New York regulations allow for HIV status to be revealed to employees or

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82. The Criminal Justice Initiative is a project funded by the New York Department of Health's AIDS Institute, in which community-based organizations go into prisons and provide tests, counseling, peer education, and discharge planning. N.Y. Dept.. of Health, Prevention and Support Services, *available at* http://www.health.state.ny.us/diseases/aids/about/prevsup.htm#cji (last visited September 26, 2010).

83. 28 C.F.R. § 549.12(a)(4) (2007).

84. *See* St. Hilaire v. Lewis, No. 93-15129, 1994 U.S. App. LEXIS 14867, at *10 (9th Cir. June 7, 1994) (*unpublished*) (finding no constitutional violation for failure to provide an HIV test because prisoner was not a member of a high-risk group and had no alleged exposure to HIV). Doe v. Wigginton, 21 F.3d 733, 738–739 (6th Cir. 1994) (finding no 8th Amendment violation where a prisoner was refused an HIV test because the state policy required an HIV test if a prisoner "provides a presumptive history of exposure" and the prisoner did not provide such information).

85. *See* Doe v. Wigginton, 21 F.3d 733, 739–740 (6th Cir. 1994) (holding the prison did not violate the 8th or 14th Amendments for refusing to test for HIV on request because it could reasonably limit the testing based on a prisoner's history, medical symptoms, prior drug use, or sexual activity). It is possible the court would have allowed Doe's claim to prevail if he had given officials information indicating that he met the criteria for testing and was still refused a test.

86. 28 C.F.R. § 549.12(a)(4) (2005) (providing that a prisoner may request to be tested only once per year, unless more testing is determined to be necessary by the Bureau).

87. *See generally* Fed. Bureau of Prisons, U.S. Dept. of Justice, Program Statement P6190.03, Infectious Disease Management, at 3 (June 28, 2005), *available at* http://www.bop.gov/policy/progstat/6190_003.pdf (last visited September 26, 2010).

88. N.Y. Comp. Codes R. & Regs. tit. 10, §§ 63.1–63.11 (2007) pgs. 4049-4064. *See also* N.Y. Dept. of Health, HIV Reporting & Partner Notification: What You Need to Know about the Law (2002), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited September 26, 2010).

89. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.4(a)(1) (2007) pg. 4053. *See also* N.Y. Dept. of Health, HIV Reporting and Partner Notification: What You Need to Know about the Law (1001), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited September 26, 2010); Mew York City Department of Health and Mental Hygiene: HIV Reporting/Partner Notification Law (1008), http://www.nyc.gov/html/doh/html/ah/ahn1.shtml (last visited Feb. 29, 2008).

90. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.6 (2007) pgs. 4055–4059. *See also* N.Y. Dept. of Health, HIV Reporting and Partner Notification: What You Need to Know about the Law (2000), *available at*

agents of the Division of Probation and Correctional Alternatives, Division of Parole, Commission of Correction, or any local probation department. Disclosure of HIV status is only allowed to the extent that the individuals who receive such information are authorized to access records containing such information to carry out their functions, powers, and duties.[91] If you are diagnosed with an HIV-related illness, your medical care provider will ask for the names of your spouse, sexual partners, and/or needle-sharing partners.[92] If you provide those names, those individuals will receive notice they are at risk of being infected with HIV,[93] and they will be offered counseling and HIV testing.[94] Your name will not be given to them.[95] You have the right to refuse to give that information at no legal penalty (civil or criminal).[96]

E. Legal Rights and Prevention of Infectious Diseases

1. Prevention and Prison Policy

The government has a duty to provide medical care to the people it incarcerates.[97] This duty may also include protecting prisoners from infectious diseases, such as TB.[98] But, it is also very important to take the necessary precautions to protect yourself and others from disease. If you have anal, vaginal, or oral sex, it is extremely important to use latex condoms in order to protect yourself against HIV infection and other sexually-transmitted diseases. This is particularly vital in the prison system, where a higher proportion of the population is HIV-positive. Very few jails or prisons provide condoms for prisoners. A few jails in Los Angeles, New York City, Philadelphia, San Francisco, and Washington, D.C. supply condoms on a limited basis, and Mississippi and Vermont offer condoms to prisoners.[99] In some prisons, condoms may be considered contraband, so make sure to check whether your prison considers condoms contraband.[100]

Prisons have some duty to prevent MRSA's spread once they know infection is present within the prison. But as a prisoner, you have limited options to enforce this duty. An Eighth Amendment claim for failing to protect a prisoner from contracting MRSA would have to show the prison's "deliberate indifference" to the prisoner's serious medical needs.[101] Courts generally hold that prisons do not have to take every possible

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http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited September 26, 2010). This brochure emphasizes that this information is confidential:

Under the law, identifying information about people with HIV infection is ONLY to be used to help the Health Department track the epidemic and for partner notification. The Health Department will NOT disclose this information to other government or private agencies like the United States Citizenship and Services (USCIS), police, welfare, insurance companies or landlords.

91. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.6(a)(13) (2007).

92. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.8(a)(3) (2007).

93. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.8(a)(3) (2007).

94. N.Y. Comp. Codes R. & Regs. tit. 10, § 63.8(g) (2007).

95. N.Y. Comp. Codes R. & Regs. tit. 10, §§ 63.6, 63.8(a)(3) (2007).

96. N.Y. Dept. of Health, HIV Reporting and Partner Notification, N.Y. Dept. of Health, HIV Reporting and Partner Notification: What You Need to Know about the Law (2000), *available at* http://www.health.ny.gov/diseases/aids/regulations/reporting_and_notification/about_the_law.htm#quest1 (last visited September 26, 2010).

97. *See* Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (confirming "the government's obligation to provide medical care for those whom it is punishing by incarceration"). See *JLM*, Chapter 23 for more information on a prison's duty to provide medical care and what you can do if you are not receiving proper care.

98. *See* Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding that a prison's failure to adequately screen incoming prisoners constituted a "threat to the well-being of the inmates [that] is so serious, and the record [is] so devoid of any justification for the defendants' policy, that under the standard of Bell v. Wolfish this practice constitutes 'punishment' in violation of the Due Process Clause"); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (holding that though a prison is not required to conduct medical exams on prisoners within 36 hours of entering the facility, leaving persons with communicable or contagious diseases, like scabies or gonorrhea, among other prisoners for a month or more, without medical care, violated the standard of adequate medical services).

99. Beth Shuster, *Sheriff Approves Handout of Condoms to Gay Inmates*, L.A. Times, Nov. 30, 2001, at A38.

100. *See, e.g.*, Karen Cropsey, Gloria Eldridge and Melanie Spector, The American Psychological Association (APA) HIV Office for Psychology Education (HOPE) Training Resource Package, HIV, Mental Health, and Prisons 15, (2006), *available at* http://www.apa.org/pi/aids/programs/hope/training/index.aspx (last visited September 26, 2010).
Amy Wooten, *House Rejects Prison Condom Bill*, Windy City Times, Mar. 21, 2007, *available at* http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=14325 (last visited September 26, 2010);
Rebecca Nerenberg, *Spotlight: Condoms in Correctional Settings*, HEPP News, Jan. 2002, *available at* http://www.thebody.com/content/art13017.html (last visited September 26, 2010).

101. *See* Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d. 251 (1976).

measure to prevent MRSA's spread. As long they take reasonable steps, you cannot make a constitutional claim by showing the prison could have done more.[102]

2. Segregation of Prisoners with Infectious Diseases

(a) Mandatory Segregation

(i) Mandatory Segregation of Prisoners with TB

Prisons may want to segregate (separate) prisoners with infectious diseases from other prisoners to prevent the disease's spread. This type of segregation is often mandatory and involves separate housing. New York law allows prison officials to separate prisoners if a "contagious disease" becomes widespread.[103] But, New York law also states that all who are "sick shall receive all necessary care and medical assistance," and that all such prisoners should be transferred back to the general population as soon as possible.[104]

Because TB can be spread through the air, the law often treats people with TB differently. Prisons *can* usually isolate prisoners who are suffering from TB to prevent the spread of a "contagious disease."[105] New York City law even allows non-incarcerated persons infected with TB to be hospitalized in certain circumstances.[106] DOCS TB policy requires prisoners with contagious TB to be placed in respiratory isolation. While in respiratory isolation, you are only allowed to leave the area for certain medical treatment and you will have to wear a surgical mask.[107]

(ii) Mandatory Segregation of Prisoners with HIV

Because HIV does not spread as easily as TB, New York state prisons[108] and federal prisons[109] do not determine housing or program assignments based upon HIV status alone. New York prisons are not allowed to automatically segregate HIV-positive prisoners. New York state courts have found that mandatory segregation violates your right to privacy—specifically, your right to medical confidentiality—because

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102. *See* Lopez v. McGrath, No. C 04-4782 MHP, 2007 WL 1577893, at * 8, 2007 U.S. Dist. LEXIS 39409 at *24-25, (N.D. Cal. May 31, 2007) *available at* http://www.websupp.org/data/NDCA/3:04-cv-04782-63-NDCA.pdf at 12 (stating that while taking more hygienic measures would have reduced the risk of infection, there is no evidence they were necessary to reduce risk to the plaintiff to acceptable levels); Walker v. Floyd County, No. 4:07-CV-0014-SEB-WGH, 2007 WL 2237622, at *9, 2007 U.S. Dist. LEXIS 56134 at *25-27 (S.D. Ind. July 31, 2007) (holding that a showing that there were additional measures a prison could have taken to stop MRSA's spread is not enough to demonstrate a constitutional violation).

103. N.Y. Correct. Law § 141 (McKinney 2003).

104. N.Y. Correct. Law § 141 (McKinney 2003).

105. *See* Dunn v. Zenk, 2007 U.S. Dist. LEXIS 73891, at *9 (N.D. Ga. 2007) (holding that states have a legitimate penological interest in controlling the spread of tuberculosis so the involuntary administration of a TB test does not offend the Constitution); Davidson v. Kelly, 1997 U.S. App. LEXIS 33796, at *4 (2d Cir. Nov. 24, 1997) (*unpublished*) (holding that placing a prisoner in TB hold for three days until he agreed to be tested for TB did not violate the prisoner's 8th Amendment rights because it furthered a legitimate penological interest); McCormick v. Stalder, 105 F.3d 1059, 1061–62 (5th Cir. 1997) (holding that prison policy requiring TB patients to be medicated or isolated was reasonably related to legitimate penological interests); Washington v. Cambra, 1998 U.S. App. LEXIS 30072, at *3 (9th Cir 1998) (*unpublished*) (holding that a policy of testing prisoners twice for TB is reasonably related to the legitimate penological goal of detecting and containing TB and the second test did not violate the prisoner's rights under the 8th or 14th Amendments); Delisser v. Goord, 2003 U.S. Dist. LEXIS 488, at *16, *18–19, *23 (N.D.N.Y. Jan. 15, 2003) (*unpublished*) (holding that prisoner, who was placed in TB Hold for a total of 93 days for refusing to submit to PPD test and then for refusing to take TB medication, did not suffer a violation of his 8th or 14th Amendment rights).

106. *See* 24 RCNY Health Code § 11.47(d)(1) (2007) (authorizing "the removal to and/or detention in a hospital or other treatment facility for appropriate examination for tuberculosis of a person who has active tuberculosis or who is suspected of having active tuberculosis and who is unable or unwilling voluntarily to submit to such examination by a physician or by the Department"); City of New York v. Doe, 205 A.D.2d 469, 469, 614 N.Y.S.2d 8, 9 (1st Dept. 1994) (holding that patient could be detained pursuant to New York City Health Code § 11.47 where there was no less restrictive way to treat patient's TB infection).

107. Division of Health Services, New York Department of Correctional Services, Health Services Policy Manual: Tuberculosis, § 1.18 at 10–11 (June 21, 2004).

108. *See*, *e.g.*, Nolley v. Erie, 776 F. Supp. 715, 719 (W.D.N.Y. 1991) (noting that "DOCS stopped isolating HIV+ inmates from the general population in 1987").

109. 28 C.F.R. § 549.13(c) (2007) ("Except as provided for in disciplinary policy, no special or separate housing units may be established for HIV-positive inmates."). However, as a federal prisoner, you can be placed in controlled housing if there is reasonable evidence that you will pose a health risk to others. 28 C.F.R. § 541.61 (2007).

housing in an AIDS unit tells other prisoners and staff that you are HIV-positive.[110] If you are a federal prisoner who has HIV or AIDS, the prison can only separate you if prison officials have reasonable evidence that you pose a health risk.[111] For more information on confidentiality issues, see Part F of this Chapter, and for information regarding discriminatory treatment based on your health status, see Part H of this Chapter.

Although New York prisons may not automatically segregate HIV-positive prisoners, some states require that all HIV-infected prisoners reside separately, and many courts outside of New York have upheld prisons' decisions to segregate HIV-positive prisoners. Courts generally view segregation as a reasonable means to limit other prisoner's exposure to HIV, and courts consider preventing the spread of HIV to be a legitimate interest of prisons.[112] Additionally, at least one federal court of appeals found that there is a high risk of transmitting HIV in prison, even though the specific prison in question did not present evidence of actual HIV transmission. Nonetheless, the court thought that the mere presence of high-risk behavior—like intravenous drug use, sex, and violent exchanges—was enough to establish a significant risk of transmitting HIV.[113] The court also rejected the prisoners' suggestions to either hire more corrections officers or to identify prisoners who were both HIV-positive and also likely to engage in high-risk conduct. The court found that these two suggestions were unreasonable and created an "undue hardship" on the prison facility.[114] The court's ruling might make it more difficult to argue that your segregation is unconstitutional.

(iii) Mandatory Segregation of Prisoners with MRSA

Prisons may segregate prisoners who have active MRSA infections to prevent the spread of the infection to others through contact. The Federal Bureau of Prisons generally recommends, however, that prisoners do not need to be housed separately, if they have MRSA wounds that are either not draining or that can be easily covered with bandages.[115] As the infection becomes more serious or develops into MRSA pneumonia, separate housing is recommended or required.[116] A prison may have the right to threaten you with solitary confinement if you refuse to accept the prison's prescribed treatment for your MRSA infection.[117]

(b) Segregation Requested by Prisoners

If you are afraid of contracting an infectious disease, read Part B of this Chapter to get a sense of the steps that you can take to protect yourself. In general, prisoners who are afraid of getting infectious diseases from other prisoners have not been able to successfully sue prison officials. Some prisoners have tried to get prisons to segregate other prisoners who are infected with a communicable disease, but these prisoners have been generally unsuccessful. Prisoners who already are infected have also been unsuccessful when they request that the prison give them a single cell (or vaccinate other prisoners) so that they do not spread their

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110. *See* Nolley v. Erie, 776 F. Supp. 715, 733–36 (W.D.N.Y. 1991) (holding that segregating HIV prisoners violated constitutional and statutory rights to privacy because HIV status was improperly disclosed to non-medical personnel); Doe v. Coughlin, 697 F. Supp. 1234, 1240–41 (N.D.N.Y. 1988) (holding that involuntary segregation of prisoners with HIV or AIDS violates prisoners' right to privacy).

111. 28 C.F.R. § 541.61 (2007).

112. *See, e.g.*, Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992) (holding that Mississippi prisons had reasonable interests in segregating HIV prisoners, and that segregation did not violate rights to privacy, equal protection, or due process).

113. Onishea v. Hopper, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that risk of HIV transmission justified segregation of HIV-positive prisoners, including exclusion from programs and activities offered to other prisoners).

114. Onishea v. Hopper, 171 F.3d 1289, 1302–04 (11th Cir. 1999) (finding that the cost of special programs to reduce the risk of HIV transmission would be too high).

115. *See* Federal Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 35 (2005), *available at* http://www.bop.gov/news/PDFs/mrsa.pdf.

116. *See* Federal Bureau of Prisons, Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 35 (2005), *available at* http://www.bop.gov/news/PDFs/mrsa.pdf.

117. *See* Keller v. Bucks, 209 F. App'x 201, 205–206 (3d Cir. 2006) (*unpublished*) (holding that it was not a constitutional violation to isolate a pre-trial detainee who refused treatment for a MRSA infection when the isolation was medically determined); Munoz v. Fortner, No. 6:07cv170, 2007 U.S Dist. LEXIS 91543, at *20–21 (E.D. Tex. Dec. 13, 2007) (holding that it does not violate the Constitution to threaten to put prisoners in isolation who both have MRSA and do not comply with recommended treatment).

diseases.[118] Courts seem to support a prison's decision not to segregate prisoners with HIV-related illnesses.[119]

Although prisons may have a legal responsibility to protect prisoners from exposure to communicable diseases,[120] to win a lawsuit against prison officials for exposing you to infectious diseases, you must prove that (1) there was a specific and significant risk of infection, and (2) prison officials were aware of that risk but disregarded it.[121] In order to win such a lawsuit, you must show that there is a significant possibility that you will contract the virus or disease. For example, some courts have held that this standard is met when prisoners are housed with people who have known MRSA infections. In order to meet the standard, however, the infected prisoner must have open wounds that are not being adequately covered or cleaned and that are likely to infect other prisoners.[122] You will not win, if you only have a general fear of getting the virus.

Additionally, the Prison Litigation Reform Act ("PLRA") makes winning money damages even more difficult. Under the PLRA, if you seek money damages, you will have to show you were physically injured, not just mentally or emotionally injured, or placed at an increased risk of being infected. For more information on the PLRA, see *JLM* Chapter 14, "The Prison Litigation Reform Act."

F. Legal Rights and Confidentiality

Under the U.S. Constitution, you have a right to privacy (a "privacy interest") regarding the disclosure of personal matters.[123] For information about your medical privacy, please see Part E (2) of *JLM* Chapter 23, "Your Right to Adequate Medical Care."

Prisoners who have infectious diseases generally have a limited right to keep information about their medical condition confidential. Some courts have held that the right to medical confidentiality also applies to an individual's HIV status.[124] But, other courts have held that there is no constitutional right to privacy

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118. Johnson v. Horn, 782 A.2d 1073, 1076–77 (Pa. Commw. Ct. 2001) (refusing to give court order forcing prison officials to assign prisoner to a single cell so he would not spread hepatitis C to other prisoners).

119. *See* Deutsch v. Fed. Bureau of Prisons, 737 F. Supp. 261, 267–68 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991) (holding that prisoner did not have the right to have another HIV-positive prisoner segregated unless the inmate poses a known health risk); Glick v. Henderson, 855 F.2d 536, 539–40 (8th Cir. 1988) (holding that prisoner's fear of contracting HIV either through sharing work assignments with an HIV-infected prisoner or through eating food that might have been prepared by an HIV-infected prisoner, was not sufficient to justify an order to segregate HIV-infected prisoners).

120. *See* Hutto v. Finney, 437 U.S. 678, 682–88, 98 S. Ct 2565, 2569–2572 (1978) (finding that prison conditions unconstitutional under the 8th Amendment where (among other concerns) inmates in "punitive isolation" were crowded into cells, and some had infectious conditions such as hepatitis and venereal diseases); Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (finding that prison's failure to adequately screen incoming prisoners violated the due process and 8th Amendment rights of other prisoners); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (stating that leaving persons with communicable or contagious diseases, such as scabies or gonorrhea, without medical attention for over a month, and in the midst of other prisoners violated the required standard of adequate medical services).

121. *See* Massick v. N. Cent. Corr. Facility, 136 F.3d 580, 581 (8th Cir. 1998) (holding that there was no 8th Amendment violation when prison officials placed the plaintiff in a cell with an HIV-positive prisoner, who had open bleeding wounds, without warning the plaintiff of his cellmate's HIV status; the court found no constitutional violation, because the risk of plaintiff contracting HIV was small and because prison officials acted reasonably by granting plaintiff's request to change cellmates); Billman v. Ind. Dept. of Corrs., 56 F.3d 785, 788–89 (7th Cir. 1995) (holding that prison officials who knowingly and without warning assign a prisoner to share a cell with an HIV-positive prisoner who has a known propensity to rape, constitutes an 8th Amendment violation due to the official's "deliberate indifference" to the "fear and humiliation inflicted by the rape and the fear of contracting the AIDS virus"); DeGidio v. Pung, 920 F.2d 525, 532–33 (8th Cir. 1990) (holding that prison officials' pattern of reckless or negligent responses to TB outbreaks was sufficient to constitute deliberate indifference, violating the 8th Amendment).

122. *See* Lopez v. McGrath, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 39409, at *31 (N.D. Cal. May 31, 2007) (finding a triable issue of fact where plaintiff claimed that administrators knew medical staff were putting prisoners with MRSA infections back into the general population, possibly creating "substantial risk" to other prisoners); Kimble v. Tennis, No. 4:CV-05-1871, 2006 U.S. Dist. LEXIS 36285, at *11 (M.D. Pa. June 5, 2006) (holding that evidence that prison doctor authorized release of a MRSA-infected prisoner with open sores to the general population may be sufficient to support a claim of deliberate indifference).

123. *See* Whalen v. Roe, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64, 73 (1977) (finding that the U.S. Constitution protects your right to make personal decisions and against disclosure of your personal information) (non-prison case); O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) ("Medical information in general, and information about a person's psychiatric health and substance-abuse history in particular, is information of the most intimate kind.") (non-prison case).

124. *See* Doe v. Delie, 257 F.3d 309, 315–17 (3d Cir. 2001) (finding prisoners retain their right to medical privacy

regarding HIV status.[125] If you are in federal prison, your HIV test results, if positive, must be disclosed to the prison's employees.[126]

In New York state, your HIV-related information cannot be disclosed to anyone other than you and individuals who are authorized by statute.[127] Individuals who are authorized to receive your HIV information include health care providers (when knowledge is necessary to provide you with adequate care),[128] employees of the Division of Parole,[129] employees of the Division of Probation and Correctional Alternatives or local probation department,[130] the medical director of the local correctional facility,[131] or an employee or agent of the Commission of Correction.[132] These authorized individuals are entitled to access your HIV information to the extent that they need such information to carry out their duties and functions.[133]

In New York, prisoners have won claims of statutory and constitutional rights violations when their HIV status was improperly disclosed. In particular, it is improper for a prison official to disclose your HIV status to other prisoners or non-medical personnel.[134] The courts seem to permit disclosure of your HIV status only if such disclosure is reasonably related to legitimate prison interests, like protecting prisoners or corrections officers from infection. But, unnecessary disclosure of such information for humor or gossip violates your constitutional rights.[135]

In other jurisdictions, courts are divided about medical privacy. Some courts find that a prisoner's right to medical confidentiality is limited,[136] while other courts protect such rights for prisoners and arrestees.[137] But now that the Prison Litigation Reform Act (PLRA) has been enacted, there may be different outcomes for similar cases brought today. For more information on the PLRA, see Chapter 14 of the *JLM*. It is

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and that the right is "particularly strong" for HIV status); Doe v. New York, 15 F.3d 264, 267 (2d Cir. 1994) ("Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.").

125. *See, e.g.,* Sherman v. Jones, 258 F. Supp. 2d 440, 444 (E.D. Va. 2003) (holding that there is no constitutional right to privacy of HIV status, and noting that different circuit courts have reached different conclusions on this issue).

126. 28 C.F.R. § 549.14 (2005).

127. N.Y. Pub. Health Law § 2782 (McKinney 2006). State agencies authorized to obtain confidential HIV-related information should have regulations to prevent discrimination, prohibit unauthorized disclosure, and establish criteria for determining who should receive the information and when. N.Y. Pub. Health Law § 2786(2)(a) (McKinney 2006).

128. N.Y. Pub. Health Law § 2782(1)(d) (McKinney 2006).

129. N.Y. Pub. Health Law § 2782(1)(l) (McKinney 2006).

130. N.Y. Pub. Health Law § 2782(1)(m) (McKinney 2006).

131. N.Y. Pub. Health Law § 2782(1)(n) (McKinney 2006).

132. N.Y. Pub. Health Law § 2782(1)(o) (McKinney 2006).

133. N.Y. Pub. Health Law §§ 2782(1)(l)–(o) (McKinney 2006).

134. *See* Lipinski v. Skinner, 781 F. Supp. 131, 140 (N.D.N.Y. 1991) (allowing prisoner to depose protected media sources in connection with lawsuit against law enforcement officials and prison officials when they disclosed his HIV status to a newspaper); V. v. New York, 150 Misc. 2d 156, 157–58, 566 N.Y.S.2d 987, 988–89 (N.Y. Ct. Cl. 1991) (holding that a prisoner stated a proper claim for relief when he accused his prison of improperly revealing his HIV information); Doe v. Coughlin, 697 F. Supp. 1234, 1240–41 (N.D.N.Y. 1988) (temporarily forbidding a plan to segregate AIDS prisoners, because it would disclose their AIDS status and therefore violate their right to privacy). *But see* Cordero v. Coughlin, 607 F. Supp. 9, 11 (S.D.N.Y. 1984) (holding that a plan which segregated prisoners with AIDS did not violate the prisoners' 1st Amendment right to privacy, because the right to privacy is limited by the prison's needs and by the prisoners' confinement).

135. *See* Powell v. Schriver, 175 F.3d 107, 112–13 (2d Cir. 1999) (holding that, while a prison official does not violate a prisoner's right to medical privacy, if the official's actions are reasonably related to legitimate prison interests, a prison official does violate a prisoner's medical privacy if he discloses a prisoner's medical information as gossip or a joke); *see also* Baez v. Rapping, 680 F. Supp. 112, 115 (S.D.N.Y. 1988) (holding that prison officials did not violate a prisoner's right to confidentiality when they warned other officials to avoid contact with prisoner's body fluids). *But see* Nolley v. Erie, 776 F. Supp. 715, 725–28 (W.D.N.Y. 1991) (holding that a policy of putting red stickers on HIV-positive prisoners' possessions, and therefore revealing prisoners' HIV status, violated privacy rights under New York law).

136. *See* Anderson v. Romero, 72 F.3d 518, 523–24 (7th Cir. 1995) (holding that prisoners do not have a constitutional right to the confidentiality of their HIV status, especially in light of the fact that HIV-positive prisoners could be identified when segregated from the rest of the prison population); Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (holding that the prisoner's right to privacy was not violated when a corrections officer, opened his file in the presence of other witnesses, after the prisoner refused to answer questions about his medical condition); Adams v. Drew, 906 F. Supp. 1050, 1055–58 (E.D. Va. 1995) (stating that prison officials' inadvertent disclosure of prisoner's HIV status to another prisoner did not violate right to privacy).

137. *See* A.L.A. v. W. Valley City, 26 F.3d 989, 990–91 (10th Cir. 1994) (stating that an arrestee brought a valid claim against the police for disclosing that he was HIV-positive to his family and strangers, even though it was later found that the arrestee was not HIV-positive).

important to remember that the PLRA requires a showing of *physical injury*, not just mental or emotional injury, to recover monetary damages. Thus, to be successful in a lawsuit, you would probably have to prove that the prison official's actions physically injured you. Some courts may require you to show the harm is likely to occur again to get injunctions (orders requiring officials to stop or change a policy).[138]

G. Legal Rights and Medical Treatment

1. Right to Medical Treatment

If you are denied medical treatment for an infectious disease, you may have a claim that the prison violated your rights under the Eighth Amendment. The Eighth Amendment protects you from cruel and unusual punishment. To win an Eighth Amendment claim, you must prove that prison officials showed "deliberate indifference" to your "serious medical needs."[139] It is important to remember that courts do not think that every claim of inadequate medical care is bad enough to be a constitutional violation.[140] But a few courts have held that a denial of prescribed AIDS or hepatitis C medical treatment does violate a prisoner's constitutional rights.[141] See Chapter 23 of the *JLM,* "Your Right to Adequate Medical Care," for more information on how to bring an Eighth Amendment claim for failure to provide adequate medical treatment.

Courts generally do *not* believe prisoners have a constitutional right to a private doctor or experimental medication.[142] You may still be able to get experimental drugs, but you will probably not have an Eighth Amendment claim against your facility if it does not prescribe them for you. But some prisons have participated in clinical trials for anti-retroviral therapy for AIDS. To take part in such trials, you must first get approval from the Institutional Review Board of the testing site and your prison's medical department.[143]

If you believe that your health is suffering because you are being wrongfully denied medication, you will probably have to show that the medical community agrees that this medication will help your condition. Otherwise, the court may see your claim as a simple disagreement between you and your doctor.[144] If you

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138. Davis v. District of Columbia, 158 F.3d 1342, 1346–47 (D.C. Cir. 1998) (holding that an HIV-positive prisoner could not obtain an injunction against prison officials for the unauthorized disclosure of his medical files because he could not show a threat that it might happen again).

139. Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (describing the standard for bringing an 8th Amendment claim for failure to receive proper medical care) (citing Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)). HIV and hepatitis are generally considered "serious medical needs." Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004).

140. *See* Smith v. Carpenter, 316 F.3d 178, 184, 186–87 (2d Cir. 2003) (citing Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)) (holding that brief interruptions of HIV medications, with no discernible adverse effects, did not constitute a denial of serious medical needs. However, the court also noted that a showing of increased risk, even absent presently detectable symptoms, might be serious enough to constitute denial of medical care).

141. *See* Montgomery v. Pinchak, 294 F.3d 492, 500 (3d Cir. 2002) (finding HIV-positive prisoner's claim regarding violation of his right to adequate medical treatment had merit and holding that because HIV is a life-threatening disease if left untreated, the prisoner had met the serious medical need prong of *Estelle v. Gamble*). *But see* Johnson v. Wright, 412 F.3d 398 (2d Cir. 2005) (finding that although a facility's refusal to give a prisoner the medication most prisoners received for hepatitis C because he had used illegal drugs constituted deliberate indifference, there was medical reason for denying the prison therapy); Niemic v. Maloney, 448 F. Supp. 2d 270 (9th Cir. 2006) (finding that the denial of a medicine subsequent to a failed drug test does not violate Due Process under the 14th Amendment, especially given that a decision to deny the medicine to active drug users is in accord with medical custom).

142. *See* Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) ("[M]ere disagreement over the proper treatment does not create a constitutional claim."); McKenna v. Wright, 01 Civ. 6571 (WK), 2002 U.S. Dist. LEXIS 3489, at *21 (S.D.N.Y. Mar. 4, 2002) (*unpublished*) (dismissing plaintiff's claim on the basis that the doctor's treatment decision was his medical judgment and consistent with current medical literature); Carter v. Cash, No. 92 Civ. 5526 (JG), 1995 U.S. Dist. LEXIS 22209, at *2–3 (E.D.N.Y. May 31, 1995) (*unpublished*) (finding that prisoner was not entitled to medication of his choice if doctor decided, based on his professional judgment, that it would not be in the prisoner's best interest).

143. You can find information about clinical trials from publications such as the American Foundation for AIDS Research ("AMFAR") AIDS/HIV Treatment Direction. AMFAR's contact information is included in Appendix A at the end of this Chapter.

144. *See* Perkins v. Kansas Dept. of Corrs., 165 F.3d 803, 811 (10th Cir. 1999) (upholding the denial of protease inhibitor to prisoner with HIV because other treatment was provided); Loch v. County of Bucks, No. 03-CV-4833, 2006 WL 2559296, at *3, 2006 U.S. Dist. LEXIS 62620, at *10–11 (E.D. Pa. Sept. 1, 2006), *available at* http://www.paed.uscourts.gov/documents/opinions/06D1114P.pdf at 5 (last visited September 27, 2010) (holding that a prisoner who had been treated for conditions including MRSA did not assert a constitutional violation simply because they claim the treatment they received was inadequate); Matthews v. Crosby, No. 3-06-CV-38, 2006 U.S. Dist. LEXIS

want to bring a claim about medical treatment or medication denied to you sometime in the past, a court may look back to see what the accepted medical practices were at that time.[145]

If you received medical treatment but think that a prison doctor incorrectly diagnosed your condition, it will be difficult to bring a successful case against the prison officials. In the past, courts have dismissed cases for a variety of reasons, such as because the prisoner could not prove that the prison officials had personal involvement,[146] the prisoner could not show any physical harm, or that his needs were ignored.[147]

If you have hepatitis C and prison officials determine that you should receive a certain treatment for a certain length of time, and you are then denied that treatment, you may have a claim under the Eighth Amendment. The initial requirements to bring a claim will be met if you can say that the removal from the prescribed treatment is endangering your life by failing to treat your disease.[148] You do *not* have to also claim that you have suffered an independent harm, other than the progress of your disease, in order to bring your claim.[149] Meeting these requirements allows you to begin your case, but does *not* mean that you will win. You will still need to show that there was "deliberate indifference" to your medical needs.[150]

This does not change the rule that courts do not like to question doctors' medical decisions. If you have received treatment for hepatitis C but think you should have been given different treatment,[151] or if your doctors said you do not have a condition requiring any treatment, this rule will not allow you to bring suit.[152]

2. Right to Refuse Medical Treatment

Some people, for a variety of reasons, choose to refuse medical treatment. Competent people—people who can think and understand well enough to make medical decisions for themselves—have the right to refuse treatment, even if it means they will die as a result.[153] However, your right to refuse treatment is limited as a prisoner.[154] Most courts have held that prisons can treat TB-infected prisoners without their consent.[155]

35049, at *7 (N.D. Fla. May 31, 2006), *available at* http://www.websupp.com/data/NDFL/3:06-cv-00038-10-NDFL.pdf at 4 (holding that a complete denial of available treatment, but not a dispute over the care received, could be a constitutional violation).

145. *See* Parker v. Proffit, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at *19 (W.D. Va. Oct. 27, 1995) (*unpublished*) (evaluating denial of medication by standards of medical treatment at time of denial); Adams v. Poag, 61 F.3d 1537, 1543 (11th Cir. 1995) (to show a prison official's actions were deliberately indifferent, a plaintiff could produce opinions of medical experts asserting the official's actions were contrary to contemporary accepted medical practices).

146. *See* Timmons v. N.Y. State Dept. of Corr. Servs., 887 F. Supp. 576, 580 (S.D.N.Y. 1995) (holding a prisoner bringing a claim against prison officials for misdiagnosing him in 1986 as having HIV had not shown the officials had any personal involvement in the alleged violations and was thus not entitled to relief under 42 U.S.C. § 1983). Section 1983 governs suits against prison officials for federal statutory and constitutional violations and is described in detail in *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

147. *See* Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003) (dismissing 8th Amendment claim because prisoner failed to show that he suffered any adverse medical effects from the sporadic lack of treatment).

148. *See* Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (holding that the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) were met by statements that a prisoner with hepatitis C had been removed from his prescribed course of treatment and denied all treatment for his disease due to suspicion of drug use).

149. *See* Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081, 1085 (2007) (stating that allegations in complaint were sufficient to bring an initial claim, and no claim of "cognizable independent harm" apart from removal from treatment is required).

150. *See* Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976).

151. *See* Loukas v. Mich. Dept. of Corr., No. 2-07-CV-142, 2008 U.S. Dist. LEXIS 14724, at *2 (W.D. Mich. Feb. 27, 2008) (holding that a prisoner who has not been denied medical care, but simply questions whether the treatment he has been receiving is adequate, does not have an 8th Amendment claim).

152. *See* Hix v. Tenn. Dept. of Corr., 196 Fed.App'x. 350, 357 n.1 (6th Cir. 2006) (stating hepatitis C does not require treatment in all cases, and a difference of opinion over medical treatment does not violate the 8th Amendment).

153. For New York law, see N.Y. Pub. Health Law §§ 2960–79 (McKinney 2007) ("Orders Not to Resuscitate") (regulating right of "adult with capacity" to direct issuance of orders not to resuscitate); N.Y. Pub. Health Law §§ 2980–94 (McKinney 2007) ("Health Care Agents and Proxies") (allowing appointment of agents to make important health care decisions including the refusal of life-saving treatment for the appointer); Quill v. Koppell, 870 F. Supp. 78, 84 (S.D.N.Y. 1994) ("It is established under New York law that a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death."). *See also* Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996) (holding that physicians can prescribe death-inducing drugs for mentally competent patients who wish to end their lives during the end stages of terminal illness. This case may lend strength to the proposition that a competent person may refuse medical treatment, even if such refusal will result in death).

154. *See* Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (recognizing 14th

Courts balance your interest in refusing treatment with the prison's "legitimate penological interest" in preventing the spread of disease. Courts will also consider whether the prison's actions are reasonably related to the prison's interests. If you do not have a disease that is transmitted through air, the prison will have a weaker argument for forcing you to take medication than if you have a disease such as TB that is easily spread. See Part C of Chapter 29, "Special Issues for Prisoners with Mental Illness," for more information about your right to refuse medical treatment.

H. Discriminatory Treatment and Infectious Diseases

1. Constitutional Rights

The Fourteenth Amendment may protect you from discriminatory treatment on the basis of having an infectious disease. For example, your rights under the Equal Protection Clause of the Fourteenth Amendment prohibit discrimination by the state that is not rationally related to a legitimate purpose.[156] The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your entitlements without due process of law.[157] The Eighth Amendment protects you from "cruel and unusual punishment."[158] Keep in mind, however, that the courts balance these constitutional rights against legitimate penological interests,[159] which may allow prison officials to lawfully infringe upon your rights. Prison policies are valid if they are reasonably related to a legitimate penological interest; however, the prison is required to use the least restrictive means of achieving the goals of the policy.[160]

If you bring a suit challenging a prison practice under the Fourteenth Amendment's Due Process Clause, you must prove you were entitled to something the prison took away.[161] Any entitlement must be created by *state law*. If you think you are entitled to something, you should first determine whether or not a state statute or regulation gives you a right to that entitlement. Also know that prison officials *can* treat prisoners with infectious diseases differently from other prisoners if their reasons further legitimate penological interests.[162] But, the reasons must be rational and not purely discriminatory.

Amendment right to refuse medical treatment, using *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to balance prisoner's rights against the state's duty to treat mentally ill prisoners and protect the safety of prisoners and correction officers, and finding the state did not deprive right to refuse treatment without due process).

155. *See* McCormick v. Stalder, 105 F.3d 1059, 1062 (5th Cir. 1997) (holding that prison officials did not violate the 8th Amendment when they required a prisoner with TB to undergo drug therapy without his consent).

156. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

157. U.S. Const. amend. XIV, § 1. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

158. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

159. *See* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (analyzing whether a prison regulations that burden fundamental rights are "reasonably related" to legitimate penological objectives).

160. *See* Turner v. Safley, 482 U.S. 78, 91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) ("But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." This means if a prisoner can point to a different procedure not requiring more money or time, the alternative can be used as evidence that the challenged policy is not reasonable); Perkins v. Kan. Dept. of Corr., 165 F.3d 803, 810–11, (10th Cir. 1999) (holding HIV-positive prisoner could claim a constitutional violation for being forced to wear a face mask whenever he left his cell and noting that wearing such a mask could become a humiliating form of branding that violated the 8th Amendment's prohibition of punishing individuals for a physical condition). *But see* Parker v. Proffit, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at *19–21 (W.D. Va. Oct. 27, 1995) (*unpublished*) (stating that making an HIV-positive prisoner wear a mask and protective clothing may have caused some embarrassment, but the practice did not rise to a constitutional violation of the 8th Amendment prohibition on cruel and unusual punishment).

161. *See* Anderson v. Romero, 72 F.3d 518, 527 (7th Cir. 1995) (ruling a state statute directing prisons to provide "barber facilities" gave the plaintiff an entitlement to a haircut, and keeping plaintiff from this entitlement because of his HIV status deprived him of his property and liberty rights under the 14th Amendment's Due Process Clause).

162. *See* Laureano v. Vega, 92 Civ. 6056 (LMM), 1994 U.S. Dist. LEXIS 2107, at *23–24 (S.D.N.Y. Feb. 25, 1994) (*unpublished*), *aff'd*, 40 F.3d 1237 (2d Cir. 1994) (rejecting prisoner's claim that he had received difficult work assignments because of his HIV status; holding that he had failed to establish any retaliatory motive by prison officials and that there is no right to a particular prison job); Farmer v. Moritsugu, 742 F. Supp. 525, 528 (W.D. Wis. 1990) (finding that prison had legitimate interest in maintaining security and order and therefore refusal of HIV-infected

The Fourteenth Amendment only applies to the *states*, but the Fifth Amendment's Due Process Clause protects your rights against the *federal* government. If you are in a federal prison, you might consider bringing your lawsuit under federal statutes, instead of under the Fifth Amendment.

2. Statutory Rights

Certain laws protect you from forms of discrimination based on disabilities, including HIV status. The Federal Rehabilitation Act of 1973 ("FRA") prohibits discrimination, or denial of programs or benefits based on disability, by a federal, state, or local government agency, or any recipient of federal funding.[163] Similarly, the Americans with Disabilities Act ("ADA") prohibits public and private entities from discriminating, excluding, or denying services, programs, or activities to a person with a disability.[164] These laws recognize TB and HIV infection as a form of disability because they are physical impairments limiting major life activities.[165] Also, in *Bragdon v. Abbott*, the Supreme Court clearly stated that under the ADA, "HIV infection satisfies the ... definition of a physical impairment during every stage of the disease."[166]

Although HIV is viewed as a disability according to the FRA and the ADA, your rights are limited to some extent if: (1) your HIV infection poses a significant risk to the health or safety of others; or (2) it would be an undue hardship on the prison facility to accommodate your needs.[167] Also, the U.S. Supreme Court has decided that individuals cannot recover monetary damages from the state for its failure to comply with the ADA.[168] However, you can still seek injunctive relief, which means that you can file a claim in which you ask the court to require the state to end practices that violate the ADA.[169]

If you are suing for violation of your statutory rights, you should cite both the FRA and the ADA, since the remedies, procedures, and rights are the same under both laws.[170] The only difference is the FRA only applies to public (government) entities while the ADA can support a claim against both private and public entities. You should also check the law of your state and city since sometimes states and localities enact additional laws to protect persons with communicable diseases, like HIV or hepatitis, from discrimination. In New York State, the Executive Law prohibits discrimination in several settings based on carrier status.[171] If you are suing in New York, you should review New York law to see if it applies to your circumstances.

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prisoner's request for food service job was not denial of equal protection); Doe v. Coughlin, 71 N.Y.2d 48, 54, 56, 60, 518 N.E.2d 536, 540, 541, 544, 523 N.Y.S.2d 782, 786, 787, 790 (N.Y. 1987) (upholding prison officials' refusal to allow a prisoner with AIDS to participate in a Family Reunion Program and holding that prisoner's privacy rights and his rights under the Due Process Clause and the Equal Protection Clause had not been violated, reasoning that there is no right to marital relations and that the prison officials had a rational basis to believe that such visits would help the spread of a disease). Note, however, the New York State Department of Corrections' official policy does not currently deny participation in the Family Reunion Program based solely on the HIV status of the prisoner. Instead, there is a special review of each prisoner's application because of potential health risks to the visitor. N.Y. Comp. Codes R. & Regs. tit. 7 §§ 220.2–220.9 (2008).

163. 29 U.S.C. § 701(a)–(c) (2006).

164. 42 U.S.C. § 12132 (2006).

165. 28 C.F.R. § 35.104(4)(1)(ii) (2009) ("The phrase physical or mental impairment includes, but is not limited to, such contagious and non-contagious diseases and conditions as ... HIV disease (whether symptomatic or asymptomatic), tuberculosis ...."); 42 U.S.C. § 12102(2) (2006) ("The term 'disability' means ... a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.").

166. Bragdon v. Abbott, 524 U.S. 624, 637, 118 S. Ct. 2196, 2204, 141 L. Ed. 2d 540, 556–57 (1998). This case concerned a dentist's refusal to examine an HIV-infected patient in his office. Though the facts did not involve prisoners, the legal principle is the same regarding HIV infection as a disability. For a lower court decision finding an HIV-positive prisoner disabled under the FRA and ADA, see, e.g., Dean v. Knowles, 912 F. Supp. 519, 521 (S.D. Fla. 1996).

167. *See* Onishea v. Hopper, 171 F.3d 1289, 1297–99 (11th Cir. 1999) (holding any amount of risk through a "specific and theoretically sound means of possible transmission" is a significant risk, and allowing segregation of HIV-positive prisoners).

168. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374, 121 S. Ct. 955, 968, 148 L. Ed. 2d 866, 884 (2001) (holding Alabama State employees could not recover damages because of state's failure to comply with the ADA).

169. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866, 884 n.9 (2001) ("[ADA] standards can be enforced by … private individuals in actions for injunctive relief.").

170. 42 U.S.C. § 12133 (2006) ("The remedies, procedures, and rights set forth in [29 U.S.C. § 794(a)] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].").

171. *See* N.Y. Exec. Law § 296 (McKinney 2010).

Most prison facilities are controlled and financed by federal, state, or local governments, so they are generally subject to the ADA and FRA. Furthermore, the U.S. Supreme Court has stated the ADA and FRA prohibit discrimination in the prison system.[172] This means prison facilities cannot exclude or deny prisoners "benefits of the services, programs, or activities of a public entity" or subject them to discrimination.[173] Benefits include recreational activities, medical services, and educational and vocational programs.[174]

However, when a court evaluates a prison policy, it will consider whether the restriction is reasonably related to a legitimate penological interest.[175] When a prison is defending a policy, it only has to show that the possibility of a risk exists; it does not have to demonstrate that the risk has actually occurred. Examples of interests cited by prison authorities include prison safety and undue financial or administrative burden.[176]

I. Sentencing Persons With Infectious Diseases

If you have an infectious disease and you have been indicted for a crime but not yet sentenced, you may be able to ask the judge to dismiss the indictment or decrease your sentence because of your health condition. Different states have different rules, so be sure to look at your state's statutes and cases.

If your case is in New York State and you have a terminal illness, you may: (1) ask for lower bail; (2) ask to be released on your own recognizance; or (3) make a *Clayton* motion to have your case dismissed "in the interest of justice" (under New York Criminal Procedure Law § 210.40 and § 210.45).[177] The court will look at the evidence of guilt, the seriousness of the offense, your character, and your criminal record.[178] To support a request for dismissal, try to provide medical documentation that imprisonment would worsen your health.

If you have a terminal disease and are in prison because you violated your parole, you can request to: (1) be returned to parole status; (2) be released to time served or granted conditional release to probation; or (3) have your case adjourned in contemplation of dismissal. The adjournment may be extended indefinitely, which may allow you to live your last days out of prison.

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172. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 221 (1998) ("[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates....").

173. 42 U.S.C. § 12132 (2006).

174. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998).

175. *See* Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994) (finding a legitimate penological interest allowed prison to discriminate against HIV-positive prisoners by denying them food service jobs). In *Gates* the prison claimed that although the medical risk of infecting other prisoners through food service is admittedly small, the perception of a risk by other prisoners could be threatening and could lead to violence. Thus, the prison interest was not in preventing the spread of HIV so much as promoting prison safety, a typical prison interest. *See also* Onishea v. Hopper, 126 F.3d 1323, 1336 (11th Cir. 1999) (the FRA "mandates judicial consideration of interests particular to the prison system").

176. Bullock v. Gomez, 929 F. Supp. 1299, 1305–08 (C.D. Cal. 1996) (finding the California Men's Colony possibly violated the ADA and the FRA when it prohibited HIV-infected prisoners from visiting their spouses in a family visiting program permitting prisoners to visit immediate family members in private conditions for relatively extended periods of time, including overnight stays; stating that the discrimination may be justified under the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79 (1987), as a legitimate penological interest if accommodating HIV-prisoners proved to be an undue financial or administrative burden, or if the concerns of other prisoners could lead to prison violence; and noting that proof of previous prison violence is not required to prove a legitimate penological interest).

177. People v. Clayton, 41 A.D.2d 204, 208, 342 N.Y.S.2d 106, 110 (2d Dept. 1973) (listing factors a court should consider where defendant seeks to dismiss case "in the furtherance of justice," including the (1) nature of the crime; (2) available evidence of guilt; (3) defendant's prior record; (4) punishment already suffered by defendant; (5) purpose and effect of further punishment; (6) any prejudice to defendant by time's passage; and (7) the impact on the public interest of indictment's dismissal); *see also* People v. Lawson, 198 A.D.2d 71, 73, 74, 603 N.Y.S.2d 311, 313 (1st Dept. 1993) (dismissing indictment of defendant, described as "'thin as a rail'" and unable to stand properly, who had not been involved in any other criminal activity, was honorably discharged from the Air Force, and was in final stages of AIDS), *aff'd*, People v. Herman L., 83 N.Y.2d 958, 960, 639 N.E.2d 404, 405, 615 N.Y.S.2d 865, 866 (1994) (dismissing indictment pursuant to N.Y. Crim. Proc. Law § 210.40 (McKinney 1993), which allows dismissals "in furtherance of justice" and in judge's discretion).

178. *See*, *e.g.*, People v. Sierra, 149 Misc. 2d 588, 590, 566 N.Y.S.2d 818, 819 (Sup. Ct. Kings County 1990) (refusing to dismiss conviction because defendant suffered from AIDS Related Complex ("ARC") and would eventually develop AIDS, since he was a repeat felon with a long criminal history; the court also considered the evidence of the defendant's guilt, the offense's seriousness, his character, and criminal history to find he was not entitled to dismissal).

If you are facing sentencing in federal court, judges consider the sentencing guidelines on an advisory basis.[179] The court may impose a lesser sentence ("downward departure") if mitigating circumstances exist.[180] The U.S. Sentencing Commission Guidelines Manual states, "an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."[181] Courts usually do not reduce sentences unless the defendant's AIDS is serious enough to be an "extraordinary physical impairment."[182] Some courts only consider the defendant's health at the time of sentencing, even if the disease will likely worsen in prison.[183]

Most courts require you to be seriously ill before dismissing an indictment or reducing your sentence, but one federal district court did grant a downward departure to an HIV-positive defendant in stable condition. The court reasoned the defendant believed his good health was a result of his special regimen of strict diet, regular exercise, acupuncture, and a combination of vitamins and natural supplements under the close supervision of a medical professional.[184] In this case the judge was not concerned whether the treatment actually contributed to the defendant's good health under the reasoning that since the defendant believed his regimen was effective, he would suffer emotional harm if he had to change treatments in prison.[185]

If you are trying to get your sentence dismissed or reduced because of your health, you have a greater chance of success if you suffer from a very serious illness, like advanced-stage AIDS. You should try to present medical documentation that being in prison will harm your health. Also, keep in mind courts might not be sympathetic to you if you have a long criminal history. Remember, courts have discretion to grant downward departures. The law does not say exactly what an "extraordinary physical impairment" is, so you may be able to get a reduced sentence or dismissal even if you do not have AIDS, but TB or hepatitis instead.

J. Life After Imprisonment: Planning for Your Release

Chapter 35 of the *JLM*, "Getting Out Early: Conditional & Early Release," contains information about compassionate release and medical parole. If you have been diagnosed with an infectious disease, you should read that Chapter carefully to see whether you might be eligible for either of these options.

If you are about to be paroled or released, you should get a confidential HIV test before leaving prison. Getting a test can be more difficult or expensive outside of prison. If you do have HIV/AIDS or hepatitis, you should continue to be careful to avoid infecting other people. Before release, you should also try to contact local agencies and organizations for help transitioning from prison to community life. You can contact the public health department in your area for free brochures. Appendix A lists other helpful agencies.

K. Conclusion

If you have AIDS, TB, hepatitis B or C, MRSA or another infectious disease, people may treat you differently due to ignorance and fear. Protect yourself by becoming aware of the facts of the disease and your legal rights. As a prisoner, you may find information and support is not always readily available. But many of the organizations in Appendix A of this Chapter work with prisoners and may be able help you.

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179. United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 756–57, 160 L. Ed. 2d 621, 651 (2005) (holding that the sentencing guidelines are not binding on federal judges).

180. U.S. Sentencing Guidelines Manual, 18 U.S.C.S. Appx. § 5H1.4 (2010).

181. U.S. Sentencing Guidelines Manual, 18 U.S.C.S. Appx. § 5H1.4 (2010).

182. *See* 16 A.L.R. Fed. 2d 113 (2007).

183. *See* United States v. Thomas, 49 F.3d 253, 261 (6th Cir. 1995) (denying downward departure because defendant's HIV infection had not progressed into advanced AIDS and was not an "extraordinary physical impairment"); United States v. Woody, 55 F.3d 1257, 1275 (7th Cir. 1995) (refusing downward departure because HIV-positive defendant did not have full-blown AIDS); United States v. Rabins, 63 F.3d 721, 729 (8th Cir. 1995) (denying downward departure because defendant's AIDS had not become life-threatening; also holding that the defendant's condition should be assessed at the time of sentencing, regardless of the serious physical difficulties that may develop over the years).

184. United States v. Blarke, 7 F. Supp. 2d 192 (E.D.N.Y. 1998).

185. United States v. Blarke, 7 F. Supp. 2d 192, 212 (E.D.N.Y. 1998).

APPENDIX A

RESOURCES FOR INFORMATION, COUNSELING, AND SUPPORT

National AIDS Organizations

AIDS in Prison Project's Hotline
Phone: (212) 674-0800 (in English, en Español)
Hours: Tuesday, Thursday 3:00 pm to 8:00 pm Eastern Time (ET).
HIV/AIDS hotline for prisoners. All collect calls accepted.

Center for Disease Control National AIDS Hotline (CDC-INFO)
Centers for Disease Control and Prevention, 1600 Clifton Rd, Atlanta, GA 30333
Phone: (800) CDC-INFO (232-4636) (24 hours, in English, en Español)
TTY (for callers with hearing impairments): (888) 232-6348 (24 hours)

Center for Disease Control National Prevention Information Network (CDC-NPIN)
Phone: (800) 458-5231
TTY (for callers with hearing impairments): (800) 243-7012 (M-F 9am-6pm ET)

HIV/AIDS Treatment Information Service (ATIS)
P.O. Box 6303
Rockville, MD 20849
Toll free: 1-800-448-0440 (M-F 12pm-5pm ET)
http://www.aidsinfo.nih.gov/
Free literature, including U.S. guidelines on HIV treatment from the Department of Health and Human Services (DHHS).

HIV/AIDS/HCV Education Project
ACLU NATIONAL PRISONER PROJECT
915 15th St. NW, 7th Floor
Washington D.C. 20005
http://www.aclu.org/hiv/index.html
Referrals to city and state programs nationwide. Resource center, including free copies of PLAY IT SAFER, a booklet on STIs (sexually transmitted infections), and HIV/AIDS magazines.

National HCV Prison Coalition
Hepatitis C Awareness Project
Phyllis Beck, Director
PO Box 41803
Eugene, OR 97404

Phone: (541) 607.5725
Fax: (541) 607-5684
Email: hepinfo@hepeducation.org
http://www.hcvinprison.org/
Education, advocacy and support for prisoners with hepatitis C and HIV co-infection.

National Minority AIDS Counsel
Prison Initiative
1931 13th Street NW
Washington, DC 20009-4432
Phone: (202) 483-NMAC (6622)
Fax: (202) 483-1127, (202) 483-1135, (202) 483-5387
www.nmac.org/index/prison-initiative
E-mail: info@nmac.org
The Prison Initiative is a project of NMAC, which helps community and faith-based organizations, correctional facilities and health departments evaluate, improve and implement effective discharge planning for HIV positive prisoners and former prisoners.

National Native American AIDS Prevention Center
720 S. Colorado Blvd., Suite 650-S
Denver, CO 80246
Phone: (720) 382-2244
Fax: (720) 382-2248
Automated fax info: 1-800-283-6880
Hours: Monday–Friday 9:00 am to 5:00 pm
http://www.nnaapc.org/
E-mail: information@nnaapc.org
The National Native American AIDS Prevention Center (NNAAPC) offers a variety of programs to help promote education about HIV/AIDS, support prevention efforts, and help foster healthy attitudes about sexuality and sexual health in the Native community.

AIDS Organizations in New York

AIDS Related Community Services
40 Sawmill River Road
Hawthorne, NY 10523
Phone: (914) 345-8888
Fax: (915) 785 8299
Counseling, education, food, and pantry. Other locations available in Westchester, Rockland, Dutchess, Putnam, Ulster, and Sullivan counties.
American Foundation for AIDS Research
120 Wall Street, 13th Floor
New York, NY 10005-3902

Phone: (212) 806-1600
Toll-free: (800) 392-6327
Fax: (212) 806-1601
This group is a non-profit organization that supports AIDS research, HIV prevention, treatment education, and the advocacy of AIDS-related public policy.

Asian Pacific Islander Coalition on HIV/AIDS
400 Broadway
New York, NY 10013
Phone: (212) 334-7940
(866) 274-2429 (Infoline)
Fax: (212) 334-7956
This group is a non-profit organization providing HIV/AIDS-related services, education, and research to Asian and Pacific Islander Communities in New York City. Services include HIV testing, STI screening and treatment, acupuncture, and more.

Correctional Association of New York
2090 Adam Clayton Powell, Suite 200
New York, NY 10027
Phone: (212) 254-5700
Fax: (212) 473-2807
This organization provides advocacy, research, information, and referral to prisoners and parolees living with HIV.

Gay Men's Health Crisis
119 West 24th Street
New York, NY 10011-1913
Phone: (212) 367-1000
Toll free: (800) 243-7692 (Hotline) (in English, en Español) (Weds. 10am–2pm; Fri. 10am–6pm)
Assists prisoners with obtaining public benefits when on parole, and publishes a variety of informational brochures. It provides legal services to anyone who is HIV-positive. It also provides referrals and serves women and children.

HIV Law Project
15 Maiden Lane, 18th Floor
New York, NY 10038
Phone: (212) 577-3001 (in English, en Español)
Fax: (212) 577-3192
This organization provides legal advocacy. However, it only deals with civil law cases, not criminal law. It provides free civil legal services primarily related to entitlements, housing, immigration (including permanency planning), and family law. It serves residents of Manhattan and the Bronx, and homeless people in all five boroughs. Collect calls are accepted.

Hispanic AIDS Forum, Inc.
Manhattan Office:
213 West 35th Street, 12th Floor
New York, NY 10010
Phone: (212) 868-6230 (in English, en Español)
Fax: (212) 868-6237

Bronx Office:
975 Kelly Street, Suite 402
Bronx, NY 10459
Phone: (718) 328-4188 (in English, en Español)
Fax: (718) 328-2888

The Hispanic AIDS Forum is New York's largest Latino-run AIDS outreach organization. It has a bilingual staff and provides seminars, outreach programs, case management services, counseling and other support, and referrals to other organizations.

Latino Commission on AIDS
24 West 25th Street, 9th Floor
New York, NY 10010
Phone: (212) 675-3288
Fax: (212) 675-3466
A grass-roots organization working in collaboration with the AIDS in Prison Project.

Legal Action Center (LAC)
225 Varick Street, 4th Floor
New York, NY 10014
Phone: (212) 243-1313
Toll-free: (800) 223-4044
Fax: (212) 675-0286
This organization provides legal services for ex-offenders with HIV, such as help with housing and employment discrimination.

New York AIDS Coalition (NYAC)
400 Broadway, 2nd Floor
New York, NY 10013
Phone: (646) 744-1598
Brings together community-based HIV/AIDS organizations and their supporters to work for increased funding and fair policies for people living with HIV/AIDS in New York State.

The Osborne Association AIDS in Prison Project
809 Westchester Avenue
Bronx, NY 10455
Phone: (718) 842-0500
Fax: (718) 842-0971
Email: info@osborneny.org
AIDS in Prison Project Hotline (718) 378-7022

(T,W,R, 3–8 p.m.; collect calls accepted)
www.osborneny.org
Provides information, counseling, education, placement in service organizations, and medical advocacy for New York prisoners.

Prisoners' Rights Project of the Legal Aid Society
199 Water Street
New York, NY 10038
Phone: (212) 577-3300
Fax: (212) 509 8433
Provides services to prisoners only. It also helps prisoners in New York City and New York State with medical concerns and brutality cases.

Prisoners Legal Services of New York (PLSNY)
Albany Location:
41 State Street, Suite M112
Albany, NY 12207
Prisons served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

Buffalo Location:
237 Main St., Suite 1535
Buffalo, NY 14203
Prisons served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

Ithaca Location:
102 Prospect St.
Ithaca, NY 14850
Prisons served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

Plattsburgh Location:
121 Bridge Street, Suite 202
Plattsburgh, NY 12901
Prisons served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.

(Due to the large number of inquiries, PLSNY does not accept telephone calls from prisoners and their family members).

PLSNY is a non-profit legal services organization providing civil legal services to indigent prisoners in New York State correctional facilities in cases where no other counsel is available.

Women's Prison Association
Reentry Unit
110 2nd Avenue
New York, NY 10003
Phone: General Info: (212) 292-7740
Reentry Services: (718) 637-6877
Fax: (212) 292-7763
*WPA **Reentry Services** include a full array of prison, jail, and community-based assistance aimed at helping women become full participants in community life following incarceration or other criminal justice involvement.*

AIDS Organizations in California

San Francisco AIDS Foundation
1035 Market St, Ste 400
San Francisco CA 94103
Phone: (415) 487-8000
Fax: (415) 487-8079
http://www.sfaf.org
Provides vital services and programs designed to improve the quality of life for people living with HIV/AIDS and to reduce the number of new infections that occur each year.

Center for Health Justice
900 Avila Street, Ste. 301
Los Angeles, CA 90012
Phone: (213) 229-0985
Fax: (213) 229-0986
Email: info@healthjustice.net
http://www.healthjustice.net
Provides HIV legal and education information inside and outside correctional facilities.

Project Inform's National HIV/AIDS Treatment Hotline
1375 Mission Street
San Francisco, CA 94103
Toll free: 1-800-822-7422
Hours: Monday-Friday, 10am-4pm Pacific Time (PT).
Nightline: 1-800-628-9240
Hours: 5pm-5am every day.
Provides legal and educational information for those with HIV/AIDS. Will mail out materials to prisoners and accepts collect calls from correctional institutions.

AIDS Project Los Angeles
611 South Kingsley Drive
Los Angeles, CA 90005
Phone: (213) 201-1600, (213) 201-1500
http://www.apla.org/

AIDS Organizations in Illinois

Illinois AIDS Hotline
Toll-free: (800) 243-2437 (in English, en Español)
Hours: daily 8am-10pm Central Time (CT).
Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction. Bilingual.

AIDS Organizations in Pennsylvania

Lewisburg Prison Project
P.O. Box 128
Lewisburg, PA 17837-0128
Phone: (570) 523-1104
Fax: (570) 523-3944
Email: prisonproject@dejazzd.com
Non-profit organization that provides legal and other assistance to prisoners in Central Pennsylvania for non-criminal issues. Counsels and assists prisoners who encounter treatment they perceive as illegal or unfair, including medical treatment.

Pennsylvania AIDS Hotline
Toll-free: (800) 662-6080
Up-to-date information on HIV transmission, HIV counseling and testing sites. Offers information and support resources, risk reduction.

AIDS Organizations in Texas

AIDS Arms
219 Sunset, Suite #116-A
Dallas, Texas 75208
Phone: (214) 521-5191
Fax: (214) 528-5879
TDD: (214) 231-0151
www.aidsarms.org
Assists individuals in accessing the healthcare, resources, and support necessary to successfully manage the challenges of living with HIV/AIDS. Assists prisoners in obtaining information regarding HIV/AIDS and other STIs.

Urban League of Greater Dallas
4315 South Lancaster Road
Dallas, Texas 75216
Phone: (214) 915-4600
Fax: (214) 915-4601
www.dallasurbanleague.com
Referral for anonymous and confidential HIV testing, prevention counseling, individual ongoing counseling (not prevention counseling), health education/risk reduction, HIV prevention education, STI prevention education, street outreach, peer education, HIV early intervention, hepatitis education/counseling, TB testing, substance abuse intervention, support groups, peer counseling, financial education/entitlement assistance, emergency financial assistance, clothing assistance, computer technology training, G.E.D. classes, employment programs, brochures, videos.

AIDS Foundation Houston
3202 Weslayan Street
Houston, Texas 77027
Phone: (713) 623-6796
Fax: (713) 623-4029
Email: info@AFHouston.org
www.aidshelp.org
Special Prison Initiative Program. Prevention counseling, health education/risk reduction, HIV prevention education, STI prevention education, street outreach, peer education, case management for HIV/AIDS, hepatitis education/counseling, hotline/telephone counseling, peer counseling, food pantry, nutrition services, volunteer services, HOPWA, emergency financial assistance, clothing assistance, housing programs.

National Hepatitis B Organization

Hepatitis B Foundation
3805 Old Easton Rd.
Doylestown, PA 18902
Phone: (215) 489-4900
Fax: (215) 489-4920
Email: contact@hepb.org
Hepatitis B Foundation provides information and support for people with Hepatitis B and supports research for a cure. It also offers online support groups.

A JAILHOUSE LAWYER'S MANUAL

Chapter 27:
Religious Freedom in Prison

Columbia Human Rights Law Review

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CHAPTER 27

RELIGIOUS FREEDOM IN PRISON*

A. Introduction

While in prison, you have the right to observe and practice the religion of your choice.[1] The U.S. Constitution, as well as federal and state laws, protects this right. This Chapter describes these protections and explains how courts determine whether a prisoner's right to religious freedom has been violated.

1. Constitutional Protections

The First Amendment to the Constitution is the most basic protection of your right to religious freedom. This Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2]

The first part of the Amendment, known as the Establishment Clause, prohibits government officials from establishing a national religion. Generally, this means that the government is not allowed to start a church, to aid one religion, to aid all religions, or to favor one religion over another.[3]

The second part of the First Amendment, known as the Free Exercise Clause, means that government cannot prevent you from practicing your religion. However, under the Free Exercise Clause, prison officials can impose restrictions on your exercise of religion that are "reasonably related" to legitimate prison goals.[4] In other words, you might be barred from performing a religious practice if the justification reasonably relates to the prison's aims. These justifications may include deterring crime, rehabilitating prisoners, and ensuring security.[5]

Both the Establishment Clause and Free Exercise Clause are part of the First Amendment, but courts address these clauses separately, and this Chapter will also address them separately.

2. Statutory Protections

Laws passed by Congress and state legislatures provide additional protection of your religious freedom. Depending on whether you are in a state or federal prison, different laws apply. If you are in a state prison, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects your religious freedom;[6] if you are in a federal prison, the Religious Freedom Restoration Act of 1993 (RFRA) applies.[7]

Although RLUIPA and RFRA are two different laws, both use the same language to describe the religious free exercise protections given to prisoners.[8] Therefore, if you are a federal prisoner (and, thus, protected by RFRA), this Chapter's discussion of RLUIPA can still help you figure out how strong your RFRA claims are. Additionally, you can cite cases decided under either RLUIPA or RFRA to support your claim, regardless of whether you are in federal or state prison.[9]

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1. *See* Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1082–83, 31 L. Ed. 2d 263, 268 (1972) (finding that prisoners retain 1st Amendment protections, including its directive that no law shall prohibit the free exercise of religion).

2. U.S. Const. amend. I.

3. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

4. Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

5. Pell v. Procunier, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–02 (1974); Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 1810–11, 40 L. Ed. 2d 224, 239 (1974).

6. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–cc-5. (2006).

7. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4. (2006).

8. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2006); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2006).

9. *See, e.g.*, Fowler v. Crawford, 534 F.3d 931, 938 (8th Cir. 2008) (holding that a RFRA case "dictate[d] the

Some states have also enacted state-specific laws that further protect the religious freedom of state prisoners. These laws are discussed in more detail in Part D of this Chapter.

3. Bringing a Religious Freedom Lawsuit

If you believe prison officials have violated your constitutional or statutory rights to religious freedom, and you wish to bring a suit against them, you will first need to follow your institution's administrative grievance procedure.[10] See *JLM*, Chapter 15 for further information on inmate grievance procedures.

If you do not receive a favorable result through the grievance procedure, you can file suit in federal court. Depending on which type of prison you are in, you will need to bring different claims. If you are a state prisoner, you should bring a RLUIPA claim under 42 U.S.C. § 2000cc and a First Amendment claim under 42 U.S.C. § 1983. If you are a federal prisoner, you should bring a RFRA claim under 42 U.S.C. § 2000bb and a First Amendment claim in a *Bivens* action.[11]

Regardless of which claims you bring, when you draft your complaint, you should be sure to begin by asserting a RLUIPA (or, if you are a federal prisoner, RFRA) claim, followed by a First Amendment claim. This is because it is easier to meet the RLUIPA or RFRA standards than the First Amendment standards, and you are thus more likely to receive relief under RLUIPA or RFRA than under the First Amendment.[12]

If you are a state prisoner, you can also file an action in a state court. If you are in a New York state prison, you can either file an action in the Court of Claims, or you can file an Article 78 petition, depending on what kind of relief you want. More information on all of these types of cases can be found in the following *JLM* chapters: Chapter 5 (Choosing a Court and a Lawsuit), Chapter 14 (Prison Litigation Reform Act), Chapter 16 (42 U.S.C. § 1983 and *Bivens* actions), Chapter 17 (Tort Actions), and Chapter 22 (Article 78 proceedings).

If you end up pursuing any claim in federal court, you should make sure to read *JLM*, Chapter 14 on the Prison Litigation Reform Act (PLRA) before you file your claim. If you do not follow PLRA requirements, you can, among other things, lose your good time credit and your right to bring future claims in federal court without paying the full filing fee.

The next part of this Chapter discusses the First Amendment Establishment Clause. Part C discusses the First Amendment Free Exercise Clause and RLUIPA or RFRA protections. Part D discusses your rights under selected state statutes, while Part E considers recent developments in faith-based rehabilitation programs. The Appendix lists some religious organizations that may provide you with additional support.

B. The First Amendment Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."[13] This means that the government cannot form a church, aid any religion, prefer any religion over another, or participate in any religious organization.[14] Thus, prison officials violate the Establishment Clause if they give special treatment to certain religious groups. For example, if prison officials

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outcome" in the RLUIPA case before the court).

10. *See* Cutter v. Wilkinson, 544 U.S. 709, 723 n.12, 125 S. Ct. 2113, 2123 n.12, 161 L. Ed. 2d 1020, 1035 n.12 (2005) ("[A] prisoner may not sue under RLUIPA without first exhausting all available administrative remedies."); Sacred Feather v. Merrill, No. 07-18 B, 2008 U.S. Dist. LEXIS 47543, at *9–10 (D. Me. June 19, 2008) (*unpublished*) (finding that the prisoners' claim that limited access to sweat lodges, powwows, ceremonial food, and music had to be dismissed because prisoners had not exhausted the prison's grievance procedure).

11. A *Bivens* action allows prisoners to sue federal officials for constitutional violations. See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for a detailed discussion; *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72, 122 S. Ct. 515, 522, 151 L. Ed. 2d 456, 467 (2001) (holding that a federal prisoner alleging a constitutional violation can bring a *Bivens* claim against a federal officer).

12. *See* Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) ("RLUIPA ... mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment]."); *see also* Smith v. Allen, 502 F.3d 1255, 1266, 21 Fla. L. Weekly Fed. C. 54 (11th Cir. 2007) (noting RLUIPA affords a "heightened protection from government-imposed burdens" than the 1st Amendment); Desimone v. Bartow, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug 12, 2008) (*unpublished*) ("RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate's exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.").

13. U.S. Const. amend. I.

14. *See* Kerr v. Farrey, 95 F.3d 472, 479–80 (7th Cir. 1996) (finding a violation of the Establishment Clause where plaintiff had been required to attend a substance abuse counseling program with explicit religious content while in prison and where the only option available to the prisoner was religious in nature).

were to set up a church within the prison and then force prisoners to attend religious services, that would violate the Establishment Clause.[15]

In order for your Establishment Clause claim to succeed, you will first need to prove that there was *government action*, often called "state action." The Supreme Court has held that "state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."[16]

Generally, courts will consider actions by prison officials and private groups acting under the authority of prison officials to be state action.[17] For example, in 2007, the Court of Appeals for the Seventh Circuit held that when a department of corrections gave private religious organizations the power to incarcerate, treat, and discipline prisoners, as well as access to facilities and substantial aid to effectuate a faith-based program, the religious organizations could be considered state actors.[18]

Unauthorized actions by individuals, on the other hand, may be less likely to constitute state action. For example, one federal appeals court held that there was no state action when a prison officer, who was also a Christian minister, brought a bible to work and put it in the prisoners' view, sang Christian songs, debated and discussed religion with prisoners, and tried to convert prisoners to Christianity. The court found no Establishment Clause violation because the jail had not approved these actions, had trained its staff to avoid such conduct, and transferred the officer when the plaintiff complained.[19]

Once you have shown that the practice or regulation you are challenging constitutes government action, you will need to prove that this action violated the Establishment Clause. To determine whether a prison regulation or practice violates the Establishment Clause, courts have used different tests,[20] including the *Lee* coercion test[21] and the *Lemon* test.[22] Both tests are explained below. While some courts have combined these tests,[23] the Supreme Court has yet to rule that either of these tests represents the sole constitutional standard.[24] So you should try to argue in your complaint that the challenged prison regulation or practice fails both of the Establishment Clause tests.

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15. *See* Campbell v. Cauthron, 623 F.2d 503, 509 (8th Cir. 1980) (holding that allowing religious volunteers into a cell block was not a state establishment of religion, but that prison officials were required to make sure that no prisoners were subjected to forced religious indoctrination).

16. Brentwood Acad. v. Tenn. Sec. Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 930, 148 L. Ed. 2d 807, 817 (2001).

17. *See* Monroe v. Pape, 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492, 503 (1961) (finding that constitutional violations committed by state officers in performance of their duties were committed "under color of" state law, and rejecting the argument "that 'under color of' state law included only action taken by officials pursuant to state law").

18. Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 421–23 (8th Cir. 2007).

19. Canell v. Lightner, 143 F.3d 1210, 1214 (9th Cir. 1998).

20. *See* Ross v. Keelings, 2 F. Supp. 2d 810, 816–18 (E.D. Va. 1998) (noting that courts have sometimes used the *Lemon* test and other times declined to apply *Lemon* in favor of the *Lee* test).

21. *See* Lee v. Weisman, 505 U.S. 577, 578, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992); Warner v. County Dept. of Probation, 115 F.3d 1068, 1074–75 (2d Cir. 1997) (applying the *Lee* coercion test to determine whether a probation practice violates the Establishment Clause); Warburton v. Underwood, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (holding that while proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient).

22. *See* Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); Kaufman v. McCaughtry, 419 F.3d 678, 683–84 (7th Cir. 2005) (applying the *Lemon* test to determine whether a prison practice violates the Establishment Clause). *But see* Gray v. Johnson, 436 F. Supp. 2d 795, 800 n.4 (W.D. Va. 2006) ("When deciding similar cases, the Second Circuit, the Seventh Circuit, and the Eastern District of Virginia have opted to apply a more basic coercion test in lieu of *Lemon*. These courts have simply examined whether the challenged program accomplished coerced religious participation, finding each time that the program did.").

23. *See*, *e.g.*, Gray v. Johnson, 436 F. Supp. 2d 795, 800 n.4 (W.D. Va. 2006) (explaining how the coercion and endorsement tests fall within the second prong of the *Lemon* test).

24. *See* Van Orden v. Perry, 545 U.S. 677, 685–86, 125 S. Ct. 2854, 2860–61,162 L. Ed. 2d 607, 615–16 (2005) (explaining that many cases have either not relied on the *Lemon* test or applied it only after concluding that a regulation was invalid under a different 1st Amendment Establishment test); *see e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679, 104 S. Ct. 1355, 1362, 79 L. Ed. 2d 604, 613 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."); County of Allegheny v. ACLU, 492 U.S. 594, 595, 109 S. Ct. 3086, 3102, 106 L.E. 2d 472, 496 (1989) ("Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion."); Lee v. Weisman, 505 U.S. 577, 597, 112 S. Ct. 2649, 2661, 120 L. Ed. 2d 467, 487 (1992)

1. The *Lee* Coercion Test

To determine whether a prison regulation or practice violates the First Amendment's Establishment Clause, a court may ask whether it amounts to "coercion." In *Lee v. Weisman*, the U.S. Supreme Court announced that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise ...."[25] Applying this rule, the Court held that a policy permitting public schools to invite clergy members to say prayers at graduation ceremonies was unconstitutional because it amounted to forced participation in religion,[26] and thus failed the coercion test.

Although *Lee* dealt with religious freedom in the school context, other lower courts have held that a showing of coercion alone, without more, may be sufficient to prove an Establishment Clause violation in the prison or probation context.[27]

For instance, in *Kerr v. Farrey*,[28] a prisoner brought a federal civil rights claim against state corrections officials. The prisoner alleged that the officials required him to attend religious-based Narcotics Anonymous meetings as part of his rehabilitation.[29] The federal court of appeals applied the *Lee* coercion rule by asking three questions: (1) whether there was state action; (2) whether the action was coercive or forceful; and (3) whether the object of the coercion was religious or secular. The prison failed all three questions because the state had acted (through the prison officials) by forcing the prisoner to participate in the Narcotics Anonymous meeting, which contained a religious element.[30] The penalty for not attending the meetings was a higher security risk classification and negative effects on the prisoner's parole eligibility. Therefore, the court found that the prison had violated the Establishment Clause.[31]

A similar conclusion was reached in *Warner v. Orange County Department of Probation*. There, the Second Circuit Court of Appeals concluded that because the department of probation had required a prisoner to attend a religious Alcoholics Anonymous program as a condition of probation, it "plainly constituted coerced participation in religious exercise" and thus violated the Establishment Clause.[32]

2. The *Lemon* Test

If you are unable to show that the prison regulation or practice amounted to coercion, you might still have a valid First Amendment claim under the *Lemon* test.[33] This test, which comes from the U.S. Supreme Court's decision in *Lemon v. Kurtzman*,[34] is a "central tool" in the court's analysis of Establishment Clause cases[35] and

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("Establishment Clause jurisprudence remains a delicate and fact-sensitive one.").

25. Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992).

26. Lee v. Weisman, 505 U.S. 577, 599, 112 S. Ct. 2649, 2661, 120 L. Ed. 2d 467, 488 (1992).

27. *See* Warburton v. Underwood, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (holding proof of government coercion is sufficient but not necessary to prove an Establishment Clause violation).

28. Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996).

29. For a more detailed discussion of faith-based addiction treatment options, see Part E of this Chapter.

30. Kerr v. Farrey, 95 F.3d 472, 479–80 (7th Cir. 1996); *see also* Warner v. Orange County Dept. of Prob., 115 F.3d 1068, 1074–75 (2d Cir. 1996), *vacated on other grounds by* 115 F.3d 1068 (2d Cir. 1997) (holding that the a county probation department could be held liable for violating the Establishment Clause by requiring a probationer to attend Alcoholics Anonymous meetings that contained religious content); Ross v. Keelings, 2 F. Supp. 2d 810 (E.D. Va. 1998) (holding that prison officials violated the Establishment Clause by forcing a prisoner to attend a drug rehabilitation program that included a religious study component).

31. Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996); *but see* Quigg v. Armstrong, 106 F. App'x 555, 556 (9th Cir. 2004) (holding that a privately-run pre-release program that served as an alternative to prison was free to offer religion-based treatment without providing nonreligious alternatives because the program employees were not state actors).

32. Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1076 n.8 (1996), *vacated on other grounds by* 115 F.3d 1068 (2d Cir. 1997).

33. *See* Alexander v. Schenk, 118 F. Supp. 2d 298, 301 (N.D.N.Y. 2000) ("In cases not involving coercion courts are required to examine whether practice [satisfies the *Lemon* test].").

34. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (finding that the state cannot give direct aid to parochial schools), *noted in* Zelman v. Simmons-Harris, 536 U.S. 639, 668–70, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627–28 (2002). The *Lemon* test has not been used recently by the Supreme Court, and some authors have suggested that the Supreme Court may abandon it. However, as recently as 2005, the Supreme Court affirmed a district court judge's use of the first factor of the test, and refused to abandon the "purpose" factor. *See* McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 859, 125 S. Ct. 2722, 2733, 162 L. Ed. 2d 729, 746 (2005).

35. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627 (2002) (describing the *Lemon* test as a "central tool in our analysis of cases in this area") (O'Connor, J., concurring).

is frequently cited. Therefore, you should be prepared to argue that the regulation which you are complaining about fails the *Lemon* test.

In order to demonstrate a violation of the Establishment Clause under the *Lemon* test, you must show one or more of the following:

(1) The regulation has a non-secular purpose (i.e., a religious purpose);
(2) Its principle or primary effect is to advance or inhibit religion; or
(3) It fosters excessive government entanglement with religion.[36]

This means that under *Lemon*, a court will uphold a prison regulation or practice if (1) it has a secular (non-religious) purpose; (2) its primary effect neither advances nor inhibits religion, and (3) it does not require "an excessive government entanglement with religion."

In assessing the first criterion—the purpose of the challenged practice—a court may be more likely to find that a prison regulation or practice has a non-religious purpose if it allows for airing more than one religious view. For example, in *Murphy v. Missouri Department of Corrections*,[37] the Eighth Circuit Court of Appeals found that a prison had not violated the Establishment Clause when it allowed a "broad spectrum" of religious programming to be shown on prison television, but refused to show programs of a specific prisoner's religious group. A central tenet of the prisoner's religion was that "its members must all be Caucasian because they are uniquely blessed by God and must separate themselves from all non-Caucasian persons."[38] The court explained that the prison's "purpose in providing the religious channel was to create a forum in which a large range of religious messages could air, subject only to [the prison's] economic and security concerns."[39] The court found no evidence that favored any one religion in its programming; the individual prisoner's religious programming posed a security risk that other religious programming did not.[40] Therefore, the prison did not violate the establishment clause when it aired other religious programming but refused to air the individual prisoner's religious programming.[41]

Similarly, in *Gray v. Johnson*,[42] a district court found that a prison rehabilitative program that involved some discussion of religion at mandatory meetings and offered both secular and religious library materials did not amount to a violation of the Establishment Clause, even if participants had sung a gospel song at a talent show and preached religion outside of the program.[43]

In contrast, the Court of Appeals for the Seventh Circuit found in *Kaufman v. McCaughtry*[44] that the Establishment Clause was violated where a prison refused to allow prisoners to organize an atheist study group. The prison had failed to show why such a gathering would pose a greater security risk than meetings of prisoners of other faiths. Thus, the court vacated a grant of summary judgment for the prison because it had not given a non-religious purpose for discrimination against the atheist group.[45]

In assessing the second and third parts of the *Lemon* test (which some courts have treated as a single inquiry),[46] courts have looked to whether the challenged practice either endorses or disapproves of religion.[47]

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36. Lemon v. Kurtzman, 403 U.S. 602, 612–13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755 (1971) (finding that the state cannot give direct aid to parochial schools), *noted in* Zelman v. Simmons-Harris, 536 U.S. 639, 668–70, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627–28 (2002).

37. Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 985 (8th Cir. 2004).

38. Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 981 (8th Cir. 2004).

39. Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 985 (8th Cir. 2004).

40. Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 985 (8th Cir. 2004).

41. Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 985 (8th Cir. 2004).

42. Gray v. Johnson, 436 F. Supp. 2d 795 (W.D. Va. 2006).

43. Gray v. Johnson, 436 F. Supp. 2d 795, 800 (W.D. Va. 2006).

44. Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005).

45. Kaufman v. McCaughtry, 419 F.3d 678, 684 (7th Cir. 2005).

46. *See* Bader v. Wren, 532 F. Supp. 2d 308, 313 (D.N.H. 2008) ("The second and third questions have been fused into one, because the same evidence often answers both questions."); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 668–69, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627 (2002) ("[T]he degree of entanglement has implications for whether a statute advances or inhibits religion."); Agostini v. Felton, 521 U.S. 203, 232, 117 S. Ct. 1997, 2015, 138 L. Ed. 2d 391, 420 (1997) (combining excessive entanglement into the effects inquiry).

47. Lynch v. Donnelly, 465 U.S. 668, 690, 104 S. Ct. 1355, 1368, 79 L. Ed. 2d 604, 621 (1984) (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.").

In summary, to bring a successful First Amendment Establishment Claim, you should be able to show:

(1) The practice or regulation that you are challenging is a government action, and either;
(2) The practice or regulation has the effect of coercing you to practice religion and thus fails the *Lee* coercion test, or
(3) If there is no coercion, the practice or regulation fails the *Lemon* test because it either (a) has a religious purpose; (b) endorses, advances, or inhibits a religion; or (c) constitutes an excessive government entanglement with religion.

C. The First Amendment Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the Religious Freedom Restoration Act (RFRA)

This section discusses your religious freedom rights under the First Amendment Free Exercise Clause and RLUIPA or RFRA.[48] Although this section describes the First Amendment Free Exercise Clause first, it is absolutely critical that when drafting a complaint, you first state a claim for relief under RLUIPA or RFRA. The RLUIPA or RFRA standards are easier to meet than the First Amendment standards, and thus, you are more likely to receive relief under RLUIPA or RFRA than under the First Amendment.[49] After you make this claim, you may then make an additional First Amendment claim.

1. First Amendment Free Exercise Clause

Under the Free Exercise Clause of the First Amendment,[50] prison officials must provide you with a "reasonable opportunity" for you to exercise your religious freedom without fear of penalty.[51]

However, in certain circumstances, prison officials may restrict this right to exercise or practice your religious beliefs.[52] Specifically, a prison may lawfully impose rules or regulations that interfere with your sincerely held religious beliefs, provided that these rules or regulations are "reasonably related" to a "legitimate penological purpose or goal" of the prison.[53] These legitimate goals might include maintaining prison order, discipline, safety, and security, among others[54]

So, in order to successfully challenge a prison regulation or practice under the Free Exercise Clause, you must be able to show that:

(1) Your belief is religious in nature;[55]
(2) Your belief is sincerely held; and
(3) The prison regulation is not reasonably related to a legitimate penological purpose or goal.[56]

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48. RLUIPA and RFRA provide the same protection; the main difference is that RLUIPA applies to state and municipal prisoners, while RFRA applies to federal prisoners. *See* Cutter v. Wilkinson, 544 U.S. 709, 715 n.2, 125 S. Ct. 2113, 2118 n.2, 161 L. Ed. 2d 1020, 1030 n.2 (2005) (noting that courts of appeals have held that RFRA remains operative on the federal government and explaining that RLUIPA targets state and local governments).

49. *See* Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) ("RLUIPA ... mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment.").

50. U.S. Const. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion].").

51. Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263, 268 (1972).

52. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353, 107 S. Ct. 2400, 2407, 96 L. Ed. 2d 282, 293 (1987) (restricting prisoners who were on work detail from participating in Jumu'ah did not violate the Constitution because it was reasonably related to legitimate penological objectives).

53. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50, 107 S. Ct. 2400, 2404–05, 96 L. Ed. 2d 282, 290 (1987), *noted in* Washington v. Harper, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990).

54. *See* Pell v. Procunier, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–02 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," including deterrence of crime, protection of society, rehabilitation of the inmate, and internal security within corrections facilities); Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 1810–11, 40 L. Ed. 2d 224, 239 (1974) ("The identifiable governmental interests at stake in [the maintenance of penal institutions] are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.").

55. *See* Wisconsin v. Yoder, 406 U.S. 205, 208, 92 S. Ct. 1526, 1530, 32 L. Ed. 2d 15, 21 (1972) (finding that the beliefs of Amish parents were religious and sincere enough to challenge a state law that required school attendance for their children).

56. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350, 107 S. Ct. 2400, 2405, 96 L. Ed. 2d 282, 291 (1987).

The answer to the first two questions must be "yes" before a court will consider whether the regulation is reasonably related to a legitimate purpose or goal.[57] The following discussion looks at each of these requirements in more detail.

(a) Religious Nature of Your Beliefs

The court will first decide whether your beliefs are religious.[58] The First Amendment only protects religious beliefs; therefore, if the court determines that your beliefs are simply moral or philosophical, it will not find any violation of the Free Exercise Clause.[59]

While this rule is fairly clear, courts have had difficulty defining what exactly constitutes a religious belief.[60] The Supreme Court has cautioned that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task,"[61] and the court has not yet authoritatively or comprehensively defined "religion."[62] Without a fixed definition, lower courts have adopted various approaches.

For example, the Third Circuit has adopted an objective test to determine whether a belief is religious. In *Africa v. Pennsylvania*,[63] the court identified three factors that help distinguish a religion:

(1) A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters;
(2) A religion is comprehensive in nature: it consists of a belief-system as opposed to an isolated teaching; and
(3) A religion often can be recognized by the presence of certain formal and external signs.[64]

In contrast, the Second Circuit has adopted a more subjective test, one that looks not to the external features of the belief system, but towards the "individual's inward attitudes towards a particular belief system."[65] In *Patrick v. LeFevre*,[66] the court described religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine."[67] Thus, courts in the Second Circuit will probably look to "whether [your] beliefs ... are, in *[your] own scheme of things*, religious."[68]

These tests are not the only ones used in state or federal courts, so be sure to research the law in your state or federal circuit. Although predicting whether a particular court will recognize a particular religion is hard,

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57. *See* Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 983 (8th Cir. 2004) ("In analyzing [a 1st Amendment Free Exercise Claim], we consider first the threshold issue of whether the challenged governmental action 'infringes upon a sincerely held religious belief,' and then apply the Turner factors to determine if the regulation restricting the religious practice is 'reasonably related to legitimate penological objectives.'" (citations omitted)).

58. *See* Wisconsin v. Yoder, 406 U.S. 205, 216, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (preliminary determination of whether the beliefs of Amish parents were religious and sincere enough to challenge a state law that required school attendance for their children).

59. *See* Wisconsin v. Yoder, 406 U.S. 205, 215–16, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

60. *See, e.g.*, Cloutier v. Costco Wholesale, 311 F. Supp. 2d 190, 196 (D. Mass. 2004) ("[C]ourts are poor arbiters of questions regarding what is religious and what is not.").

61. Thomas v. Review Bd., 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624, 631 (1981).

62. *See* Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 Miss. C. L. Rev. 67, 71–79 (2008).

63. Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

64. Africa v. Pennsylvania, 662 F.2d 1025, 1026 (3d Cir. 1981) (citing Malnak v. Yogi, 592 F.2d 197, 207–10 (3d Cir. 1979)) (holding that although members of the MOVE organization, a "revolutionary organization absolutely opposed to all that is wrong," held sincere beliefs, these beliefs did not amount to a religion).

65. Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984).

66. Patrick v. LeFevre, 745 F.2d 153 (2d Cir. 1984).

67. Patrick v. LeFevre, 745 F.2d 153, 158 (2d Cir. 1984) (quoting W. James, *The Varieties of Religious Experience* 31 (1910)). This definition is similar to the Supreme Court's description of religious belief as one "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." United States v. Seeger, 380 U.S. 163, 176, 85 S. Ct. 850, 859, 13 L. Ed. 2d 733, 743 (1965); *accord*, Welsh v. United States, 398 U.S. 333, 339–40, 90 S. Ct. 1792, 1796, 26 L. Ed. 2d 308, 317 (1970).

68. Jackson v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) (*quoting* Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984); United States v. Seeger, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965)) (emphasis in *Jackson*).

you should be aware of some guideposts when assessing whether a court will determine that your belief is religious.

First, the U.S. Supreme Court has stated that the main consideration in deciding whether beliefs are religious is the role they play in the life of the person making the claim.[69] Second, the Supreme Court has emphasized that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[70] Likewise, your religion does not need to be organized like traditional churches,[71] conform to an established doctrine,[72] or otherwise meet any other organizational or doctrinal test.[73]

For example, a federal district court recently held that a prisoner who had invented his own religion had a potentially valid claim under the First Amendment and RLUIPA.[74] In *DeSimone v. Bartow*,[75] the prisoner argued that prison officials had violated his right to free exercise of religion when they prohibited him from keeping journals written in a language that he invented. The prisoner asserted that he believed that biblical scripture commanded him to write in this language and that the act of writing was itself a religious act. Accepting this argument, the court allowed the suit to proceed, finding that the prisoner had set forth cognizable claims under both the First Amendment and RLUIPA.[76]

Note, however, that although courts say that non-major religions are entitled to First Amendment protection,[77] you may encounter greater difficulty if your religion is not well-known.

(b) Sincerity of Your Beliefs

If the court determines your belief is religious, it will next consider whether your belief is sincerely held.[78] Prison officials and courts may require that you demonstrate *sincerity*, meaning a true deep commitment to your religion.[79]

In making this decision, courts are not supposed to judge whether your beliefs are "accurate or logical,"[80] or rule on the correctness of your beliefs.[81] Thus, a court may still find your belief sincerely held, even if the clergy

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69. *See* U.S. v. Seeger, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965) ("[C]ourts … are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a [prisoner] are sincerely held and whether they are, in his own scheme of things, religious.").

70. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624, 631 (1981).

71. *See* Marria v. Broaddus, No. 97 Civ. 8297, 2003 U.S. Dist. LEXIS 13329, at *26–29 (S.D.N.Y. July 31, 2003) (*unpublished*) (finding the prisoner's beliefs as a member of the Nation of Gods and Earths to be sincere and religious).

72. *See* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1163 (6th Cir. 1980) (finding that "[o]rthodoxy is not an issue" and that "[t]he Cherokees have a religion within the meaning of the Constitution ...").

73. *See* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1163 (6th Cir. 1980) (finding that despite having "no written creeds and no man-made houses of worship ... [t]he Cherokees have a religion within the meaning of the Constitution ...").

74. DeSimone v. Bartow, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *13 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (holding that a prisoner who had created his own religion, which he refers to as the "Religious Society of Atlantis and the Sanctuary of the Yahweh" had a potentially valid claim under the 1st Amendment and RLUIPA).

75. DeSimone v. Bartow, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419 (E.D. Wis. Aug. 12, 2008) (*unpublished*).

76. DeSimone v. Bartow, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *13 (E.D. Wis. Aug. 12, 2008) (*unpublished*) ("DeSimone's allegations can be understood to allege that he considers writing in [the fictional language] Atlantean as central to his faith, and that the Defendants have targeted his writing, as opposed to the writings of other inmates in foreign languages, because of his uncommon religious beliefs. Thus, Desimone will be permitted to proceed with his claims that by forbidding him from writing in Atlantean, the Defendants violated the First Amendment and RLUIPA."), *dismissed on other grounds*, No. 08-C-638, 2009 U.S. Dist. LEXIS 48689 (E.D. Wis. June 10, 2009).

77. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1981).

78. *See generally* Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (holding Amish children could be exempted from required high school attendance because formal education beyond eighth grade violated sincerely held Amish religious beliefs).

79. *Cf.* United States v. Seeger, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965) (stating that a belief must be "sincerely held" and meet other criteria to qualify a believer for exemption from service in the armed forces).

80. *See* Jackson v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) ("In determining whether a prisoner's particular religious beliefs are entitled to free exercise protection, the relevant inquiry is not whether, as an objective matter, the belief is 'accurate or logical.'" (quoting Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996)).

81. *Cf.* Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451–52, 89 S. Ct. 601, 607, 21 L. Ed. 2d 658, 666–67 (1969) (holding that the constitution prohibits a court from interpreting church doctrine to settle a property dispute that depends upon whether a group is adhering to the doctrine); Bear v. Nix, 977 F.2d 1291, 1294 (8th Cir. 1992) (holding that a court would unconstitutionally intrude upon a good faith "application of

says you are not a member of the religion.[82] Indeed, "clergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief."[83]

Instead, courts will look to factors including your familiarity with your faith's teachings,[84] your demonstrated observance of its rules,[85] and the length of time that you have practiced these religious beliefs.[86] Thus, evidence that you are familiar with your religion, have practiced it for a long time, have participated in religious ceremonies when possible, or have otherwise acted on the basis of your religion can help to establish the sincerity of your religious beliefs.

(c) The Validity of Prison Rules and Regulations

If the court decides your belief is religious and sincerely held, it will then apply the *Turner* test to the prison regulation or practice that you are challenging by asking whether a prison regulation "is reasonably related to legitimate penological interests," and therefore does not violate your constitutional rights.[87] Specifically, under *Turner*, a court will consider the following four factors:

(1) Whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it";
(2) Whether there are other ways of exercising the right despite the regulation;
(3) If, by allowing you to exercise your right, there will be a "ripple effect" on others such as prison personnel, other prisoners, and on the allocation of prison resources; and
(4) Whether there is a different way for the prison to meet the regulation's goal without limiting your right in this way.[88]

When evaluating the first factor, courts have deferred to prison officials' judgment[89] and found that prison security is a legitimate governmental interest.[90] This means courts are not likely to second guess the reasons

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religious doctrine by a recognized spiritual leader of the relevant faith" if it overruled a refusal to admit plaintiff into a Native American religion).

82. *See* Jackson v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) (remanding case in which prisoner sought to be served Kosher food because the lower court incorrectly evaluated the prisoner's claim that he was Jewish by relying on the chaplain's report that the prisoner was not Jewish, rather than looking to whether the prisoner's belief was "sincerely held").

83. Koger v. Bryan, 523 F.3d 789, 799–800 (7th Cir. 2008) (citing Ford v. McGinnis, 352 F.3d 582, 593–94 (2d Cir. 2003)) (holding that the role the Eid ul Fitr feast played in a prisoner's practice of Islam was determinative of whether there had been a substantial burden, and not the testimony of Muslim clerics as to the proper celebration of the feast); Jackson v. Mann, 196 F.3d 316, 320–21 (2d Cir. 1999) (holding that it was the sincerity of a prisoner's beliefs, and not the decision of Jewish religious authorities, that determined whether the prisoner was an adherent of Judaism entitled to a kosher meal); Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829, 834, 109 S. Ct. 1514, 1517, 103 L. Ed. 2d 914, 920 (1989) (holding that in the context of a denial of unemployment benefits, the plaintiff's refusal, based on his Christianity, to work on Sundays was entitled to protection even though "there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work").

84. *See, e.g.*, Robinson v. Foti, 527 F. Supp. 1111, 1113 (E.D. La. 1981) (ruling against a prisoner who sought an exemption from prison rules against dreadlocks in part because the prisoner failed to demonstrate familiarity with Rastafarian practice, history, or teachings, which suggested that the prisoner's Rastafarian beliefs were not sincere).

85. *See, e.g.*, Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("Evidence of nonobservance is relevant on the question of sincerity, and is especially important in the prison setting, for an inmate may adopt a religion merely to harass the prison staff with demands to accommodate his new faith … [b]ut the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.").

86. *See, e.g.*, Iron Eyes v. Henry, 907 F.2d 810, 813 (8th Cir. 1990) (upholding lower court's conclusion that a prisoner's belief was sincerely held where the lower court "noted that [prisoner] had maintained Sioux religious beliefs throughout his life, and that he had participated in religious ceremonies whenever possible").

87. Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

88. Turner v. Safley, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79–80 (1987) ("First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it …. A second factor … is whether there are alternative means of exercising the right that remain open to prison inmates …. A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally …. Finally, the absence of ready alternatives [for prison rules to accomplish the same goal] is evidence of the reasonableness of a prison regulation …. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns.").

89. *See* Thornburgh v. Abbott, 490 U.S. 401, 407–08, 109 S. Ct. 1874, 1878–79, 104 L. Ed. 2d 459, 469 (1989)

prison officials give for prison regulations. For example, a federal court of appeals used the *Turner* test to decide prison officials could prohibit religious items like a bear tooth necklace and a medicine bag in cells to protect the safety of other prisoners, prison security, and the prisoner himself.[91]

For the fourth factor, you will want to show that a different policy could meet the prison's needs without affecting your religious exercise as severely and hence that the current regulation is unnecessary: the U.S. Constitution does not require that the prison prove that the current regulation is necessary.[92]

2. RLUIPA and RFRA

In addition to the First Amendment protections described above, your right to religious freedom is also protected by federal laws. If you are in state prison, your right is protected by a law called the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[93] If you are in federal prison, your right is protected by a law called the Religious Freedom Restoration Act (RFRA).[94]

These laws prohibit the government from imposing a substantial burden on the religious practices of prisoners, unless the government can demonstrate the burden both (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.[95]

Both federal laws provide a higher level of protection for prisoners to exercise their religion than the protection provided by the First Amendment Free Exercise Clause.[96] Therefore, you should begin your complaint with an argument that the restriction violates RLUIPA (or, if you are in federal prison, RFRA). You may then make an argument that the restriction also violates the Free Exercise Clause of the First

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("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); Harbin-Bey v. Rutter, 420 F.3d 571, 578 (6th Cir. 2005) ("Courts generally afford great deference to prison policies, regulations, and practices relating to the preservation of these interests.").

90. Pell v. Procunier, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves").

91. *See* Hall v. Bellmon, 935 F.2d 1106, 1113 (10th Cir. 1991) (upholding on the grounds of security a prison policy that prohibited a Native American from wearing a bear tooth necklace and medicine bag); *see also* Spies v. Voinovich, 173 F.3d 398, 405 (6th Cir. 1999) (upholding on the grounds of security the prohibition of certain Buddhist religious materials from a prisoner's cell and the chapel).

92. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 350, 107 S. Ct. 2400, 2405, 96 L. Ed. 2d 282, 291 (1987) ("Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that 'prison officials ... have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.'") (quoting Turner v. Safley, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80)). This case was decided before the RLUIPA and RFRA were passed into law. These statutes, discussed in Part C(2) of this Chapter, provide additional statutory protections for prisoners.

93. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to cc-5. (2006).

94. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2006). In 1997, the Supreme Court held that RFRA does not apply to claims against states. City of Boerne v. Flores, 521 U.S. 507, 534, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624, 648 (1997) (holding that RFRA "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens" and overturning it as unconstitutional in that regard). However, RFRA still applies to prisoners' claims against federal prisons. *See, e.g.*, Hankins v. Lyght, 441 F.3d 96, 106 (2d Cir. 2006) (noting that since *Boerne*, "every appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies") (citation omitted).

95. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2006). ("No government shall impose a substantial burden upon the religious exercise of a person residing in or confined to an institution ... unless the government demonstrates that the imposition of the burden (1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."); *see also* Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2006).

96. *See* Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) ("RLUIPA ... mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment]; *see also* Smith v. Allen, 502 F.3d 1255, 1266 (11th Cir. 2007) (noting that RLUIPA affords a "heightened protection from government-imposed burdens" compared with 1st Amendment standards); Desimone v. Bartow, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008) (*unpublished*) ("RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate's exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.").

Amendment. In practice, if a court finds that a regulation does not violate RLUIPA or RFRA, it will also almost certainly find that it does not violate the First Amendment Free Exercise Clause.[97]

Although RLUIPA and RFRA are separate laws, a court deciding a case under one law may also look to how a court decided a case under the other law. In other words, RLUIPA cases will be looked at by courts deciding RFRA cases and vice versa.[98] This is because both laws prohibit laws and policies that substantially burden the exercise of your religion, unless the restrictions further a compelling governmental interest using the least restrictive means available.[99] Additionally, both statutes protect the same type of "religious exercise."[100] Thus, although this Chapter primarily refers to RLUIPA, if you are a federal prisoner, this discussion of RLUIPA should help you to determine if you have a viable claim under RFRA.

The following sections will explain what you need to show to establish a RLUIPA or RFRA violation. In general, you first need to show that you meet the jurisdictional requirements of the law. Second, you will need to show (1) you are seeking to engage in an exercise of religion; (2) the prison regulation or practice you are challenging "substantially burdens" that exercise of religion; and (3) prison officials cannot demonstrate that regulation is the "least restrictive means" of achieving a "compelling government interest."[101]

(a) Jurisdictional Requirements

(i) RLUIPA

If you are a state prisoner bringing a claim under RLUIPA, you must first show that the law applies to the prison regulation or practice you are challenging. RLUIPA provides that its protections apply only when "(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."[102]

This means that you will need to show that the prison regulation you are challenging is either (a) imposed in a program or activity that receives federal funds (called "Spending Clause jurisdiction") or (b) affects interstate commerce (called "Commerce Clause jurisdiction").[103]

In order to meet the Spending Clause jurisdictional requirement, the regulation that you are challenging must be imposed in the context of a program or activity that receives Federal financial assistance.[104] "Program or activity" means "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or local government."[105] Basically, this means that whenever a state or local

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97. *See, e.g.*, Daker v. Wetherington, 469 F. Supp. 2d 1231, 1238 (N.D. Ga. 2007) (finding a prison's shaving policy did not violate either RLUIPA or the 1st Amendment); Nelis v. Kingston, No. 06-C-1220, 2007 U.S. Dist. LEXIS 86036, at *17 (E.D. Wis. Nov. 19, 2007) (*unpublished*) (finding a prison's eligibility rule for religious activities did not violate either RLUIPA or the 1st Amendment); Borzych v. Frank, 439 F.3d 388, 390–91 (7th Cir. 2006) (finding a prison's refusal to provide access to books did not violate either RLUIPA or the 1st Amendment); Fegans v. Norris, 537 F.3d 897, 906–08 (8th Cir. 2008) (finding a prison's grooming policy did not violate either RLUIPA or the 1st Amendment).

98. *See* Hoevenaar v. Lazaroff, 422 F.3d 366, 370 (6th Cir. 2005) ("RFRA cases according deference to prison decisions [are] applicable to cases brought pursuant to the RLUIPA."); *see also* Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 987 (8th Cir. 2004) (RLUIPA and RFRA apply the same standard) (*overruled on other grounds*, Van Wyhe v. Reisch, 536 F. Supp. 2d 1110; Congregation Kol Ami v. Abington Tp., No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at *45, n. 11 (E.D. Pa. Aug. 12, 2004) (*unpublished*) ("Cases involving establishment clause challenges to the RFRA are as relevant as those involving the RLUIPA.").

99. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2006); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb–bb-4. (2006).

100. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000bb-2(4) (2006).

101. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

102. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(b) (2006).

103. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2006) ("[RLUIPA] applies in any case in which (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."). If you are a federal prisoner bringing a claim under RFRA, these jurisdictional requirements do not apply to you; instead, you must allege that your Free Exercise rights were violated at a Federal prison or by an agent of the Federal Government.

104. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(f) (2006).

105. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000d-4a (2006); 42 U.S.C. § 2000cc-5(6) ("[T]he term 'program or activity' means all of the operations of any entity as described in paragraph (1) or (2) or section 2000d-4a of this title.") (2006).

prison or department of corrections accepts federal funding, RLUIPA will apply to all of its programs.[106] Virtually every prison and jail system accepts some federal money, so you can and should plead in good faith in your complaint that the court has Spending Clause jurisdiction. After you have filed your complaint, you can then request the proof of that fact from the defendants during the discovery phase.

A court also has RLUIPA jurisdiction under the Commerce Clause if the substantial burden placed on your religious exercise "substantially affects interstate commerce."[107] However, because, as previously mentioned, nearly all prison and jail systems accept some federal funds, it is very unlikely that you will need to rely upon Commerce Clause jurisdiction.

(ii) RFRA

If you are a federal prisoner bringing suit under RFRA, these jurisdictional requirements do not apply. Instead, you must allege your Free Exercise rights were violated at a federal prison or by a federal agent.[108]

(b) Religious Exercise

Assuming you have met the jurisdictional requirements, a court will next assess whether the activity you are seeking to pursue is a religious exercise. To constitute a religious exercise, the activity you are seeking to pursue must be rooted in a (1) sincerely held belief that is (2) religious in nature.[109]

Congress has defined "religious exercise" broadly, to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[110] This broad definition, which applies to both RLUIPA and RFRA,[111] significantly increases the likelihood your suit will succeed, or at least survive a summary judgment motion.[112]

Under this definition, RLUIPA also protects religious practices that are not necessarily central to your religion, such as practices that are a small part of your religion, or not of primary importance to your religion.[113] This means that, as a general rule, courts will not attempt to determine whether your religious

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106. *See* Orafan v. Goord, 2003 WL 21972735, at *7 (N.D.N.Y. Aug. 11, 2003) (*unpublished*) ("No where [sic] in this definition [of program and activity] does it state that a receiver of federal funds is at liberty to decide which programs are under the auspice of RLUIPA. Quite the contrary, as the statute clearly applies to all of the operations.").

107. United States v. Lopez, 514 U.S. 549, 558–59, 115 S. Ct. 1624, 1629, 131 L. Ed. 2d 626 (1995) (describing the types of commerce authority enjoyed by Congress, including "the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."). This means that if other people in the same situation as you were similarly burdened, the total effect of all of those situations combined would affect interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111, 128, 63 S. Ct. 82, 91, 87 L. Ed. 122 (1942) (holding that interstate effect is measured by evaluating the activity in question "together with that of many others similarly situated.").

108. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-3 (2006).

109. *See* Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) ("RLUIPA is a guarantor of sincerely held religious beliefs"); *see also* Porter v. Burnett, No. 1:05-cv-562, 2008 WL 3050011, at *5, 2008 U.S. Dist. LEXIS 58993 (W.D. Mich. Aug. 4, 2008) (*unpublished*) ("While [RLUIPA's] definition of religious exercise is broad, it does require that [p]laintiff's religious beliefs are 'sincerely held.'") (citing Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004) (citation omitted); Lovelace v. Lee, 472 F.3d 174, 187 n.2 (4th Cir. 2006) (citations omitted)); Starr v. Cox, No. 05-cv-368-JD, 2008 U.S. Dist. LEXIS 34708, at *21 (D.N.H. Apr. 28, 2008) (*unpublished*) ("[C]ourts have construed RLUIPA to require a plaintiff to show that the exercise of religion is part of a (1) system of religious belief and (2) that the plaintiff holds a sincerely held belief in the religious exercise.") (citing Guzzi v. Thompson, 470 F. Supp. 2d 17, 26 (D. Mass. 2007)).

110. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A) (2006).

111. Congress amended RFRA through § 7 of RLUIPA. This amendment ensures that the type of "religious exercise" protected by RLUIPA is identical to that protected by RFRA. *See* Pub.L. 106-274, § 7, 114 Stat. 803, (2000); 42 U.S.C. § 2000bb-2(4) (2006). As a result, RFRA now defines "exercise of religion" as "religious exercise, as defined in section 2000cc-5 [RLUIPA]." Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000bb-2(4) (2006).

112. Because the determination of whether your belief is sincere and religious in nature is a fact-specific inquiry, some courts have expressed reluctance to grant summary judgment motions. *See, e.g.*, Porter v. Caruso, 479 F. Supp. 2d 687, 691 (W.D. Mich. 2007) (holding that even when there is evidence in the record to suggest that a belief is sincerely held, summary judgment is inappropriate because the sincerity of a belief is a factual dispute that must be resolved at trial).

113. *See* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7) (2006) ("'[R]eligious exercise' includes any exercise of religion, whether or not ... [it is] central to a system of religious belief.").

belief is accurate or supported by your religious teachings, but will simply determine whether it is sincerely held belief and religious in nature.[114]

The current definition of religious exercise prevents courts and government officials from deciding what types or levels of religious exercise are necessary or appropriate for membership in a certain religion. This definition also incorporates the idea that the judicial system is not competent to decide whether a particular act is central to a person's faith.[115]

(c) Substantial Burden

If the court finds that you have engaged in religious exercise, it will then evaluate whether the prison regulation that you are challenging substantially burdens this religious exercise.[116]

Although Congress did not define what "substantial burden" means, the Supreme Court has interpreted "substantial burden" to mean that the government action or regulation at issue either (1) puts substantial pressure on a believer to modify his behavior and violate his beliefs, or (2) prevents you from engaging in religious actions in a way that more than just inconveniences you.[117] The legislative history of RLUIPA indicates that Congress wanted courts to follow this interpretation.[118]

Although courts have emphasized that the question of whether a regulation imposes a substantial burden is a fact-specific inquiry requiring a case-by-case determination,[119] the examples discussed below in Part C(3) can help you assess whether a court would find a regulation to be a substantial burden.

(d) Compelling Government Interest and Least Restrictive Means

Once you have established that a prison rule or regulation places a substantial burden on your religious exercise, RLUIPA shifts the burden of production of evidence and the burden of persuasion to the government.[120] This means that in order to defeat your claim, the government needs to show that:

(1) the substantial burden it has placed on your religious exercise is necessary because of a "compelling government interest;" and
(2) the burden it placed on your religious exercise is the "least restrictive means" of achieving its goal.[121]

In order to meet the first of these requirements, the government must show that it has a compelling interest in restricting your religious exercise. The Supreme Court has defined "compelling interest" as "only

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114. *See* Thomas v. Review Bd., 450 U.S. 707, 716, 101 S. Ct. 1425, 1431, 67 L. Ed. 2d 624, 632 (1981); *see also* Hernandez v. Comm'r, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148, 104 L. Ed. 2d 766, 786 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

115. McEachin v. McGuinnis, 357 F.3d 197, 201–02 (2d Cir. 2004) ("Courts have long puzzled over how best to maintain the delicate balance between, on the one hand, preserving legitimate governmental needs to legislate, regulate, and maintain order, and, on the other, protecting the right of individuals to practice their faith unfettered by the state's definition of what constitutes a legitimate religious imperative.").

116. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2006).

117. *See* Thomas v. Review Bd., 450 U.S. 707, 718, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624, 634 (1981); *see also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (summarizing the Supreme Court's interpretation of "substantial burden" and noting that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."); *see also* Coronel v. Paul, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (holding that "state action substantially burdens the exercise of religion within the meaning of the RLUIPA when it prevents a religious adherent from engaging in conduct both important to the adherent and motivated by sincere religious belief.").

118. *See* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (stating that the term "substantial burden" is to "be interpreted by reference to existing Supreme Court jurisprudence").

119. *See*, *e.g.*, Adkins v. Kaspar, 393 F.3d 559, 571 (5th Cir. 2004) ("We recognize that our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise; however, we perceive this kind of inquiry to be unavoidable under the RLUIPA and the circumstances that it addresses. This is why we make no effort to craft a bright-line rule.").

120. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2006); *see also* Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008) ("Once the plaintiff establishes this prima facie case, the defendants 'bear the burden of persuasion on any [other] element of the claim,' namely, whether their practice 'is the least restrictive means of furthering a compelling governmental interest.'").

121. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2006).

those interests of the highest order."[122] The government's interest in maintaining prison safety and security is a compelling interest.[123] However, other examples of state interests, such as reducing expenses, are less likely to be considered "compelling."[124]

In order to show that the challenged rule or restriction is the least restrictive means, the government must do more than merely claim that there is no less restrictive means available.[125] The government must also do more than simply speculate as to the possible negative effects that could occur if it were to accommodate your religious practice.[126] Moreover, in at least some circuits, the government must demonstrate that "it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."[127] Like the compelling interest test, the least restrictive means test is quite strict and well established in constitutional law.[128]

Although you do not have the burden of proof, you can, and should, challenge the government's argument that the regulation is the least restrictive means. For example, if the government allows other types of practices in the prison that harm its stated compelling interest, or if other prisons allow the religious exercise you are seeking, you can use this evidence in an effort to overcome the government's argument.[129] Several courts have recognized that evidence of what other prisons have done to accommodate prisoners' religious practices is relevant to RLUIPA claims.[130] But "[c]ourts have repeatedly recognized that

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122. Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972).

123. *See*, *e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 725 n.13, 125 S. Ct. 2113, 2124 n.13, 161 L. Ed. 2d 1020, 1036 n.13 (2005) ("[P]rison security is a compelling state interest, and … deference is due to institutional officials' expertise in this area."); Pell v. Procunier, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."); Jova v. Smith, 582 F.3d 410, 415 (2d Cir. 2009) ("Where a plaintiff adduces evidence sufficient to show that the government practice substantially burdens her religious exercise, the onus shifts to the government to demonstrate that the practice furthers a compelling governmental interest, and that the burden imposed on religion is the least restrictive means of achieving that interest.").

124. Some courts, however, have held that expense is a compelling governmental interest. *See, e.g.*, Baranowski v. Hart, 486 F.3d 112, 125–26 (5th Cir. 2007) (holding "controlling costs" to be a compelling governmental interest), *cert. denied*, 128 S. Ct. 707, 169 L. Ed 553 (2007).

125. *See* Warsoldier v. Woodford, 418 F.3d 989, 1001 (9th Cir. 2005) (finding the government's conclusory statements insufficient to meet its burden that it had adopted the least restrictive means to achieve its interest in maintaining prison security).

126. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 434–36, 126 S. Ct. 1211, 1222–24, 163 L. Ed. 2d 1017, 1034–35 (2006) (holding that under the compelling interest test of the Restoration of Freedom of Religion Act (RLUIPA's predecessor statute), the government's interest in enforcing the Controlled Substances Act uniformly was insufficient to justify the substantial burden on religious exercise imposed on a small religious group).

127. *See, e.g.*, Spratt v. R.I. Dept. of Corr., 482 F.3d 33, 41 n.11 (1st Cir. 2007) ("[T]o meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives."); *see also* Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005) (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 824, 120 S. Ct. 1878, 1892, 146 L. Ed. 2d 865, 886 (2000) (finding, in context of 1st Amendment challenge to speech restrictions, that "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); City of Richmond v. J.A. Croson, 488 U.S. 469, 507, 109 S. Ct. 706, 729–30, 102 L. Ed. 2d 854, 890–91 (1989) (holding that city's minority set-aside program was not narrowly tailored in part because city had not considered whether race-neutral measures would have achieved government's interest); Hunter ex rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061, 1078 (9th Cir. 1999) (concluding that government "neglected to undertake any consideration—let alone serious, good faith consideration" of race-neutral alternatives).

128. The "least restrictive means" test is a form of a common test used in constitutional cases known as the "narrowly tailored" test, which instructs courts to evaluate whether a proposed regulation or law is carefully crafted to achieve its goals. *See* Burk v. Augusta-Richmond County, 365 F.3d 1247, 1255 (11th Cir. 2004) (noting that law could be written to meet least restrictive means test where "government ... tailor[s] its regulation more closely to fit ... conduct likely to threaten the harms it fears.").

129. For example, the Court of Appeals for the Ninth Circuit found that a grooming restriction that required all male prisoners to maintain their hair no longer than three inches was not the least restrictive means of ensuring prison security when other prisons did not impose such restrictions. In *Warsoldier v. Woodford*, the court noted that "other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies, or, if they do, provide religious exemptions." Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005). The court also noted that the Department of Corrections had failed to explain why it did not impose the same grooming restriction on female prisoners at its women's prisons. Warsoldier v. Woodford, 418 F.3d 989, 1000 (9th Cir. 2005).

130. *See, e.g.*, Washington v. Klem, 497 F.3d 272, 285 (3d Cir. 2007) (finding that prison's limitation on the number of books allowed in cell was not the least restrictive means to ensure safety because, in part, other prisons

'evidence of policies at one prison is not *conclusive* proof that the same policies would work at another institution.'"[131]

3. Examples of Common Challenges to Prison Restrictions

This section provides examples of common challenges to prison restrictions, including restrictions on attending religious services or worship areas, receiving visits from religious advisors, sending and receiving religious mail, changing one's name or diet for religious reasons, refusing to receive medical treatment for religious reasons, and wearing special religious attire. It describes how courts have applied the *Turner* test to examine First Amendment Free Exercise claims as well as how courts have applied, or might in the future apply, the RLUIPA standards outlined above.

Because RLUIPA generally provides more protection to your religious freedom than the First Amendment Free Exercise Clause,[132] you should think of the discussion of the Free Exercise Clause as protecting your basic rights to freely exercise your religion in prison. At times, RLUIPA will provide you with more rights than the First Amendment. Also, because the law in this area is constantly changing, be sure to check for new RLUIPA cases that support your particular claim.

(a) Restrictions on Attending Religious Services, Group Worship, and Receiving Visits from Religious Advisors

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, prisons must provide you with a reasonable opportunity to worship in accordance with your conscience.[133] This right to worship applies even if there is only a minority of prisoners who observe the religion in question.[134] However, courts have long held that this right may be restricted in certain instances.

For example, courts have held that prison officials may limit or prohibit religious group services when such services would pose a threat to prison security.[135] For example, in *Green v. McKaskle*,[136] a federal court of appeals examined a warden's order limiting a prisoner's right to attend services at a Baptist church. The court determined that the order was constitutional, even though the prisoner was occasionally prevented from

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permitted a greater number of books); Fowler v. Crawford, 534 F.3d 931, 942 (8th Cir. 2008) (noting that policies of other prisons are "relevant" but not dispositive of the "least restrictive means" inquiry).

131. Fowler v. Crawford, 534 F.3d 931, 941 (8th Cir. 2008) (quoting Spratt v. R.I. Dept. of Corr., 482 F.3d 33, 41 n.11 (1st Cir. 2007) (emphasis added).

132. *See* Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) ("RLUIPA ... mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness test [used to review regulations under the 1st Amendment]"); *see also* Smith v. Allen, 502 F.3d 1255, 1266 (11th Cir. 2007) (noting that RLUIPA affords more "protection from government-imposed burdens" than the 1st Amendment standards); DeSimone v. Bartow, 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008) (*unpublished*) ("RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate's exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.").

133. *See* Cruz v. Beto, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1081 n.2, 31 L. Ed. 2d 263, 368 n.2 (1972); *see also* Johnson v. Moore, 948 F.2d 517, 520 (9th Cir. 1991) (holding that the failure to provide a Unitarian Universalist chaplain for a prisoner did not violate the 1st Amendment, reasoning that "the Constitution does not necessarily require prisons to provide each inmate with the spiritual counselor of his choice," but that "[p]risons need only provide inmates with a reasonable opportunity to worship in accord with their conscience" (quotations and citations omitted)).

134. *See* Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263, 268 (1972) (noting that a prisoner must be given "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts").

135. *See* Brown v. Johnson, 743 F.2d 408, 412 (6th Cir. 1984) (holding that a blanket ban against religious services by a church that ministered to homosexual persons did not violate the 1st Amendment because the ban was reasonably related to the prison's interest in maintaining internal security and reducing prison violence); *see also* Johnson v. Collins, 2009 U.S. Dist. LEXIS 47844, at *14–15 (N.D. Ohio May 2, 2009) (*unpublished*) (granting summary judgment for prison officials where a prisoner alleged a violation of his right to freely exercise his religious beliefs when he was denied permission to maintain his dreadlocks in accordance with Rastafarianism principles, noting that "substantial deference is given to prison officials in terms of their discretion to impose regulations" and that "prison officials need only demonstrate potential danger, not *actual* danger.") (citations omitted)).

136. Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986).

attending the services and was denied access to additional services. The court said that this limitation was allowed because "a reasonable opportunity to practice his religion" was afforded.[137]

Similarly, in *Thomas v. Gunter*,[138] a federal court of appeals held prison officials could deny a Native American prisoner daily access to the prison sweat lodge for prayer. Applying *Turner*, the court held the denial was reasonably related to a legitimate prison interest in security. The sweat lodge was near a truck delivery entrance in use during weekday afternoons, and the court accepted the prison's argument that frequent use of the sweat lodge created a security risk. The court noted that daily access to the sweat lodge would also have interfered with scheduled educational and vocational activities.[139]

Courts have also held prison officials may attend prisoner religious group services, provided their presence is reasonable and consistent with prison security measures and does not unreasonably restrict the manner in which the services are conducted.[140] Prison officials may also regulate the time, place, and sometimes the manner in which religious services are conducted, provided the restrictions are rationally related to legitimate prison goals.[141] Similarly, courts have held that prison officials may limit or prohibit visits by religious advisors and counselors when such visits would undermine prison security, prison administration, or both.[142] The time, length, and manner of these visits are also subject to reasonable regulation by prison officials.

For example, in *Ha'min v. Montgomery County Sheriff's*,[143] a prisoner sued law enforcement officials alleging violations of his First Amendment right to freely exercise his religion. Friday Muslim prayer services were not regularly conducted during the period of the prisoner's incarceration, despite being authorized by prison regulations. He was further not allowed to conduct the Muslim service for himself as a result of a rule that only volunteer religious leaders from outside could perform such services, regardless of the religion. Since the prisoner could keep his Holy Quran in his cell and pray, he had alternative means to exercise his religion. In light of this, the court held that the prisoner's First Amendment rights were not violated.[144]

Note that although your right to attend services or receive visits from ministers may be restricted, you do not have to be a presently affiliated or professed member of a religion to attend such services and receive visits from ministers of that faith. You may also receive visits from the clergy of your choice even if you were not a member of that faith prior to incarceration.[145] Instead, you may simply be thinking about joining the religion and want to attend services or talk to a minister in order to learn about the religion. But, a religious advisor may examine the sincerity of your belief and restrict your access to religious services of that particular faith.[146]

Finally, although prisons must provide a reasonable opportunity to prisoners whose religious practices are observed by a minority of prisoners,[147] many courts have held that the accommodation a prison must make for

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137. Green v. McKaskle, 788 F.2d 1116, 1126 (5th Cir. 1986).

138. Thomas v. Gunter, 103 F.3d 700 (8th Cir. 1997).

139. Thomas v. Gunter, 103 F.3d 700, 703 (8th Cir. 1997).

140. *See* Butler-Bey v. Frey, 811 F.2d 449, 452 (8th Cir. 1987) (holding, in part, that a prison regulation requiring a guard to be present at religious meetings did not violate the 1st Amendment where the regulation applied to all prison group meetings, both secular and non-secular).

141. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 358, 107 S. Ct. 2400, 2409, 96 L. Ed. 2d 282, 296 (1987) ("[I]f a regulation merely restricts the time, place, or manner in which prisoners may exercise a right, a prison regulation will be invalidated only if there is no reasonable justification for official action.").

142. *See* Brown v. Johnson, 743 F.2d 408, 412 (6th Cir. 1984) (affirming that prison authorities can restrict visits by officials of a church that ministers to the spiritual and religious needs of homosexuals because "a strong correlation existed between inmate homosexuality and prison violence").

143. Ha'min v. Montgomery County Sheriff's, 440 F. Supp. 2d 715 (M.D. Tenn. 2006).

144. Ha'min v. Montgomery County Sheriff's, 440 F. Supp. 2d 715, 718–19 (M.D. Tenn. 2006) (finding that the government showed a "valid, rational connection between the jail's action in not providing a regular Friday Muslim service and the legitimate governmental interest" and that plaintiff had an "alternative means of exercising his right to the free exercise of religion").

145. *See* Pell v. Procunier, 417 U.S. 817, 824–25, 94 S. Ct. 2800, 2805, 41 L. Ed. 2d 495, 503 (1974) (allowing restricted visits from "members of their families, the clergy, their attorneys, and friends of prior acquaintance" as long as "such visits will aid in the rehabilitation of the inmate").

146. *See* Montano v. Hedgepeth, 120 F.3d 844, 850–51 (8th Cir. 1997) (allowing a prison chaplain to deny participation in Protestant services to a Messianic Jew).

147. *See, e.g.*, Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008) ("We have long held that '[t]he rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations.'") (quoting Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991)).

a particular religion is proportional to the number of believers of that particular faith.[148] For example, in *Cruz v. Beto*,[149] a Buddhist prisoner alleged that prison officials violated his constitutional rights when they prohibited him from conducting Buddhist services in the prison chapel, offering religious materials to other prisoners, and corresponding with his religious advisor. The U.S. Supreme Court reversed the decision of the federal court of appeals, which had dismissed the prisoner's claims. The Court held that the same constitutional standard must be applied to all limitations on religious practices and that there must be equal treatment of different religions.[150] However, the Court also stated that prisons were not required to provide every religion with identical facilities and accommodate each equally.[151]

(ii) RLUIPA

Under RLUIPA, a prison may regulate your access to religious services and/or worship areas, provided that, if the regulation imposes a substantial burden on your religious exercise, it is (1) the least restrictive means possible, and (2) furthers a compelling government interest.[152] However, if a court determines that a regulation does not impose a substantial burden or that the activity you are pursuing is not a religious exercise, it will dismiss your challenge and uphold the requirement.[153]

Keep in mind, however, that a court's determination of whether a rule imposes a substantial burden on your right to religious worship will depend on the specific facts of your case. For example, in at least two instances, the Court of Appeals for the Fifth Circuit has found that a policy requiring volunteers to attend prisoner religious group meetings did not impose a substantial burden, when the prisoners were able to engage in other means of worship. Likewise, in *Baranowski v. Hart*,[154] the court found that a volunteer requirement did not impose a substantial burden on Jewish prisoners who wanted more meetings on Sabbaths and other Jewish holy days than their volunteer could attend. In a more recent case, however, the same Court of Appeals concluded that a volunteer requirement could impose a substantial burden, in a case where there was evidence that no new volunteers would be available to provide group religious worship, the prison applied the volunteer requirement differently for different religious groups, and the prisoner did not have access to alternative means of worship.[155]

If you are able to show there is a substantial burden on your religious exercise, the government will need to demonstrate that the restriction on group worship or religious services is the least restrictive means to further the compelling government interest.[156] Although the court will require the prison to provide some evidence

148. *See* Cruz v. Beto, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1082 n.2, 31 L. Ed. 2d 263, 268 n.2 (1972) ("[The Court does not suggest] that every religious sect or group within a prison—however few in number—must have identical facilities or personnel ... nor must a chaplain, priest, or minister be provided without regard to the extent of the demand."); *see also* Jones v. Bradley, 590 F.2d 294, 296 (9th Cir. 1979) (citing *Cruz*) (holding that prison's refusal to provide use of chapel to prisoner, a pastor of the Universal Life Church, did not violate the 1st Amendment).

149. Cruz v. Beto, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972).

150. Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081–82, 31 L. Ed. 2d 263, 268 (1972).

151. Cruz v. Beto, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1082 n.2, 31 L. Ed. 2d 263, 268 n.2 (1972) ("We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size."). This case is still good law in New York, but is not accepted in every state. *See, e.g.*, Allah v. Menel, 844 F. Supp. 1056, 1063 (E.D. Pa. 1994) ("[T]he state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety in order to establish that its interests are of the 'highest order.'").

152. 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

153. See Part C(2) above. For example, the Court of Appeals for the Fifth Circuit has dismissed at least two RLUIPA challenges based on a finding that a prison policy that required an outside volunteer to attend prisoner group religious meetings did not impose a substantial burden on the prisoners' religious exercise. *See* Adkins v. Kaspar, 393 F.3d 559, 571 (5th Cir. 2004); Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007).

154. Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007).

155. Mayfield v. Tex. Dept. of Corr., 529 F.3d 599, 614–15 (5th Cir. 2008) (finding that summary judgment was inappropriate when there was evidence that no new volunteers would be available, the prisoner did not have alternative means of worship, and prison officials were unevenly applying the requirement).

156. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2006). *See* Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008) ("Once the plaintiff establishes this prima facie case, the defendants 'bear the burden of persuasion on any [other] element of the claim,' namely, whether their practice 'is the least restrictive means of furthering a compelling governmental interest.'").

showing that the policy meets this standard, the Supreme Court has told courts to give "due deference to the experience and expertise of prison and jail administrators" while interpreting RLUIPA.[157]

Thus, for example, in *Murphy v. Missouri Department of Corrections*,[158] the Eighth Circuit Court of Appeals found the prison had not met its burden when the only reason it gave for denying a prisoner the right to group worship was that the prisoner was a racist whose religion limited participation to Anglo-Saxons. In contrast, the Eighth Circuit Court of Appeals found the prison had met its burden in a case involving a Native American prisoner who had been denied access to a sweat lodge.[159] There, the prison provided the court with evidence that it had suggested alternative religious means to the prisoner. In that case, officials had offered the prisoner an outdoor area where he could smoke a ceremonial pipe, suggested a medicine wheel, and sought to locate a volunteer to oversee a Native American group.[160] Based in part on this evidence, the court concluded that the ban on accessing the sweat lodge was the least restrictive means to furthering the prison's interest in security.

These cases suggest that if you can show that the prison denied your request for group worship or attendance of religious services, and did not offer you any alternative to your preferred means of worship, you may have a better chance of defeating the government's arguments that the restriction is the least restrictive means towards furthering a compelling interest.

(b) Mail Censorship

(i) First Amendment Free Exercise Clause

Under the First Amendment Free Exercise Clause, a prison may censor the religious mail that you receive or send, depending on the purpose the censorship serves. For a summary of the Supreme Court's decisions on prisoners' use of the postal system, including receipt of religious materials and correspondence about religious materials, see Chapter 19 of the *JLM*, "Your Right to Communicate with the Outside World."

In general, prison officials may censor *incoming* religious mail in any manner reasonably related to the legitimate needs of prison administration.[161] To determine whether the censorship is appropriate, courts apply the *Turner* test. Under this test, courts have allowed prison officials to withhold mail that advocates racial violence and hatred, even if the mail contains religious content or is from a religious organization. For example, in *Chriceol v. Phillips*,[162] the Fifth Circuit Court of Appeals allowed a Louisiana prison to withhold mail that the Aryan Nation and its affiliate church, the Church of Jesus Christ Christian, had sent to prisoners. The court explained that the mail encouraged racial violence and hatred, and that the "purpose of the rule [was] to eliminate potential threats to the security or order of the facility," which "clearly ... is a legitimate interest."[163]

Similarly, in *Shabazz v. Parsons*,[164] the Tenth Circuit Court of Appeals applied the *Turner* test and held that Oklahoma prison officials had a rational basis for denying a prisoner access to an entire issue of a religious magazine, which officials determined would create a danger of violence based on racial, religious, and national hatred.[165] Furthermore, the court denied the prisoner's claim that merely deleting the offending portions of the magazine was a good alternative since doing so would be very expensive and would "prevent the prisoner from obtaining meaningful administrative review."[166]

Prison officials may also regulate *outgoing* mail, provided that the regulation is "generally necessary" to protect one or more legitimate governmental interests.[167] Note that it may be easier for you to successfully challenge a restriction on outgoing mail, as the Supreme Court has recognized that outgoing correspondence

157. Cutter v. Wilkinson, 544 U.S. 709, 723, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020, 1035 (2005).

158. Murphy v. Mo. Dept. of Corr., 372 F.3d 979, 986 (8th Cir. 2004).

159. Folwer v. Crawford, 534 F.3d 931 (8th Cir. 2008).

160. Folwer v. Crawford, 534 F.3d 931, 939–40 (8th Cir. 2008).

161. *See* Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (applying the *Turner* standard to determine whether regulations censoring incoming mail are constitutional).

162. Chriceol v. Phillips, 169 F.3d 313 (5th Cir. 1999).

163. Chriceol v. Phillips, 169 F.3d 313, 316 (5th Cir. 1999); *see also* Murphy v. Missouri, 814 F.2d 1252, 1256–57 (8th Cir. 1987) (finding that a complete ban on Aryan Nation materials is too restrictive, but that a mail policy restricting materials that advocate violence or racial inflammation is valid).

164. Shabazz v. Parsons, 127 F.3d 1246 (10th Cir. 1997).

165. Shabazz v. Parsons, 127 F.3d 1246, 1249 (10th Cir. 1997).

166. Shabazz v. Parsons, 127 F.3d 1246, 1249 (10th Cir. 1997).

167. *See* Thornburgh v. Abbott, 490 U.S. 401, 412, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472 (1989) (the regulation of restricting outgoing mail must closely fit the interest it is supposed to serve).

that includes "grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison."[168]

Note also that although prisons can censor mail if there are legitimate prison interests at stake, indiscriminate censorship, or an absolute ban on correspondence with a religious advisor is unconstitutional. See Chapter 19 of the *JLM*, "Your Right to Communicate with the Outside World."

(ii) RLUIPA

Under RLUIPA, a prison may censor the religious mail you receive or send, provided that if the censorship substantially burdens your religious exercise, it (1) furthers a compelling government interest (2) by the least restrictive means.[169] Though the Supreme Court has noted no reason exists to believe "that RLUIPA would not be applied ... with a particular sensitivity to security concerns,"[170] the Court further acknowledged that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions" and anticipated that "courts would apply the Act's standard with due deference to prison administrators' experience and expertise."[171] Thus, whether courts are likely to reach different outcomes under a RLUIPA standard than they would under a Free Exercise standard is unclear.

(c) Shaving, Haircuts, and Grooming Restrictions

(i) First Amendment Free Exercise Clause

A prison may restrict how you choose to wear your hair or beard, even if this choice is part of your religious practice. To determine whether a prison grooming restriction is acceptable under the Free Exercise Clause, a court will apply the *Turner* "reasonably related" standard. Under this test, a court will balance the importance of the religious practice in question against the prison's interests for discipline, order, identification, and hygiene.[172] If the prison grooming requirement does not reasonably relate to a legitimate penological interest, the requirement will fail.

Although all courts apply the same test, the results of cases have differed. Some courts have recognized the rights of prisoners to grow beards or wear their hair in accordance with their religious beliefs.[173] For example, the Court of Appeals for the Second Circuit upheld a Rastafarian prisoner's right to avoid getting an initial haircut when first received as a prisoner in a New York prison.[174]

Other courts, however, have been less willing to recognize these types of religious practices. For example, in *May v. Baldwin*,[175] the Seventh Circuit Court of Appeals affirmed a prison regulation requiring a Rastafarian prisoner to unbraid his dreadlocks during searches of his hair. The court accepted the prison's argument that, in order to maintain prison security, the prison needed to search for contraband, and that unbraiding and hair inspection was the least restrictive means available.[176]

Likewise, in *Fromer v. Scully*,[177] the Court of Appeals for the Second Circuit upheld a New York Department of Correctional Services (DOCS) directive forbidding prisoners from wearing beards longer than

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168. Thornburgh v. Abbott, 490 U.S. 401, 411–12, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472 (1989).

169. 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

170. Cutter v. Wilkinson, 544 U.S. 709, 722–23, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020, 1035 (2004).

171. Cutter v. Wilkinson, 544 U.S. 709, 723, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1035 (2004).

172. *See* Hines v. S.C. Dept. of Corr., 148 F.3d 353, 358 (4th Cir. 1998) (upholding a grooming policy that all male prisoners keep their hair short and faces shaven in order to "suppress contraband, limit gang activity, maintain discipline and security, and prevent prisoners from quickly changing their appearance"); *see also* Zargary v. City of New York, 607 F. Supp. 2d 609, 613 (S.D.N.Y. 2009) (holding that orthodox Jewish woman could be required to briefly remove her headscarf to further the government's compelling interest in identification of prisoners).

173. *See, e.g.*, Teterud v. Burns, 522 F.2d 357, 359 (8th Cir. 1975) (Native American); Moskowitz v. Wilkinson, 432 F. Supp. 947, 950 (D. Conn. 1977) (Orthodox Jew).

174. Benjamin v. Coughlin, 905 F.2d 571, 577 (2d Cir. 1990) (finding the legitimate penological goal of obtaining an initial identification photograph could be accomplished by pulling back prisoner's hair rather than cutting it off).

175. May v. Baldwin, 109 F.3d 557 (9th Cir. 1997).

176. May v. Baldwin, 109 F.3d 557, 564 (9th Cir. 1997). The court analyzed the regulation under the strict scrutiny of RFRA which is a harder test to satisfy than *Turner*. Therefore, this grooming regulation would probably pass the *Turner* test as well, for claims brought exclusively under the 1st Amendment. Also note that the RFRA strict standard was overturned by the Supreme Court a few months after this decision, but was re-implemented in 2000 with The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").

177. Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989).

one inch. The *Fromer* court "recognized a 'valid, rational connection' between beard restrictions and a legitimate penological interest in inmate identification," emphasizing that the plaintiff had the burden of proving that the prison's concerns were irrational.[178] Explaining its decision to defer to the judgment of the prison administrators, the court noted that "[i]t is certainly not irrational to believe that a full beard, which may well extend for significant lengths sideways from the cheeks as well as downwards from the chin, may impede identification more than a one-inch beard."[179]

(ii) RLUIPA

Under RLUIPA, even if a grooming requirement substantially burdens your religious exercise, a prison may restrict how you choose to style your hair or beard if it (1) furthers a compelling governmental interest (2) by the least restrictive means.[180] These dual requirements may make it easier for you to challenge prison regulations regarding shaving, haircuts, and grooming under RLUIPA than under the First Amendment.

For example, in *Fluellen v. Goord*,[181] a prisoner brought a successful RLUIPA challenge against a DOCS policy prohibiting all non-Rastafarian prisoners from wearing dreadlocks. The prisoner, a member of the Nation of Islam, argued his refusal to cut his dreadlocks was based upon a specific verse of the Quran. In response, DOCS asserted that the Nation of Islam does not mandate dreadlocks, that the prisoner's interpretation of the Quran was incorrect, and that allowing the prisoner to wear dreadlocks potentially threatened security.

In considering these arguments, the district court in *Fluellen* rejected DOCS's assertion, explaining that it is not for the courts to question the importance of particular religious beliefs or practices, nor is it proper for judges to determine the accuracy of a plaintiff's interpretation of his religion's teachings.[182] While the court acknowledged that prison safety and security constituted a compelling government interest under RLUIPA, it found that the fact that DOCS permitted Rastafarians to wear dreadlocks meant that dreadlocks do "not impose an insurmountable threat to DOCS' security, safety or sanitation."[183] The court further noted that "DOCS does not appear to have any concerns that permitting this particular plaintiff to wear dreadlocks would threaten DOCS' security, safety or sanitation,"[184] and therefore held that the prisoner could not be forced to cut his dreadlocks, nor could he be punished if he refused to do so.[185]

Similarly, in *Smith v. Ozmint*,[186] the Fourth Circuit Court of Appeals reviewed an RLUIPA claim brought by a Rastafarian challenging a prison policy that forced him to shave his dreadlocks.[187] The court reversed a grant of summary judgment for the prison on the grounds that the prison had not met its burden of proving its compelling interest, nor did the prison show that its policy was the least restrictive means of furthering its interest.[188]

But, other courts have reached different conclusions, finding that prison grooming requirements do not violate RLUIPA.[189] For example, in *Fegans v. Norris*, the Eighth Circuit Court of Appeals found that a prison

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178. Fromer v. Scully, 874 F.2d 69, 74 (2d Cir. 1989) (citations omitted).

179. Fromer v. Scully, 874 F.2d 69, 74 (2d Cir. 1989).

180. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2006).

181. Fluellen v. Goord, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

182. Fluellen v. Goord, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at * 16 (W.D.N.Y. Mar. 12, 2007) (*unpublished*) (citing McEachin v. McGuinnis, 357 F.3d 197, 201 (2d Cir. 2004)).

183. Fluellen v. Goord, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

184. Fluellen v. Goord, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19–20 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

185. Fluellen v. Goord, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *24 (W.D.N.Y. Mar. 12, 2007) (*unpublished*); *see also* Warsoldier v. Woodford, 418 F.3d 989, 1002 (9th Cir. 2005) (holding that a Native American prisoner at a minimum-security prison, whose faith taught that hair should only be cut upon the death of a close relative, could not be punished for violating a rule prohibiting prisoners from having hair longer than three inches without a showing by the prison that the policy constituted the least restrictive way of promoting safety).

186. Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009).

187. Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009).

188. Smith v. Ozmint, 578 F.3d 246, 254 (4th Cir. 2009).

189. *See e.g.*, Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008); *see also* Logan v. Ark. Dept. of Corr., No. 5:07CV00252, 2008 U.S. Dist. LEXIS 61809, at *5–8 (E.D. Ark. July 28, 2008) (*unpublished*) (finding that the prisoner had failed to state a claim because the grooming policies imposed by the Arkansas DOCS did not violate RLUIPA

policy prohibiting male prisoners from wearing hair below the collar and from wearing beards did not violate RLUIPA, even though the department of corrections did not impose the same requirement on women.[190] The court found that the grooming requirements were the least restrictive means to furthering prison safety and security. Specifically, the court noted that prisoners had used their hair to conceal contraband, and to change their appearance after escaping.[191] The court further concluded that there was no less restrictive means to preventing these risks, as "longer hair created a greater opportunity for inmates to conceal contraband, and because correctional officers are placed at risk of assault if required to search through the long hair of individual inmates."[192] Although the court recognized that the prison did not impose the same requirement in the women's barracks, the court noted that the women were housed in a single unit and thus had less opportunity to conceal contraband.[193]

(d) Name Restrictions

(i) First Amendment Free Exercise

Under the First Amendment Free Exercise Clause, a prison may refuse to recognize your choice of a religious name, provided that the refusal is "reasonably and substantially justified by considerations of prison discipline and order."[194] If you have legally changed your name, courts are more likely to recognize your right to be called by your new name.[195]

For example, in *Malik v. Brown*,[196] a federal court of appeals recognized that a prisoner has a clear constitutional interest in using his religious name, at least in addition to his committed name. While the court did not require the prison to revise its filing system after the prisoner changed his name, the court at least recognized the prisoner's right to include his religious name on outgoing mail.[197]

Note that although courts may be willing to recognize a religious name, courts are unlikely to question the way in which prison officials choose to organize their administrative prison records.[198]

(ii) RLUIPA

Under RLUIPA, a prison may refuse to recognize your choice of a religious name, provided that if the refusal substantially burdens your religious exercise, it (1) furthers a compelling governmental interest and (2) uses the least restrictive means.[199]

Some courts have expressed reluctance to find that a refusal to recognize a name is a substantial burden on your religious exercise.[200] Therefore, it may be difficult for you to show that the refusal to recognize your

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because they were the least restrictive means of addressing concerns about inmate health and hygiene, opportunities for disguises, and concealment of contraband).

190. Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008).

191. Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008).

192. Fegans v. Norris, 537 F.3d 897, 903 (8th Cir. 2008). Applying a similar analysis to the beard restriction, the court concluded that the prison had a compelling interest in restricting prisoners from wearing an uncut beard, as a beard could create a better guise for an escapee and allow for contraband. Fegans v. Norris, 537 F.3d 897, 906 (8th Cir. 2008).

193. Fegans v. Norris, 537 F.3d 897, 904 (8th Cir. 2008).

194. Barrett v. Virginia, 689 F.2d 498, 503 (4th Cir. 1982) (holding that a Virginia statute that places a flat ban on the recognition of religious name changes was unreasonable given that prisoners were already known by several names, and the addition of newly adopted religious names into existing records would not threaten the "reliability and efficiency of correctional records") (quoting Sweet v. S.C. Dept. of Corr., 529 F.2d 854, 863 (4th Cir. 1975)).

195. *See* Salahuddin v. Coughlin, 591 F. Supp. 353, 359 (S.D.N.Y. 1984) (upholding prison policy that recognizes statutory court-ordered name changes but not common law name changes, in light of speedy and easily proven statutory name changes and "legitimate [state] interest in avoiding confusion and simplifying record-keeping"). *But see* Barrett v. Commonwealth of Virginia, 689 F.2d 498, 503 (4th Cir. 1982) (finding that adding a newly adopted religious name to prison records would not be overly burdensome or disruptive to record-keeping procedures).

196. Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995).

197. Malik v. Brown, 71 F.3d 724, 728–29 (9th Cir. 1995) (finding minimal burden on the prison and "no legitimate penological interest in preventing use of the religious name with the committed name on outgoing mail").

198. *See e.g.*, Barrett v. Virginia, 689 F.2d 498, 503 (4th Cir. 1982) (holding that while the prison must recognize a legally adopted religious name and add it to the prisoner's file, it does not have to reorder the files according to the new name).

199. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2006).

200. *See* Amun v. Culliver, No. 04-0131-BH-M, 2006 U.S. Dist. LEXIS 75949, at *1 (S.D. Ala. Oct. 18, 2006) (*unpublished*) (holding that prison's refusal to add prisoner's religious name to visitor list, prisoner location list, and prison correspondence list was not a "substantial burden" on prisoner's exercise of religious beliefs).

name violates RLUIPA. Remember that under RLUIPA, the government can impose rules that burden your religious exercise; it is only barred from adopting rules that *substantially* burden your religious exercise.

In order to show that the refusal to recognize your name constitutes a substantial burden, you should try to provide the court with concrete examples of the obstacles that having an unchanged name presents. For example, if an unchanged name will exclude you from participating in religious ceremonies, subject you to harsh treatment or exclusion by your co-believers, or make it so that you cannot "rise through the ranks" of your religion, the court may be more willing to find that the restriction constitutes a substantial burden.[201]

If the court determines that not allowing your name change does significantly burden your religious exercise, the government would then be required to show that not allowing you to change your name served a "compelling governmental interest" and that it did so by the "least restrictive means."[202] As noted above, prison safety and security are compelling governmental interests.[203] Accordingly, if the prison claims that not allowing your name changes is the least restrictive way of maintaining safety and security, the court may uphold the prison's refusal to grant your name-change request.[204]

If you can show that other prisoners in your prison or in similar prisons were permitted to change their names, you may be able to demonstrate that not permitting you to change your name for religious reasons is not the least restrictive means by which the prison can maintain order. [205]

(e) Special Diet Restrictions

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison can refuse to accommodate your request for a special diet, provided that the restriction is rationally connected to legitimate penological goals. To determine whether a prison may refuse to accommodate your request for a special diet, a court will apply the *Turner* test.[206] Under this test, the court will first determine whether your special diet request is based on sincerely held religious beliefs. The court may also examine whether or not your special diet is absolutely required by your religion.[207] It will then look to whether the prison's denial of that request is rationally connected to any legitimate prison

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201. Two federal district court cases suggest that these factors may have supported a conclusion that a refusal to recognize a changed name constitutes a substantial burden. *See* Scott v. California Supreme Court, No. CIV S-04-2586 LKK GGH P, 2008 WL 2788346, at *10 (E.D. Cal. July 17, 2008) (*unpublished*); *see also* Ashanti v. Cal. Dept. of Corr., No. CIV S-03-0474, 2007 U.S. Dist. LEXIS 10612, at *53-54 (E.D. Cal. Feb. 15, 2007) (*unpublished*).

202. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

203. Fawaad v. Jones, 81 F.3d 1084, 1087 (11th Cir. 1996) ("[M]aintaining security in a prison constitutes a compelling governmental interest. The control of contraband into and out of the prison is a fundamental part of maintaining prison security, and the requirement of dual names on incoming and outgoing mail is the least restrictive means of satisfying that compelling interest). *See also* Fegans v. Norris, 537 F.3d 897, 902 (8th Cir. 2008) (holding that deterrence of crime and institutional security are valid penological interests, and noting that "context matters" in the application of this "compelling governmental interest" standard, and that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety.").

204. *See, e.g.*, Fawaad v. Jones, 81 F.3d 1084, 1087 (11th Cir. 1996) (holding that a prison may require a prisoner to use both his chosen name and the name under which he was committed on incoming and outgoing mail). Although this case was decided under RFRA, the holding would similarly apply to cases brought under RLUIPA.

205. *See, e.g.*, Fluellen v. Goord, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19–20 (W.D.N.Y. Mar. 12, 2007) (*unpublished*) (explaining that the fact that a prison allowed some prisoners to wear dreadlocks indicated that refusing to allow others to wear dreadlocks was not the least restrictive means to achieving compelling government interests).

206. *See generally* DeHart v. Horn, 227 F.3d 47 (3d Cir. 2000) (holding that where a prison regulation limits an prisoner's ability to engage in a particular religious practice, the second prong of *Turner* requires an examination of whether there are other means available to the prisoner for expressing his religious beliefs. If the prison affords the prisoner alternative means of expressing his religious beliefs, that fact tends to support the conclusion that the regulation at issue is reasonable).

207. *See* Spies v. Voinovich, 173 F.3d 398, 407 (6th Cir. 1999) (holding plaintiff was not entitled to a strict vegan diet because it was not required by Zen Buddhism and because a vegetarian diet, which the prison already provided, sufficed); *see also* Dawson v. Burnette, 631 F. Supp. 2d 878,894 (W.D. Mich. 2009).

However, the Third Circuit Court of Appeals has refused to follow this analysis of considering whether a religion requires a practice or diet, finding the judiciary ill equipped to determine the truth and significance of religious beliefs and practices. Instead, it strictly applied the *Turner* test. *See* DeHart v. Horn, 227 F.3d 47, 56–57 n.6 (3d Cir. 2000); *see also* McEachin v. McGuinnis, 357 F.3d 197, 203 (2d Cir. 2004) (stating that "a religious practice [need not] be mandated by a religion" to receive 1st Amendment protection) (citing Levitan v. Ashcroft, 281 F.3d 1313, 1319 (D.C. Cir. 2002)).

concerns. If so, the court will balance the reasonableness of the refusal with the prison's legitimate interests, looking to effects on the prison community, use of resources, and alternative means of satisfying the meal request.[208]

Although courts may look into the costs of accommodating prisoners' dietary requirements, budgetary considerations alone cannot excuse a prison from respecting your First Amendment rights. In other words, your religious dietary habits will be accommodated where prison officials can do so reasonably without jeopardizing security, or causing significant expense or administrative burden.[209]

(ii) RLUIPA

Under RLUIPA, a prison can refuse to accommodate your request for a special diet, provided that if the refusal substantially burdens your religious exercise, the refusal (1) furthers a compelling interest and (2) uses the least restrictive means. [210]

In order for your special diet to be protected, you will first need to show your special diet is a religious exercise, one that is based on sincerely held religious beliefs and practices and not simply a concern for your bodily health.[211] Remember that your beliefs do not need to be affiliated with any organized religion to constitute religious beliefs, and you do not need to show the religion absolutely requires you to follow a special diet.[212]

One way that you may try to prove that a diet is a religious exercise is to submit paperwork from your religious organization stating that adherents to the religion often choose to follow special dietary restrictions. For example, in *Koger v. Bryan*,[213] the Seventh Circuit Court of Appeals found that a prisoner who submitted paperwork from his religious organization, stating that individual members of the faith "may, from time to time, include dietary restrictions as part of his or her personal regimen of spiritual discipline," had established that his dietary request was "squarely within the definition of religious exercise set forth by RLUIPA."[214]

When determining whether your religious beliefs are sincerely held, courts have also looked to the length of time that you asked to have your request for a special diet accommodated. For example, in *Koger*, the court pointed to the long time that the prisoner had asked to have his request for a non-meat diet accommodated; the prisoner had first filed a request nearly eight years before the case reached the court of appeals.[215] The court also noted that the fact that the prisoner had remained committed to his original religious affiliation throughout this time—rather than changing to another religion that *required* non-meat diets—indicated that his religious belief was sincerely held.[216]

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208. *See* DeHart v. Horn, 227 F.3d 47, 49–52 (3d Cir. 2000) (balancing the *Turner* factors and holding that although there is a legitimate penological interest in having an efficient food system and avoiding prisoner jealousy, accommodating the Buddhist prisoner's request for a cup of soy milk with each meal was not administratively prohibitive and not unreasonable in light of these penological interests, but that on remand the district court was required to examine whether there were other means available to prisoner for expressing his religious beliefs); *see also* Williams v. Morton, 343 F.3d 212, 217–18 (3d Cir. 2003) (holding that the denial of Muslim prisoner's request for Halal meals with meat, rather than prison-provided vegetarian meals, was valid in light of legitimate prison interests in "simplified food service, prison security, and budgetary constraints"). *But see* McEachern v. McGuinnis, 357 F.3d 197, 203–04 (2d Cir. 2004) (holding that prisoner who claimed that he was subjected to a disciplinary diet of food "loaf" during Ramadan, when Muslims are required to break their fast each day with Halal food, stated a claim).

209. *See* Makin v. Colo. Dept. of Corr., 183 F.3d 1205, 1211–14 (10th Cir. 1999) (holding prison's failure to accommodate meal requirements during the holy month of Ramadan violated Muslim prisoner's 1st Amendment rights); Ashelman v. Wawrzaszek, 111 F.3d 674, 677 (9th Cir. 1997) (holding providing Orthodox Jews with a frozen kosher dinner supplemented with non-kosher meals violated their right to free exercise, since reasonable alternatives existed).

210. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

211. *See* Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) (hypothesizing that if a prisoner's desire for a non-meat diet "was rooted solely in concerns for his bodily health, it would not be protected by RLUIPA"); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (holding that where fundamental claims of religious freedom are at stake, we must searchingly examine the interests that the State seeks to promote and the impediment to those objectives that would flow from recognizing the claim).

212. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A) (2006).

213. Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008).

214. Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008).

215. Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008).

216. Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008).

Once you show you are seeking accommodation of a religious exercise based on sincerely held beliefs, you must then show the refusal to provide the diet substantially burdens this religious exercise.[217] At least one court has found that repeated refusal to accommodate a request for a special diet some members of a religion follow constitutes a substantial burden, even if the religion does not actually require the diet.[218]

If you are able to prove that by not providing your requested diet, the prison substantially burdens your religious exercise, the prison must then show that its reason for not fulfilling your request is based on a compelling government interest and not permitting the diet is the "least restrictive means" of accomplishing these goals.

To date, courts have recognized orderly administration of a prison dietary system as a valid concern of prison officials.[219] In *Jova v. Smith*,[220] the Second Circuit Court of Appeals seemed to assume that such administrative interests could be compelling.[221] The plaintiffs had requested a vegan diet, specific foods on individual days of the week, and preparation of the food by Tulukeesh adherents.[222] Whether the government's interest is compelling perhaps depends on the prison's ability to meet your religious dietary needs. This idea is also supported by *Jova v. Smith* because the court reversed the district court's grant of summary judgment on the grounds that the prison had not demonstrated that providing a vegan diet was too burdensome.[223] Generally, the orderly administration of a prison dietary system is not a compelling interest.[224] Moreover, if the prison already serves meals that could satisfy your request for a special diet, the court may be more likely to find the prison did not meet its burden of showing the refusal is based on a compelling government interest.[225]

(f) Special Attire

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison may prevent you from wearing certain attire required by your religion, like prayer hats or head coverings, provided there is a reasonable relationship between the regulation and a legitimate prison interest.[226] Many courts have held the right to wear head coverings must be weighed against the state's security concern that weapons and drugs can be concealed under a hat.[227]

For example, a New York court held that a prison could prohibit prisoners from wearing Rastafarian "crowns" (loose fitting headgear worn over dreadlocks) in some or all areas of the prison, given the legitimate security interests of the prison, even though Jewish and Muslim prisoners could wear their respective religious headgear (that are smaller and more closely fitted) throughout the prison.[228] The court determined that the prison had a legitimate security interest in the different treatment because Rastafarian crowns are large and

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217. *See* Muhammad v. Warithu-Deen Umar, 98 F. Supp. 2d 337, 341 (W.D.N.Y. 2000) (finding that prison's refusal to provide Muslim prisoner with a kosher cold alternative meal rather than the religious alternative meal was not a substantial burden on prisoner's religious exercise).

218. Koger v. Bryan, 523 F.3d 789, 798 (7th Cir. 2008).

219. *See, e.g.*, Resnick v. Adams, 348 F.3d 763, 769 (9th Cir. 2003) ("The legitimate governmental interest at stake here is the orderly administration of a program that allows federal prisons to accommodate the religious dietary needs of thousands of prisoners.") (citations omitted); DeHart v. Horn, 227 F.3d 47, 52 (3d Cir. 2000) (agreeing with prison officials that "a simplified and efficient food service" is a legitimate penological interest).

220. Jova v. Smith, 582 F.3d 410, 417 (2d Cir. 2009).

221. Jova v. Smith, 582 F.3d 410, 417 (2d Cir. 2009).

222. Jova v. Smith, 582 F.3d 410, 417 (2d Cir. 2009).

223. Jova v. Smith, 582 F.3d 410, 417 (2d Cir. 2009).

224. Koger v. Bryan, 523 F.3d 789, 800 (7th Cir. 2008) ("[N]o appellate court has ever found these [legitimate concerns for orderly administration of a prison dietary system] to be compelling interests.").

225. Koger v. Bryan, 523 F.3d 789, 798 (7th Cir. 2008).

226. *See* Davis v. Clinton, 74 F. App'x 452, 455 (6th Cir. 2003) (upholding prison policy prohibiting Muslim prisoner from wearing religious garb every day due to the policy's reasonable relationship to valid security concerns).

227. *See, e.g.*, Boles v. Neet, 486 F.3d 1177 (10th Cir. Colo. 2007) (denying prison warden's motion to dismiss action for violation of 1st Amendment for prohibiting the wearing of a yarmulke while in transport between prison and hospital); Young v. Lane, 922 F.2d 370 (7th Cir. 1991) (same with Jewish prisoners and yarmulkes); Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir. 1987) (same with Native Americans and religious headbands).

228. Benjamin v. Coughlin, 905 F.2d 571, 578–79 (2d Cir. 1990) (holding that restricting wearing of Rastafarian crowns did not violate the 1st Amendment or Equal Protection); Bunny v. Coughlin, 187 A.D.2d 119, 122, 593 N.Y.S.2d 354, 357 (3d Dept. 1993) (holding that wearing of Rastafarian crown was properly denied).

shapeless enough to conceal weapons and contraband, as compared to the smaller, closely fitting head coverings worn by members of other religions.[229]

(ii) RLUIPA

Under RLUIPA, you will first need to show that the prison has substantially burdened your religious exercise by not permitting you to wear your religious attire.[230] If you make such a showing, the court will then determine whether the restriction furthers compelling governmental interests by the least restrictive means available. Because prison safety and security are considered compelling governmental interests, the court will then need to determine whether the challenged regulations are the least restrictive means of accomplishing the safety and security goals. Ultimately, the outcome may be similar to raising a First Amendment challenge, where objects that threaten security are banned while those that do not are permitted.

As with other RLUIPA claims, if you can show that prison officials allow other prisoners to wear the religious attire you wish to wear, you may be able to convince the court that the restriction is not the least restrictive means. For example, in *Clarke v. Scribner*,[231] a federal district court found that a prisoner had put forward a valid claim under RLUIPA when the prisoner argued that a prison official had refused the prisoner access to the dining hall unless the plaintiff removed his head covering. Significantly, the prisoner had claimed that non-Muslim prisoners were allowed to wear their religious attire in the hall.

(g) Medical Tests

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison may refuse to accommodate your request not to receive medical procedures, such as the tuberculosis skin test, based on religious objections. To determine whether an injunction is appropriate, a court will apply the *Turner* standard.[232] In most cases, courts have upheld mandatory tuberculosis testing policies as reasonably related to legitimate objectives of prison administration.[233]

Because medical testing and vaccination requirements affect the wellbeing of the entire prison population and not just the rights of an individual prisoner, courts apply an analysis that is somewhat different from the one applied to other limitations of prisoners' rights. Some courts give significant weight to the fact that vaccination and medical testing requirements are general, do not burden or support one religion over any others, and are rationally related to maintaining the health and safety of the prison population and officials.[234]

Many courts have also upheld a state statute that required a prisoner to provide a DNA sample against a religious challenge. For example, in *Shaffer v. Saffle*,[235] an Oklahoma statute required individuals convicted of certain offenses (sex-related crimes, violent crimes, and other crimes where biological evidence was recovered) to provide a DNA sample for a state DNA Offender Database for the purpose of identifying and prosecuting criminals. A prisoner challenged the statute, contending that it would force him "to submit to a practice that will require him to deny his faith and condemn him to eternal damnation."[236] The court held that the prisoner's First Amendment Free Exercise Clause had not been violated because the statute was a neutral, generally applicable law that did not discriminate against him based on his religious beliefs.

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229. Benjamin v. Coughlin, 905 F.2d 571, 579 (2d Cir. 1990); Bunny v. Coughlin, 187 A.D.2d 119, 123, 593 N.Y.S.2d 354, 357 (3d Dept. 1993).

230. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

231. Clarke v. Scribner, No. CIV S-05-00702 ALA P., 2007 U.S. Dist. LEXIS 69836, at *6 (E.D. Cal. Sept. 12, 2007) (*unpublished*).

232. For more information on the *Turner* standard, see Part C(1)(c) of this Chapter.

233. *See, e.g.*, Ballard v. Woodard, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (holding that the free religious exercise rights of a Muslim prisoner were not violated when he was subjected to tuberculosis testing during the holy month of Ramadan since the state had a "paramount interest in maintaining the health of its prison population").

234. *See generally* Ballard v. Woodard, 641 F. Supp. 432 (W.D.N.C. 1986) (holding that the free religious exercise rights of a Muslim prisoner were not violated when he was subjected to tuberculosis testing during the holy month of Ramadan since the state had a "paramount interest in maintaining the health of its prison population"); *see also* McCormick v. Stalder, 105 F.3d 1059 (5th Cir. 1997) (holding that prison officials could constitutionally quarantine a prisoner who tested positive for tuberculosis and force him to undergo treatment).

235. Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998).

236. Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998).

(ii) RLUIPA

Under RLUIPA, a prison may refuse to accommodate your request not to receive medical procedures, provided that, if such a refusal constitutes a substantial burden on your religious exercise, it (1) furthers a compelling government interest (2) by the least restrictive means.[237]

As in other RLUIPA cases, you must prove that the medical testing or vaccination requirement substantially burdens your religious exercise.[238] The prison must then prove that the regulation furthers a compelling government interest by the least restrictive means.[239] Because most medical procedures potentially affect the entire prison population's health, and not just the individual prisoner's rights, the court will likely conclude the procedure protects the health of the prison population and thus furthers a compelling government interest.[240] Your best chance of successfully challenging a medical testing or vaccination requirement may be that the specific medical procedures is not the least restrictive means of testing you. For example, in *Jolly v. Coughlin* a Rastafarian prisoner was placed in medical keeplock for refusing to take a tuberculosis test.[241] The court held that while the government's interest in preventing the spread of tuberculosis is compelling, keeping the prisoner in medical keeplock violated RFRA because even if the prisoner had tested positive for latent tuberculosis and refused to take the medication, he would have been placed back in the general population.[242] Results like *Jolly*, however, are fact-specific, and your chance of successfully challenging a medical testing or inoculation requirement under RLUIPA, as under the First Amendment Free Exercise Clause, is probably minimal.[243]

D. Your Rights Under State Statutes

In addition to federal law, many states have laws ensuring prisoners' rights to practice their religion. This Part specifically reviews relevant New York statutes that are different from what is explained in the rest of this Chapter. These statutes provide remedies to state prisoners in state court that are not exclusive of the remedies available in federal court. In other words, you may sue under a state statute, a federal statute, and/or the U.S. Constitution. Make sure that you check for the most recent version of the law in your state before you file a claim.

1. New York

Section 610(1) of the New York Corrections Law declares that you are entitled to the "free exercise and enjoyment of religious profession and worship, without discrimination or preference."[244] Subdivision (3) of this law provides that the rules and regulations of correctional institutions must allow religious services, spiritual advice, and private support from recognized clergy members.[245] But, the law also authorizes correctional institutions to reasonably restrict this right if necessary for proper institutional management.[246]

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237. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

238. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006). *See also* Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996) (stating that a substantial burden exists when the state puts substantial pressure on a prisoner to modify his behavior and to violate his beliefs).

239. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2006).

240. *See* Johnson v. Sherman, CIV S-04-2255 LKK EFB P, 2007 U.S. Dist. LEXIS 24098, at *10–11 (E.D. Cal. Mar. 30, 2007) (*unpublished*) (finding that prison established a compelling governmental interest in protecting prisoners and correctional staff from tuberculosis).

241. Jolly v. Coughlin, 76 F.3d 468, 471 (2d Cir. 1996).

242. Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996).

243. *See* Johnson v. Sherman, No. CIV S-04-2255 LKK EFB P, 2007 U.S. Dist. LEXIS 24098, at *12 (E.D. Cal. Mar. 30, 2007) (*unpublished*) (denying injunction to Rastafarian prisoner challenging prison's requirement that he undergo a tuberculin skin test to test for latent tuberculosis because "[t]he tuberculosis skin test is the only medically accepted test available to discover latent tuberculosis in California's prisons."); *see also* Soder v. Williamson, No. 4:07-CV-1851, 2008 U.S. Dist. LEXIS 68513, at *14–17 (M.D. Pa. Aug. 7, 2008) (*unpublished*) (finding no grounds for an RLUIPA violation where prison officials had tested a prisoner for tuberculosis using a chest X-ray—the method that the prisoner requested—and observing that the state has a particularly "clear and compelling interest in detecting" highly contagious and potentially dangerous diseases).

244. N.Y. Corr. Law § 610(1) (McKinney 2008).

245. N.Y. Corr. Law § 610(3) (McKinney 2008). *See generally* Brown v. McGinnis, 10 N.Y.2d 531, 536, 180 N.E.2d 791, 793, 225 N.Y.S.2d 497, 501 (1962) (holding that Muslim prisoner has right to spiritual advice from clergymen of his religion under § 610).

246. N.Y. Corr. Law § 610(3) (McKinney 2008); *See also* Brown v. McGinnis, 10 N.Y.2d 531, 535–36, 180 N.E.2d

A New York court applying this statute has required the redrafting of the Commissioner of Correction's rules and regulations to allow for the admission of clergy into a prison for purposes of conducting religious services.[247] However, this allowance is subject to reasonable limitation by the Commissioner of the Department of Correctional Services (DOCS) and by wardens for purposes of prison security or other legitimate prison interests.[248] Note that courts have also interpreted Section 610(1) to require the presence of a "non-inmate spiritual leader" at all religious congregations in prison, and the non-inmate spiritual leader must be registered and approved pursuant to prison directives.[249] You should read Section 610 carefully, along with the cases cited in the corresponding Notes of Decisions, which can be found in the same volume of McKinney's Consolidated Laws as the statute, just after the statute's text.

In addition to Section 610, you may also bring claims under the New York State Constitution. In determining the legality of a restriction limiting your right to free exercise of religion under the New York State Constitution, courts will balance the "importance of the right asserted and the extent of the infringement ... against the institutional needs and objectives being promoted."[250] In general, New York courts follow the same analysis as claims brought under the U.S. Constitution. Therefore, if you believe a New York law or DOCS directive interferes with your right to free exercise of religion, you should be prepared to make an argument using the constitutional analysis provided earlier in this Chapter.

Although New York state courts follow the same general constitutional analysis as federal courts, there are some differences that you should be aware of when evaluating whether you have a viable claim.

For example, New York courts and DOCS have adopted a specific rule concerning initial haircuts and shaves for purposes of obtaining identification photographs.[251] Under this rule, a prison may not require all prisoners to have their haircut upon admission, as there are less intrusive alternatives available that do not increase any administrative burden (for example, tying one's hair back).[252] An initial haircut requirement is therefore an unconstitutional violation of religious rights under New York law. But, a prison can still require prisoners to undergo an initial shave, since there are "no less intrusive alternatives for photographing the underlying facial features."[253] Note, however, that DOCS seems to recognize computer imaging as a viable alternative to the initial shave requirement.[254]

791, 793, 225 N.Y.S.2d 497, 500 (1962) (stating that the freedom to exercise religion is not absolute because the law allows for these rights to be reasonably curtailed when necessary to manage the prison and maintain discipline).

247. *See* SaMarion v. McGinnis, 55 Misc. 2d 59, 61, 284 N.Y.S.2d 504, 507–08 (Sup. Ct. Erie County 1967) (requiring the redrafting of paragraphs 3, 7, 16, & 17 of § 610 of the Corrections Law to permit the admission of clergy for religious ministry after Black Muslims alleged denial of their right to practice their religion).

248. SaMarion v. McGinnis, 55 Misc. 2d 59, 61, 284 N.Y.S.2d 504, 508 (Sup. Ct. Erie County 1967) (requiring the redrafting of the Corrections Law to permit the admission of clergy, but allowing reasonable limitation by the Commissioner and Wardens for the purposes of prison security).

249. State of New York, Department of Correctional Services, Directive No. 4750 IV-A-4 (2004), *available at* http://www.docs.state.ny.us/Directives/4750.pdf (last visited February 27, 2010) (dealing with "Volunteer Services Programs," and including guidelines for "religious volunteer and spiritual advisor"); State of New York, Department of Correctional Services, Directive 4202 F-2-a-(3) (2009), *available at* http://www.docs.state.ny.us/Directives/4202.pdf (last visited February 27, 2010) (providing that, with specific authorization of the facility Superintendent, prisoners "shall be permitted to observe their congregational worship services when led by employee chaplains or outside religious volunteers, and to attend religious study, meetings, classes, study groups, or congregational worship of their respective religious faiths.").

250. Lucas v. Scully, 71 N.Y.2d 399, 406, 521 N.E.2d 1070, 1073, 526 N.Y.S.2d 927, 930 (1988).

251. *See* State of New York, Department of Correctional Services, Directive 4914 (2001) *available at*, http://www.docs.state.ny.us/Directives/4914.pdf (last visited February 27, 2010) (discussing "Inmate Grooming Standards").

252. *See* People v. Lewis, 115 A.D.2d 597, 598, 496 N.Y.S.2d 258, 260 (2d Dept. 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986) ("[T]he identification objective would be fully achieved by pulling respondent's locks back tightly behind the head for a photograph so they could not be seen … the asserted objectives of a haircut can be achieved through alternatives that impinge less drastically on respondent's First Amendment rights than directing him to cut his hair.").

253. *See* People v. Lewis, 115 A.D.2d 597, 598, 496 N.Y.S.2d 258, 260 (2d Dept. 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986); *see also* Phillips v. Coughlin, 586 F. Supp. 1281, 1285 (S.D.N.Y. 1984) (denying Rastafarian's claim for damages after an initial shave pursuant to Directive 4914, since a single shave is the "simplest, quickest and most comfortable method" of satisfying the security need for a clean-shaven identification photograph).

254. *See* Helbrans v. Coombe, 890 F. Supp. 227, 230 (S.D.N.Y. 1995) (noting that DOCS and prisoner reached an agreement in which DOCS allowed a Jewish prisoner to pay for a computer-generated photograph that displayed his image without his beard as an alternative to the initial shave requirement) .

DOCS has also adopted specific rules for the post-admission shaving of facial hair. Under this rule, although prisoners cannot grow facial hair longer than one inch from the face, there is a religious exemption for the one-inch requirement for those whose religious tenets prohibit the cutting of facial hair.[255]

Likewise, DOCS has adopted specific dietary rules. Prisoners in New York prisons may avoid eating foods forbidden by their religious beliefs, in which case the prison must provide them with a nutritionally adequate substitute diet.[256] For example, prisons must provide Muslim and Jewish prisoners with a pork-free diet.[257] DOCS policy also provides Muslim, Buddhist, and Orthodox Jewish prisoners special meals during certain holidays.[258] Despite these provisions, there are limitations to the religious meals and ceremonies a prisoner can demand. For example, a court held a Jewish prisoner could not insist on preparing his meals himself, nor could he require that only a Jewish or Muslim cook prepare them. Since the prison provided the prisoner with pork-free meals, it did not have to meet his other preparation demands for valid budgetary reasons.[259]

E. Faith-Based Rehabilitation Programs

In the past few years, there has been an increase in the number of faith-based rehabilitation programs within state prison facilities, many initiated by volunteer evangelical Christian organizations (the Prison Fellowship Ministries in particular).[260] What makes these faith-based programs different from other religious-based organizations within the prison is their implementation by the state and the "special treatment" participating prisoners seem to receive.

These faith-based programs raise serious constitutional questions. While the Supreme Court has not yet decided the constitutionality of these faith-based rehabilitation programs, several state and federal courts have done so.[261] In *Americans United for Separation of Church and State v. Prison Fellowship Ministries*,[262] an Iowa federal district court held the challenged faith-based program violated the Establishment Clause, which is explained above in section B of this Chapter.[263]

Much of the court's decision in that case, however, turned on the fact that the program was state funded, conducted in a state prison by a private religious organization, and all instruction (with the exception of one subject) was presented from the viewpoint of Evangelical Christianity.[264] It is unclear how a similar case would come out if the program were privately funded, or if the program was less religiously oriented.

Courts generally treat faith-based prison addiction treatment programs differently (primarily Alcoholics Anonymous and Narcotics Anonymous, which "are rooted ... in a regard for a 'higher power'").[265] Rather than holding that these programs violate the Establishment Clause, courts tend to say simply prisoners cannot be required to participate in faith-based programs,[266] and some go so far as requiring secular alternatives.[267]

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255. *See* State of New York, Department of Correctional Services, Directive 4914 III-B-1 (2001).

256. *See* State of New York, Department of Correctional Services, Directive 4202(P) (2008). *But see* Bunny v. Coughlin, 187 A.D.2d 119, 123, 593 N.Y.S.2d 354, 357 (3d Dept. 1993) (holding that a Rastafarian prisoner was not entitled to dietary restrictions because the prison did not have the resources to accommodate him).

257. *See* State of New York, Department of Correctional Services, Directive 4202(P) (2008); *see also* Majid v. Leonardo, 172 A.D.2d 914, 568 N.Y.S.2d 200, 201 (3d Dept. 1991) (finding that Halal meals for Muslim prisoners are not required given budgetary constraints and staff resources and because pork-free meals are already provided).

258. *See* Benjamin v. Coughlin, 905 F.2d 571, 579–80 (2d Cir. 1990) (noting the provision of special meals).

259. Malik v. Coughlin, 158 A.D.2d 833, 834, 551 N.Y.S.2d 418, 419 (3d Dept. 1990).

260. *See* Daniel Brook, *When God Goes to Prison*, Legal Affairs, May–June, 2003 at 22; Samantha M. Shapiro, *Jails for Jesus*, Mother Jones, Nov.–Dec., 2003 at 54.

261. *See, e.g.*, Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006) (holding that a faith-based prison program violated prisoners' Establishment Clause rights under the 1st Amendment and the Iowa Constitution), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007); Williams v. Huff, 52 S.W.3d 171, 192 (Tex. 2001) (holding that a faith-based prison program violated prisoners' Establishment Clause rights under the 1st Amendment).

262. Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007).

263. Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 933 (S.D. Iowa 2006), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007).

264. Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 918–21 (S.D. Iowa 2006), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007).

265. Inouye v. Kemna, 504 F.3d 705, 710 (9th Cir. 2007).

266. *See, e.g.*, Kerr v. Farrey, 95 F.3d 472, 478–80 (7th Cir. 1996) (holding that prisoner could not be required to participate in Narcotics Anonymous, nor could he have his security classification raised for refusing to do so); Turner v. Hickman, 342 F. Supp. 2d 887, 895–98 (E.D. Cal. 2004) (holding that requiring prisoner to participate in Narcotics

F. Conclusion

The previous Parts indicate that the law is not always clear concerning your right to religious freedom. This lack of clarity is due to the difficulty of weighing the strongly opposed interests involved. On one side lies your constitutional and statutory right to freely exercise your religion, combined with the prohibition against state establishment of religion. On the other side is the prison system's desire to maintain safety and order in prisons. To bring a claim concerning any of your religious rights in prison, you must be mindful of the following criteria that courts examine.

To bring a free exercise of religion claim under RLUIPA or RFRA, you must first allege that you fall under RLUIPA or RFRA's jurisdiction. In the RLUIPA context, the easiest way to do so is to plead that RLUIPA applies to you because your prison or prison system receives federal funds. Recall that for federal prisoners to bring a RFRA claim, you must simply allege that your rights were either violated while you were a federal prisoner, or violated by an agent of the federal government acting in his or her official capacity.

After making this jurisdictional showing, you must then convince the court that your religious exercise has been substantially burdened. If you succeed, the court will then require the government to show that the burden upon your religious exercise furthers a compelling governmental interest by the least restrictive means. While this is the government's burden, you will want to argue that the interest is not compelling, the means used are not the least restrictive, or both.

To bring a free exercise claim under the First Amendment of the Constitution, you must first convince the court that your religion is authentic and that your beliefs are sincere. The court will then apply the *Turner* test to determine (1) whether there is a rational connection between the prison regulation and the governmental interest claimed to justify it, (2) whether there are other ways of exercising your right despite the regulation, (3) if allowing you to exercise your right will cause a "ripple effect" on others in the prison and on the allocation of prison resources, and (4) whether there is an easier way for the prison to meet the regulation's goal without limiting your right in this way. Remember that unlike in the RLUIPA or RFRA context, you have the burden of proving the fourth element under the *Turner* test.

If you feel that your prison has violated the Establishment Clause, you must convince the court that the prison's regulations fail the *Lemon* test and the *Lee* coercion rule. Remember that the courts are recognizing both tests until the Supreme Court clarifies which test is proper. Therefore, you should try to show that the prison regulation you are challenging fails both tests.

Anonymous in order to be eligible for parole violated the Establishment Clause).

267. *See*, *e.g.*, Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1081 (2d Cir. 1997) (holding forced attendance at Alcoholics Anonymous as a probation condition violated the Establishment Clause and requiring county to make a non-religious treatment alternative available).

APPENDIX A

LIST OF RELIGIOUS ORGANIZATIONS

Below is a list of organizations that might be able to assist you in practicing your religion in prison. Most of these organizations do not provide legal assistance, and unless otherwise stated, probably do not have an outreach program specifically for prisoners. The *JLM* makes no endorsement or recommendation of any of the following organizations or religions, nor guarantees they will be able to help you.

Antiochian Orthodox Christian
Orthodox Christian Prison Ministry
P.O. Box 468
Fleetwood, PA 19522
(610) 777-1552

Armenian Apostolic
Armenian Church of America, Eastern Diocese
630 Second Ave.
New York, NY 10016
(212) 686-0710; FAX: (212) 252-0681

Bahá'í
National Spiritual Assembly of the Bahá'ís
of the United States
536 Sheridan Road
Wilmette, IL 60091
(847) 733-3400

Buddhist
Tu An Zen Temple
4310 W. 5th St.
Santa Ana, CA 92703
(714) 265-2357
Vietnamese and Chinese speakers available.

Byzantine Catholic
Byzantine Catholic Church
Most Rev. Archbishop Basil Schott
66 Riverview Ave.
Pittsburgh, PA 15214-2253
(412) 231-4000; FAX: (412) 231-1697

Chinese Catholic
Ascension Chinese Catholic Church
4605 Jetty Lane
Houston, TX 77072
(281) 575-8855; FAX: (281) 575-6940

Croatian Catholic
Croatian Church of St. Cyril & Methodius
502 W. 41st St.
New York, NY 10036
(212) 563-3395; FAX: (212) 868-1203

Roman Catholic (including Spanish and French-Speaking)
Catholic League for Religious and Civil Rights
450 Seventh Ave.
New York, NY 10123
(212) 371-3191; FAX: (212) 371-3394
This group does not provide legal assistance. But, it will advocate informally on your behalf by contacting your prison warden if you are Roman Catholic and prevented in some way from practicing your religion.

Asociación Nacional de Sacerdotes
Hispanos en USA
(The National Association of Hispanic
Priests of the USA)
2472 Bolsover, Suite 442
Houston, TX 77005
(713) 528-6517; FAX: (713) 528-6379

Coptic Christian
St. Mark's Coptic Orthodox Church
1600 S. Robertson Blvd.
Los Angeles, CA 90035
(310) 275-3050

Greek Orthodox
Greek Orthodox Church
Archdiocese of America
8 E. 79th St.
New York, NY 10075
(212) 570-3500; FAX: (212) 570-3569

Hindu
Hinduism Today
Kauai's Hindu Monastery
107 Kaholalele Rd.
Kapaa, HI 96746-9304
(808) 822-3012; FAX: (808) 822-4351
Subscriptions are available to Hinduism Today.

Hindu Temple Society of Southern California
1600 Las Virgenes Canyon Rd.
Calabasas, CA 91302
(818) 880-5552; FAX: (818) 880-5583

Islamic
Islamic Society of North America
P.O. Box 38
Plainfield, IN 46168
(317) 839-8157; FAX: (317) 839-1840

Jainist
Federation of Jain Associations in North America (JAINA)
JAINA Headquarters
43-11 Ithaca Street
Elmhurst, NY 11373
(718) 606-2885

Jewish
Aleph Institute
Executive Director of Legal Affairs
9540 Collins Ave.
Surfside, FL 33154
(305) 864-5553; FAX (305) 864-5675
This organization serves the needs of Jews of all backgrounds who are in institutional environments, including the military, hospitals, and prisons. Volunteers conduct prison visits, particularly in conjunction with religious holidays. It provides religious education, legal advocacy on behalf of religious rights, and assistance to prisoners' families.

Native American/Indigenous
See Appendix IV of the *JLM* for a list of several organizations that work with Native Americans and address some Native American religious concerns.

Serbian Orthodox
Saint Steven's Serbian Orthodox Cathedral
1621 W. Garvey Ave.
Alhambra, CA 91803
(626) 284-9100; FAX: (626) 281-5045

Shi'a Muslim
Shi'a Ithna Asheri Jamaat of New York
48-67 58th St.
Woodside, NY 11377
(718) 507-7680

Miscellaneous/ Interdenominational
Prison Ashram Project
Human Kindness Foundation
P.O. Box 61619
Durham, NC 27715
(919) 383-5160 FAX: (919) 383-5140

A JAILHOUSE LAWYER'S MANUAL

Chapter 28: Rights of Prisoners with Disabilities

Columbia Human Rights Law Review

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Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER 28

RIGHTS OF PRISONERS WITH DISABILITIES*

A. Introduction

This Chapter explains the protections and legal rights available to prisoners with disabilities. As a prisoner with one or more disabilities—whether physical, mental, or both—you have legal rights based in the U.S. Constitution, federal civil rights laws, and some state laws. These laws forbid discrimination against you because of your disability.

Part A of this Chapter summarizes the laws protecting prisoners with disabilities. Part B of this Chapter explains the two major federal laws against disability discrimination: (1) Section 504 of the Rehabilitation Act of 1973 ("Section 504")[1] and (2) Title II of the Americans with Disabilities Act ("ADA," "Title II," or "ADA Title II").[2] Part B of this Chapter also explains what you need to prove in a legal claim under the ADA.[3] Your rights are mostly the same under Section 504 and Title II,[4] so you probably should seek relief under both statutes.[5] Part C of this Chapter explains how to enforce your rights under both Section 504 and Title II. It explains what a court can and cannot order, taking into account some new restrictions.

If because you have a disability you either (1) are not receiving the services you need, or (2) are being discriminated against, you may have a constitutional claim (in addition to Section 504 and Title II claims). For example, the way prison officials treat disabled prisoners—particularly in denying them medical care—can violate the Eighth Amendment's prohibition against "cruel and unusual punishment."[6] As a prisoner with disabilities, you also have important constitutional rights to medical care. This Chapter does *not* talk about your constitutional rights. To learn more about your constitutional rights, including your right to adequate medical care, you should read these chapters of *JLM*: Chapter 23: "Your Right to Adequate Medical Care"; Chapter 26: "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison"; and Chapter 29: "Special Issues for Prisoners with Mental Illness." Other chapters that are especially useful for all prisoners include: Chapter 4, "How to Find a Lawyer"; Chapter 14, "The Prison Litigation Reform Act"[7]; Chapter 15,

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1. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006).

2. Americans with Disabilities Act, 42 U.S.C. §§ 12101–213 (2006).

3. The ADA contains many sections, called "titles." Title II of the ADA is the most important ADA section for your claims. It protects you from disability discrimination by state and local government entities, including prisons and jails. Americans with Disabilities Act, 42 U.S.C. §§ 12131–34 (2006). It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Americans with Disabilities Act, 42 U.S.C. §12132 (2006).

4. Americans with Disabilities Act, 42 U.S.C. § 12133 (2006) (stating that the "remedies, procedures, and rights set forth in § 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of" Title II of the ADA).

5. Part B(1), below, explains the details of when you would seek relief under only one of these laws. Generally, you cannot not sue the *federal* government under the ADA. If you are in a *privately run prison*, you most likely can sue under Title II of the ADA, but you may *also* want to sue under Title III of the ADA.

6. *See, e.g.*, Allah v. Goord, 405 F. Supp. 2d 265, 275–76 (S.D.N.Y. 2005) (holding that a paraplegic prisoner stated an 8th Amendment claim in alleging that, while he was in his wheelchair, his wheelchair had been strapped into a vehicle too loosely, and thus he had been injured when the vehicle stopped suddenly); *see also* Lawson v. Dallas County, 286 F.3d 257, 263–64 (5th Cir. 2002) (holding that a prison's failure to provide a paraplegic prisoner with rehabilitation therapy, adequate toilet facilities, and a bed with an adequate mattress was medical neglect and inhumane treatment that violated the prisoner's 8th Amendment rights); LaFaut v. Smith, 834 F.2d 389, 392–94 (4th Cir. 1987) (holding that not offering prescribed rehabilitation therapy and adequate toilet facilities violated the 8th Amendment); Miller v. King, 384 F.3d 1248, 1261–62 (11th Cir. 2004) (holding that allegations by a wheelchair-using paraplegic that he was denied wheelchair repairs, physical therapy, medical consultations, leg braces and orthopedic shoes, wheelchair-accessible showers and toilets, opportunity to bathe, urinary catheters, and assistance in using the toilet raised a material factual issue under the 8th Amendment), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006).

7. This Chapter is particularly relevant; it discusses restrictions on prisoners' lawsuits that could affect your § 504 or ADA claim.

"Inmate Grievance Procedures"; and Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

Although your protections under Section 504 and the ADA have been weakened by the courts recently, they are still important civil rights and antidiscrimination laws. Using these laws, prisoners with disabilities have won important victories in many circuits, through both individual and class action suits. This Chapter will explain how you, as a prisoner with a disability, can use these laws to protect your rights while incarcerated.

B. Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act

1. Introduction

If you are a prisoner in a state or local facility and have one or more disabilities, Section 504 and Title II are two different laws that protect you in similar ways. Section 504 was enacted by Congress in 1973. It applies both to the federal government and to state and local entities that receive federal funding. In 1990, Congress passed the ADA, which expanded and strengthened Section 504's protections.[8] The language of Section 504 is very similar to the language of Title II; courts read them as prohibiting the same basic forms of discrimination.[9] You should start researching your claim by reading the two laws carefully, because most cases focus on how to interpret the laws. Since these two laws offer you similar protections, much of the discussion of the ADA in this Chapter will apply to Section 504, and vice versa.

If you are a prisoner in a federal prison, or a non-citizen detainee in a federal detention center, you can file suit *only* under Section 504. You cannot use the ADA because *the ADA cannot be used to sue the federal government.*[10] Also, if you sue a federal agency under Section 504, you can ask only for an injunction, not

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8. In some areas of the law, the ADA provides much broader protections for the disabled than § 504 does. For instance, the ADA specifically requires places like stores, restaurants, and banks to accommodate (make adaptations for) persons with disabilities. The ADA also provides persons with disabilities protection against employment discrimination because of their disabilities. But for prisons, jails, and state and local government entities, the ADA and § 504 give basically the same protections.

9. Recently, Congress passed the ADA Amendments Act of 2008 (which went into effect on January 1, 2009) because it was upset that the courts were interpreting the definition of disability differently under the ADA than under § 504. The ADA Amendments Act states, "Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973" and that, in particular, courts have "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress" (ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), (7), 122 Stat. 3554) (2008). Hopefully, the ADA will now provide protection for more people with disabilities because it will be easier to meet the qualifications for having a disability. Also, you may be more likely to win under the ADA if you win under § 504, since the two laws will become more similar to each other. Because this statute is so new (and the *JLM* is being published so soon after it goes into effect), you should be sure to look for recent cases in which it comes up. It is important to figure out how courts now treat the definition of disabled, as well as how the Equal Employment Opportunity Commission (which defines, in its regulations, many of the terms you will use in your ADA suit) changes its definition of "substantially limits."

10. The ADA defines "public entity" as as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B) (2006). This definition does *not* include agencies of the federal government. *See* Cellular Phone Taskforce v. FCC, 217 F.3d 72, 73 (2d Cir. 2000) (noting that the ADA does not apply to the federal government); Disability Rights Section, U.S. Dept. of Justice, Americans with Disabilities Act: Title II Technical Assistance Manual, II-1.2000, *available at* http://www.ada.gov/taman2.html (last visited Oct. 31, 2009).

You can get English and Spanish Department of Justice (DOJ) printed materials on the ADA for free by contacting the DOJ by mail or phone. Publications are available in standard print, large print, audiotape, Braille, and computer disk. To order by mail, write to:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., N.W.
Disability Rights Section -- NYA
Washington, D.C. 20530.

In your letter, include the name of the publication you want. To order by phone, call the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY). At these numbers, you can hear recorded information and order publications twenty-four hours a day. You can reach someone who can answer specific questions about the ADA, in English or Spanish, if you call on weekdays between 9:30 a.m. and 5:30 p.m. (except on Thursdays, when the hours are 12:30 p.m. to 5:30 p.m.).

money damages.[11] (An injunction is a court order requiring the prison or agency to correct the violation.)

Even if you are a prisoner in a privately operated prison, you should probably bring suit under Title II. According to DOJ regulations (proposed in 2008, to be available in the *Federal Register*), Title II applies to a public (nongovernmental) entity when it is *used* by a government entity:

> In essence, the private builder or contractor that operates the correctional facility does so at the direction of the state government, unless the private entity elects to use the facility for something other than incarceration, in which case title III may apply. For that reason, the proposed Sec. 35.152(a) makes it clear that this section's requirements will apply to prisons operated by public entities directly or through contractual or other relationships.[12]

However, if you are being held in a privately run prison, you should be sure to look for recent cases to see how the DOJ's proposed regulation has been treated by the courts. You may also want to sue under Title III[13] (which applies to public accommodations), in case Title II arguments are rejected. Title II and Title III are very similar. However, under Title III, you must show that the private prison is a "public accommodation"[14] rather than a "public entity." Private prisons and other public accommodations sued under Title III have different legal defenses than do state and local governments sued under Title II.[15] And individuals suing under Title III can seek only injunctive relief, not monetary damages.[16] Although there are minor differences between Title II and Title III, this discussion of Title II and Section 504 generally will apply to your Title III claim as well. But you should still read Title III cases.

(a) Section 504 of the 1973 Rehabilitation Act

Section 504 of the 1973 Rehabilitation Act states:

> No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.[17]

Section 504 guarantees that anyone qualified to participate in a program, service, or activity will have meaningful access to it when it is offered by a state or local recipient of federal funds.[18] Under Section 504, a "program or activity" is defined broadly to include "all of the operations" of a state or local government.[19]

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11. Lane v. Pena, 518 U.S. 187, 200, 116 S. Ct. 2092, 2100, 135 L. Ed. 2d 486, 497–98 (1996) (holding that Congress did not waive the federal government's immunity against monetary damages for violations of the Rehabilitation Act).

12. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 117 (proposed May 30, 2008) (to be codified at 28 C.F.R. 35) (2009).

13. 42 U.S.C. §§ 12181–89 (2006).

14. 42 U.S.C. § 12181(7) (2006) (defining "public accommodation").

15. Instead of defending itself by arguing that accommodating your disability would create a "fundamental alteration," a private prison can defend itself by arguing that correcting the problem is not "readily achievable." See Part B(4)(b)(i), below, to learn more about the fundamental alteration defense. "The term 'readily achievable' means easily accomplishable, and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include: (A) the nature and cost of the action needed under this chapter; (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity." 42 U.S.C. § 12181(9) (2006). *See also* 42 U.S.C. §§ 12182(b)(2)(A)(iv)–(v) (2006).

16. 42 U.S.C. § 12188(a) (2006).

17. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (Supp. 2007).

18. Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 672 (1985) (noting that § 504 requires state and local governments receiving federal aid to provide "meaningful access to the benefit" they offer).

19. Rehabilitation Act of 1973, 29 U.S.C. § 794(b)(1)(A)–(B) (2006 & Supp. 2007) (defining program or activity as

Thus, Section 504 applies not only to federal facilities, but also to any state, county, or city prison or jail that receives federal financial assistance, either directly or through a state or local government.[20] It includes almost every state prison and many jails.[21]

(b) Title II of the Americans with Disabilities Act

A major ADA goal is to end disability discrimination by public and private actors.[22] The ADA has three main sections (called "Titles"), only one of which applies to state and local entities. If you pursue an ADA claim against a state prison or county jail, you will file under Title II, which applies to all state and local governments. The antidiscrimination protections provided by Title II and Section 504 are very similar, but the ADA has stronger regulations. Title II provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[23]

The ADA defines many of the terms in the above paragraph, including: "qualified individual with a disability,"[24] "disability,"[25] and "public entity."[26] However, the statute does *not* define the key phrase "services, programs, or activities." It is important that you understand how courts have interpreted and applied both the defined and the undefined terms to claims made by prisoners with disabilities. Parts B(3)–(5) of this Chapter will discuss these terms.

(c) Necessary Elements of Your Title II and Your Section 504 Claims

You must include several basic elements in your Title II/Section 504 complaint. If you do not, the court will dismiss your lawsuit. Fortunately, most of the elements are the same for both statutes, so a well-pleaded complaint[27] under one statute will probably meet the requirements of the other, as well.

"all of the operations of a department, agency, special purpose district, or other instrumentality of a State or a local government; or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government").

20. Rehabilitation Act of 1973, 29 U.S.C. § 794(b) (2006 & Supp. 2007); Bellamy v. Roadway Exp., Inc., 668 F. Supp. 615, 618 (N.D. Ohio 1987) (noting that "the term 'federal financial assistance' has been very broadly construed to encompass assistance of any kind, direct or indirect"); Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000) (noting that acceptance of funds by one state agency does not constitute a waiver by the entire state, which would make the whole state subject to suit).

21. *But see* Nolley v. County of Erie, 776 F. Supp. 715, 742–43 (W.D.N.Y. 1991) (holding that a jail that received money in exchange for housing federal prisoners was not receiving federal financial assistance, but was instead receiving money in exchange for performing a service for the federal government), *rev'd*, 798 F. Supp. 123 (W.D.N.Y. 1992) (reversed only as to the awarding of punitive damages); *see also* Jarno v. Lewis, 256 F. Supp. 2d 499, 504 & n.3 (E.D. Va.) (holding that since the federal government merely hired the INS to operate a jail, and did not offer the INS any financial aid beyond payment for operating that jail, the INS was not a government actor; although this plaintiff was not suing under § 504, the court made clear in a footnote that it interpreted "federal financial assistance" in the same way as it would under § 504 because the Rehabilitation Act, including § 504, was modeled after the law under which the plaintiff was suing).

22. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2006) (stating that one of the goals of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). The ADA also prohibits discrimination against you because of your *association* with a person with a disability. 28 C.F.R. § 35.130(g) (2008); Niece v. Fitzner, 922 F. Supp. 1208, 1216 (E.D. Mich. 1995) (finding a possible ADA violation when prison officials refused to make accommodations for prisoner to communicate with his deaf fiancée).

23. Americans with Disabilities Act, 42 U.S.C. § 12132 (2006).

24. Americans with Disabilities Act, 42 U.S.C. § 12131(2) (2006) (defining "qualified individual with a disability" as anyone "with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

25. Americans with Disabilities Act, 42 U.S.C. §§ 12102(2)(A)–(C) (2006) (defining "disability" as "a physical or mental impairment that substantially limits one or more of [a person's] ... major life activities ... ; a record of such impairment; or being regarded as having such an impairment").

26. Americans with Disabilities Act, 42 U.S.C. §§ 12131(1)(A)–(B) (2006) (defining "public entity" as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government").

27. A well-pleaded complaint is a complaint that sufficiently sets forth a claim for relief. Black's Law Dictionary (8th ed. 2004) (definition of "well-pleaded complaint"). A court can throw out your complaint if it is not well-pleaded. A

To state a Title II claim, your complaint must say that:

(1) You are an individual with a disability;
(2) You are "qualified to participate in or receive the benefit of" the particular service, program, or activity at the prison or jail that discriminated against you;
(3) You were excluded from participation in or denied the benefits of the service, program, or activity at your prison or jail, or you were discriminated against in some other way; and
(4) This exclusion, denial of benefits, or discrimination was because of your disability.[28]

A claim under Section 504 has one additional requirement. Section 504 covers all federal facilities, but only those state and local facilities that receive federal funding. So *your complaint must state that the facility receives federal funding*.[29]

Your Section 504 complaint must say that:

(1) You are an individual with a disability;
(2) You are "otherwise qualified" for the program, activity, or service from which you were excluded;
(3) You were denied benefits or discriminated against solely because of your disability; and
(4) The program, activity, prison, or jail receives federal financial assistance.[30]

Of course, you should make sure to list the four facts listed above. But your complaint should also include other information, both to make your situation clear and to get the judge to sympathize with the problems you face in prison. You should (1) discuss your disability in detail, (2) explain the accommodations you need, and (3) describe the discrimination you have experienced. You should also mention any other facts you think are relevant and will make your argument stronger.

If your claim is about physical access within a prison or jail, your Section 504 claim should point out that the prison or jail is in violation of a statute that has been the law for more than thirty years. By pointing this out, you will be showing that the prison or jail has little basis for arguing that it did not know it had to be accessible to individuals with disabilities.

Many of the terms above will be explained later in detail. For now, know that the ADA and Section 504 are antidiscrimination laws, so your complaint should be clear as to how prison staff have discriminated against you because of your disability. The rest of Part B of this Chapter shows how courts have interpreted the ADA and Section 504 in the prison context.

2. What is Discrimination under the ADA?

The ADA regulations describe certain categories of action by public entities that are considered "discrimination" under the ADA. The categories are broad, and they clarify what the ADA prohibits. Keeping in mind the main goals of the ADA—(1) preventing discrimination, (2) integrating people with disabilities into the mainstream, and (3) providing strong and consistent enforceable standards addressing disability discrimination[31]—can help you understand why particular actions are considered discrimination. The following paragraphs discuss types of actions that constitute discrimination under the ADA.

According to the ADA, it is discrimination for public entities to deny an otherwise qualified person with a disability "the opportunity to participate in or benefit from" a program or service solely because of his

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well-pleaded complaint must meet the requirements of Rule 8(a) of the Federal Rules of Civil Procedure (F.R.C.P.). According to F.R.C.P. 8(a): "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." For a case in which the court addresses the meaning of "well-pleaded complaint," see, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (U.S. 2007).

28. *See, e.g.*, Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) (discussing the requirements for an ADA Title II claim).

29. *See, e.g.*, Thomas v. Nakatani, 309 F.3d 1203 (9th Cir. 2002) (affirming the dismissal of a § 504 claim because it did not allege that the state agency received federal funds); Hamilton v. Illinois Cent. R.R., 894 F. Supp. 1014, 1017 (D. Miss. 1995) (dismissing a § 504 claim because the plaintiff failed to allege that the private facility received federal funds). When you file your complaint, you probably will not *know* whether the jail or prison receives federal funding. (This is something that you should learn during discovery.) When you are giving the court documents about something you *believe, but do not know, to be true*, you should begin your statement with the phrase, "Upon information and belief." For example, in your § 504 complaint, you could say, "Upon information and belief, [the jail or prison you are suing] receives federal funding."

30. Doe v. Pfrommer, 148 F. 3d 73, 82 (2d Cir. 1998) (describing the essential elements of a § 504 claim).

31. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(8), (b)(1)–(2) (2006).

disability.[32] For instance, if you meet the requirements for participating in a vocational program, the prison cannot exclude you from the program just because of your disability.[33]

According to the ADA, it is discrimination for public entities, like prisons and jails, to offer individuals with disabilities any benefits or services that are worse than those offered to individuals without disabilities.[34] For instance, the ADA prohibits the prison from providing only one therapy session per week to a paraplegic prisoner, while providing two therapy sessions per week to prisoners without this disability (if the disability is the reason for providing fewer sessions). Similarly, if a prison offers GED classes for individuals with hearing disabilities, it cannot offer them a lower-quality program than it offers to individuals without hearing disabilities. (However, the ADA does not prohibit the prison from canceling *both* programs.)

According to the ADA, a prison can only provide "different or separate aids, benefits, or services" to individuals with disabilities if the programs *must* be separate to be effective.[35] In addition, the prison cannot exclude individuals with disabilities from other programs just because special programs are available for persons with disabilities.[36]

According to the ADA, a public entity discriminates if it provides "significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program."[37] So if a state or local government provides "significant assistance" to a prison—including a private prison—that discriminates on the basis of disability, then the state or local government can be in violation of the ADA. If you are in a private prison, this type of claim will help you sue the state or local entity that contracts with the prison.

According to the ADA, it is discrimination for public entities to use criteria or methods of administration that defeat or substantially impair the accomplishment of the objectives of the public entity's program with respect to people with disabilities.[38] In other words, a prison cannot run its programs in a way that keeps prisoners with disabilities from being able to participate, even if disabled prisoners are not explicitly excluded. For instance, if a visually impaired prisoner could not enroll in a business class because the print on the enrollment application was too small for him to read, this would be discrimination. The prison would have to provide the prisoner with a way to enroll in the business class.

Although the ADA regulations prohibit these forms of discrimination in prisons, not all of the above categories have come up in prisoner lawsuits. So you may have to argue by analogy to discrimination cases in other areas, like employment.

3. What is a Disability under the ADA and Section 504?

Under both the ADA and Section 504, you have a disability if: (1) a physical or mental impairment substantially limits one or more of your major life activities; (2) you have a record of such an impairment; or (3) you are regarded as having such an impairment.[39] If you satisfy any of these tests, you are considered an individual with a disability under the ADA and Section 504. If you currently have a disability, such as an

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32. 28 C.F.R. § 35.130(b)(1)(i) (2007).

33. *See, e.g.*, Montez v. Romer, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting prisoners' claim that they could not participate in vocational training because the prison did not accommodate their disabilities).

34. 28 C.F.R. § 35.130(b)(1)(ii) (2009).

35. 28 C.F.R. § 35.130(b)(1)(iv) (2009). *See also* 28 C.F.R. pt. 35, app. A, at 568 (2009), which explains that the DOJ "recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted").

36. 28 C.F.R. § 35.130(b)(2) (2009).

37. 28 C.F.R. § 35.130(b)(1)(v) (2009).

38. 28 C.F.R. § 35.130(b)(3)(ii) (2009).

39. Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B) (2006 & Supp. 2007); Americans with Disabilities Act, 42 U.S.C. § 12102(2) (2006). Most of the cases establishing which disabilities qualify for ADA antidiscrimination protection have been employment discrimination suits. Those employment discrimination suits may be useful to your case even though you are suing as a prisoner and not as an employee. Many people have brought ADA prisoner discrimination suits that rely on the outcomes of ADA employment discrimination suits. This is because the right of a disabled person to be free from discrimination is a right that he can enforce in many situations, including when he is an employee, and when he is a prisoner. *See, e.g.*, Carter v. Taylor, 540 F. Supp. 2d 522, 528 (D. Del. 2008) (citing Toyota Motor Mfg. Inc. v. Williams, 534 U.S. 184, 199, 122 S. Ct. 681, 692, 151 L. Ed. 2d 615, 632 (2002)) (applying the "case-by-case manner" standard from *Williams*, an ADA employment discrimination suit, to a prisoner's ADA disability claim); Smith v. Masterson, 538 F. Supp. 2d 653, 657 (S.D.N.Y. 2008) (adopting for a prisoner's suit the "major life activity" requirement from an employment suit, *Colwell v. Suffolk County Police Dept.,* 158 F.3d 635, 641 (2d Cir. 1998)).

uncorrectable hearing impairment, you would be disabled under the first test. Under the second test, you might be considered disabled if, for example, you once had cancer that substantially limited your ability to care for yourself, but the cancer is now in remission.[40] Finally, you may have a claim under the third test if prison officials discriminate against you because they believe you have a mental impairment that substantially limits your ability to learn when, in fact, you do not have a mental impairment, or you have an impairment but it does not substantially limit your ability to learn.[41]

The definition of *disability* has two parts. First, the disability at issue must be a *physical or mental impairment*. The meaning of "physical or mental impairment" is explored in Subsection (a) below. Second, the impairment must *substantially limit one or more major life activities.* The meanings of "substantially limits" and "major life activity" are discussed in Subsection (b).

(a) What is a "Physical or Mental Impairment"?

The ADA implementing regulations (rules spelling out the details of the law), from the U.S. Department of Justice ("DOJ"), define a "physical or mental impairment" to include a wide range of physical and mental conditions.[42] The regulations also list specific things that qualify as physical or mental impairments. The phrase "physical or mental impairment" includes, but is not limited to, contagious and non-contagious diseases and conditions such as: orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, and diabetes; mental retardation, emotional illness, and specific learning disabilities; HIV (whether symptomatic or asymptomatic) and tuberculosis; and drug addiction and alcoholism.[43] This list is not exhaustive. Diseases and conditions not included above may be considered physical or mental impairments if they meet the definition of impairment, which can be found at footnote 42.

If you are HIV-positive, you should note that the definition of physical impairment includes asymptomatic HIV (testing positive, but not showing symptoms).[44] For example, if you are asymptomatic HIV-positive and the prison denies you trustee status because you have HIV, you may have Title II and Section 504 claims.[45]

Drug addiction is also considered an impairment, but not if you are currently addicted. If you have stopped using drugs, and have completed or are participating in a drug rehabilitation program, the prison cannot discriminate against you on the basis of your past drug addiction.[46] However, the laws and regulations do not prohibit discrimination based on *current* illegal use of drugs.[47]

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40. *See*, *e.g.*, EEOC v. R.J. Gallagher Co., 181 F.3d 645, 655–56 (5th Cir. 1999) (noting that a man with a record of cancer may have a disability under the ADA if the cancer or treatment substantially limited him in one or more major life activities). *But see* Shaw v. Greenwich Anesthesiology Assocs., 137 F. Supp. 2d 48, 58 (D. Conn. 2001) (rejecting the Fifth Circuit's analysis and requiring that the plaintiff suffer from a disability *currently*).

41. Milholland v. Sumner County Bd. of Education, 569 F.3d 562, 566–67 (6th Cir. 2009) (reading the 2008 ADA Amendments as expanding the Act's reach to include cases where "[an] individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*") (emphasis added).

42. 28 C.F.R. § 35.104(1)(i) (2007) (defining "physical or mental impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine … [or] [a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities").

43. 28 C.F.R. § 35.104(1)(ii) (2007).

44. 28 C.F.R. § 35.104(1)(ii) (2007); *see* Bragdon v. Abbott, 524 U.S. 624, 637–41, 118 S. Ct. 2196, 2204–07, 141 L. Ed. 2d 540, 556–59 (1998) (holding that (1) under the ADA, HIV infection is a physical impairment "from the moment of infection," and (2) in this case, an asymptomatic HIV-positive woman was disabled under the ADA).

45. Harris v. Thigpen, 941 F.2d 1495, 1524 (11th Cir. 1991) (holding that HIV-positive status is a disability under § 504 because the correctional system treated HIV-positive people as if they were disabled); Dean v. Knowles, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (allowing an asymptomatic HIV-positive prisoner to go forward with a discrimination suit against prison officials who denied him trustee status).

46. 28 C.F.R. §§ 35.131(a)(2)(i)–(iii) (2007) ("A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who (i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; (ii) Is participating in a supervised rehabilitation program; or (iii) Is erroneously regarded as engaging in such use").

47. 28 C.F.R. § 35.131(a)(1) (2007) ("this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs"). § 504 contains similar language. Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(C)(i) (1999 & Supp. 2007). "Current illegal use of drugs" is defined as the illegal use of drugs "recent[] enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." 28

Other conditions and diseases that courts have found *could be* physical or mental impairments include: asthma,[48] deafness and other hearing impairments,[49] quadriplegia,[50] paraplegia,[51] amputations or artificial limbs,[52] certain stomach and digestive problems,[53] blindness or other vision impairments,[54] degenerative disk condition,[55] and other disabilities.[56] In many of the below cases (dealing with possible impairments), either the court did not decide whether the individual was disabled, or even decided that the plaintiff was not disabled. These cases simply give examples of the types of impairments courts have said *could* qualify as disabilities—as long as the claims were backed up with facts, and the impairment *substantially limited* the individual in a *major life activity*. (What it means to be *substantially limited* in a *major life activity* is discussed in Subsection (b) below.)

Being gay, lesbian, bisexual, or transgender is not a "physical or mental impairment" under the ADA.[57] (For information on special issues for gay, lesbian, bisexual, transgender, and transsexual prisoners, see Chapter 30 of the *JLM*.) Furthermore, the ADA regulations explicitly exclude certain "conditions"—including "transvestism, transsexualism," "sexual behavior disorders," and "gender identity disorders not resulting from physical impairments"[58]—from the definition of "physical or mental impairment" or

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C.F.R. § 35.104(4) (2007). According to the regulation, "[t]he term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use." 28 C.F.R. § 35.104 (2007).

48. *See, e.g.*, Wesley v. Vaughn, No. 99-1228, 1999 U.S. Dist. LEXIS 18098, at *14 (E.D. Pa. Nov. 18, 1999) (*unpublished*) (letting a prisoner with asthma go forward with his ADA claim that his prison's practice of locking shower doors at the end of the shower period discriminated against people with respiratory disabilities); McIntyre v. Robinson, 126 F. Supp. 2d 394, 408 (D. Md. 2000) (finding that although asthma *can* be considered a disability in the prison context, it is especially subject to case-by-case analysis because it is an easily controlled ailment).

49. *See, e.g.*, Duffy v. Riveland, 98 F.3d 447, 454–55 (9th Cir. 1996) (finding that a deaf prisoner was disabled under the ADA and § 504, and allowing him to go forward with claim against prison for failure to provide a qualified interpreter in prison disciplinary and classification hearings); Calloway v. Glassboro Dept. of Police, 89 F. Supp. 2d 543, 546 (D.N.J. 2000) (finding that a deaf arrestee could go forward with her ADA and § 504 case for failure to provide a qualified interpreter during questioning at the police station); Niece v. Fitzner, 922 F. Supp. 1208, 1217 (E.D. Mich. 1996) (recommending that a prisoner be allowed to proceed with his case against the department of corrections for failure to provide a Telecommunications Device for the Deaf ("TDD"), which would allow him to communicate with his deaf girlfriend over the phone); Clarkson v. Coughlin, 898 F. Supp. 1019, 1036–38 (S.D.N.Y. 1995) (finding that a prison's failure to accommodate hearing-impaired prisoners violated the ADA and § 504).

50. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 560 (7th Cir. 1996) (affirming judgment of damages for a quadriplegic who was denied access to prison programs based on his disability).

51. *See, e.g.*, Pierce v. County of Orange, 526 F.3d 1190, 1214–22 (9th Cir. 2008) (finding that a prisoner with paraplegia could go forward with his ADA claim).

52. *See, e.g.*, Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032 (D. Kan. 1999) (finding that a double amputee could proceed with his ADA and § 504 claims that he was denied the benefit of some basic jail services because of his disability); Kaufman v. Carter, 952 F. Supp. 520, 533 (W.D. Mich. 1996) (refusing to issue summary judgment against a double amputee because of conditions alleged in his complaint); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 U.S. Dist. LEXIS 21063 (M.D. Ala. Apr. 27, 1993) (*unpublished*) (noting that the defendant did not disagree that a prisoner with an artificial leg was a "qualified individual with a disability").

53. *See, e.g.*, Scott v. Garcia, 370 F. Supp. 2d 1056, 1074–75 (S.D. Cal. 2005) (holding that eating is a major life activity, and a plaintiff with stomach and digestive problems raised a material factual issue under the ADA when he submitted evidence that he was denied access to the prison meal service by not being given enough time to eat or the option to eat smaller, more frequent meals).

54. *See, e.g.*, Williams v. Ill. Dept. of Corr., No. 97 C 3475, 1999 U.S. Dist. LEXIS 18190, at *15 (N.D. Ill. Nov. 16, 1999) (*unpublished*) (holding that the defendant's extreme myopia constituted a disability where the defendant agreed that the condition was disabling); Armstrong v. Davis, 275 F.3d 849, 857–58 (9th Cir. 2001) (finding that a parole board provided inadequate accommodations for the visually impaired during the parole process, and that this constituted a valid part of an ADA claim).

55. *See, e.g.*, Saunders v. Horn, 960 F. Supp. 893, 901 (E.D. Pa. 1997) (finding that a prisoner with degenerative disk disorder stated a claim under § 504 and the ADA).

56. *See, e.g.*, Raines v. State of Florida, 983 F. Supp. 1362, 1372–74 (N.D. Fla. 1997) (holding that a prison policy withholding benefits of the Incentive Gain Time program from prisoners who are physically or mentally unable to perform work may be an ADA violation); Armstrong v. Wilson, 942 F. Supp. 1252, 1254 (N.D. Cal. 1996) (finding that a certified class [for a class action lawsuit] of prisoners with mobility, hearing, vision, kidney, and learning disabilities stated a claim under the ADA), *aff'd*, 124 F.3d 1019 (9th Cir. 1997).

57. 28 C.F.R. §§ 35.104(1)(iii), (5)(i) (2007).

58. 28 C.F.R. § 35.104(5)(i) (2007).

"disability."[59] If you file a complaint in federal court alleging that one of these conditions or identities is a disability, the court will almost certainly dismiss your case.[60] However, one of these conditions or identities may be considered a disability under state law. So you should consult statutes and case law for the state in which you live.

(b) When is an Impairment a Disability?

To be considered disabled under the ADA and Section 504, it is not enough for you to have a physical or mental impairment. The impairment has to substantially limit you in at least one major life activity.[61] The decision whether an impairment substantially limits a major life activity is made on a case-by-case basis. In other words, the court will look at how an impairment limits *you*, and not at how an impairment usually limits a person.[62] If you have an impairment that limits different people in different ways, you must show that your particular limitation is substantial.[63]

The impairment does not have to be current. If you are discriminated against because you have a record of an impairment, that is considered discrimination under the ADA.[64] A record of an impairment is when you have a history of having an impairment that substantially limits a major life activity, or when you have been misclassified as having an impairment that substantially limits a major life activity.[65] In addition, even if you have no history of the impairment, you are disabled under the ADA if you are "regarded as having such an impairment."[66] You will be "regarded as having such an impairment" if you are discriminated against because of an actual or perceived disability, whether or not that disability limits or is perceived to limit you in a major life activity. [67]

Under the ADA Amendments Act of 2008, Congress has tried to make clear what it means by "substantially limits." The Act says that an impairment can count as a disability even if it (1) only substantially limits you in *one* major life activity; or (2) is episodic or in remission, *if* it would substantially limit you in at least *one* major life activity when it were active.[68]

When you start doing legal research to help you argue that your impairment counts as a disability, you will probably find that most of the cases discussing the term "substantially limits" have been about employment discrimination, which falls under a different ADA section: Title I.[69] Right now, the regulations for Title I define "substantially limits" as making you "[u]nable to perform a major life activity that the average person in the general population can perform," or being "[s]ignificantly restricted as to the condition, manner or duration under which … the average person in the general population can perform that same major life activity."[70] But because the ADA Amendments Act of 2008 is so new, you should be sure to look for very recent cases, as well as updates to the ADA regulations.

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59. 28 C.F.R. § 35.104 (2007).

60. See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for a discussion of the "three strikes rule" and other negative consequences of filing a suit that is dismissed.

61. Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B) (Supp. 2007); Americans with Disabilities Act, 42 U.S.C. § 12102(2) (2006); 28 C.F.R. § 35.104 (2007).

62. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566, 119 S. Ct. 2162, 2169, 144 L. Ed. 2d 518, 530 (1999) (noting that there is a "statutory obligation to determine the existence of disabilities on a case-by-case basis").

63. Toyota Motor Mfg. Inc. v. Williams, 534 U.S. 184, 199, 122 S. Ct. 681, 692, 151 L. Ed. 2d 615, 632 (2002) (stating that an "individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person"); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566, 119 S. Ct. 2162, 2169, 144 L. Ed. 2d 518, 530–31 (1999) (noting that some impairments may limit people's major life activities in different ways and to different degrees).

64. 28 C.F.R. § 35.104 (2007) ("[*D*]*isability* means ... a physical or mental impairment that substantially limits one or more of the major life activities ... [or] a record of such impairment.").

65. 28 C.F.R. § 35.104 (2007) ("[T]he phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.").

66. 28 C.F.R. § 35.104 (2007).

67. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555.

68. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3556.

69. Americans with Disabilities Act, 42 U.S.C. §§ 12111–17 (2006) (Title I of the ADA, covering discrimination in private employment).

70. 29 C.F.R. § 1630.2(j)(i)–(ii) (2007); *see also* Bartlett v. New York State Bd. of Law Examiners, 226 F.3d 69, 74–75 (2d Cir. 2000) (noting that the proper test is whether the plaintiff is "substantially limited in the major life activity of reading by her slow reading speed, or by any other 'conditions, manner, or duration' that limits her reading 'in comparison to most people'").

Since the passage of the ADA Amendments Act of 2008, you still have to show that you are substantially limited in a major life activity.[71] However, you do not have to show that you are substantially limited even when (1) your impairment is in its corrected state (for example, wearing glasses), or (2) you have taken steps to reduce the impact of your impairment (for example, taking blood pressure medication).[72]

In *Toyota Motor Manufacturing, Inc. v. Williams*, the Supreme Court defined "major life activities" as "those activities that are of central importance to [most people's] daily li[ves]."[73] Under the ADA Amendments Act of 2008, major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[74] For example, if you have vision problems and cannot read regular-size print, or require Braille materials, then your condition limits the major life activity of seeing. Courts have found other important activities, such as eating[75] and reproduction,[76] to be major life activities.

Note that the ADA Amendments Act includes "working" as a major life activity. Previously, the Supreme Court had questioned whether "working" was a major life activity, at least in employment discrimination cases.[77] The pre-2008 test for whether you were substantially limited in your ability to work required that you be limited in performing a "class of jobs" that made use of your skills, not just a "single, particular job."[78]

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71. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555 (stating that "disability" involves "a physical or mental impairment that *substantially limits* one or more *major life activities*") (emphasis added).

72. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3556 ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."). Before the passage of this Act, courts often considered mitigating measures. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482, 119 S. Ct. 2139, 2146, 144 L. Ed. 2d 450, 462 (1999) (holding that courts must take into account the negative and positive effects of mitigating or corrective measures in determining whether a person has a disability that substantially limits a major life activity under the ADA); Murphy v. United Parcel Serv., 527 U.S. 516, 520–21, 119 S. Ct. 2133, 2137, 144 L. Ed. 2d 484, 489–90 (1999) (noting that determinations of whether a person has a disability under the ADA are made with respect to mitigating and corrective measures). Those cases have been overruled by statute; you are likely to see them in your legal research, but they are no longer binding. Be sure to look for recent (post-2010 cases) for support of your position.

73. Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 197, 122 S. Ct. 681, 691, 151 L. Ed. 2d 615, 631 (2002) (holding that, to be considered substantially limited in performing manual tasks, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"). Additionally, the impact of the impairment must be permanent or long-term. Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 198, 122 S. Ct. 681, 691, 151 L. Ed. 2d 615, 631 (2002). But Congress has used the ADA Amendments Act of 2008 to criticize the Supreme Court on this point. The new law rejects the Court's ruling "that the terms 'substantially' and 'major' … need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554. In other words, now that Congress has stepped in to protect the rights of people with disabilities, you might not have to meet the *Toyota* standard to win in court. Because the Act is so new, you should study recent cases (from 2010 and later) to see what courts now expect you to show.

74. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555.

75. Scott v. Garcia, 370 F. Supp. 2d 1056, 1074 (S.D. Cal. 2005) (holding that eating is a major life activity, and that a plaintiff with stomach and digestive problems must show that his dietary restrictions are serious enough to constitute a disability).

76. Bragdon v. Abbott, 524 U.S. 624, 637–42, 118 S. Ct. 2196, 2204–07, 141 L. Ed. 2d 540, 556–59 (1998) (holding that an asymptomatic HIV-positive woman had a disability because her HIV infection substantially limited her ability to reproduce, but refusing to decide whether HIV infection is always a disability under the ADA); Colwell v. Suffolk County Police Dept., 158 F.3d 635, 642 (2d Cir. 1998) (noting that to determine whether a particular activity is a "major life activity," the proper question is whether "that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff").

77. Sutton v. United Air Lines, Inc., 527 U.S. 471, 492, 119 S. Ct. 2139, 2151, 144 L. Ed. 2d 450, 468–69 (1999) (noting that "there may be some conceptual difficulty in defining 'major life activities' to include work").

78. 29 C.F.R. § 1630.2(j)(3)(i) (2007) ("With respect to the major life activity of *working* ... *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.") (emphasis in original); *see also* Murphy v. United Parcel Serv., 527 U.S. 516, 523–25, 119 S. Ct. 2133, 2138–39, 144 L. Ed. 2d 484, 491–92 (1999) (stating that while the plaintiff's high blood pressure prevented him from obtaining the health certification he needed to perform one specific type of job, he had not shown that he was disqualified from "a class of jobs utilizing his skills," and so he had not shown that he was disabled) .

The test for working may remain the same, or it may change as a result of the ADA Amendments Act. Be sure to look for post-2008 cases to see how the courts treat "working" as a major life activity.

In the prison context, the "substantially limits" and "major life activities" requirements are not usually a focus in ADA and Section 504 cases. If you sue the prison or prison officials, alleging discrimination on the basis of your disability, the case likely will focus on whether you are (1) a "qualified individual with a disability," and (2) whether you were "excluded from participation in or … denied the benefits of the services, programs, or activities" of the prison, or discriminated against by the prison.[79] The next two Sections discuss how courts have interpreted these two parts of a disability discrimination claim in the prison context.

4. Who is a Qualified Individual under the ADA and Section 504?

Not everybody who has a disability under the ADA and Section 504 is protected from discrimination. The ADA and Section 504 prohibit discrimination based on your disability only if you are a "*qualified individual* with a disability" (emphasis added).[80] The ADA defines the phrase "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[81]

So in addition to having a disability, you also must be eligible to participate in or benefit from a particular program, service, or activity. If you decide to file suit under either the ADA or Section 504, your complaint must include: (1) generally what your disability is, and (2) that you are a "*qualified* individual with a disability" within the meaning of the ADA and Section 504. In its answer to your complaint, the prison might say that even if you have a disability, you are not a "qualified individual." If the prison convinces the court that you are not a qualified individual, the court will dismiss your case.

The fact that you are a prisoner does not mean you are *dis*qualified from programs or services. In *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court firmly established that a prisoner is not excluded from being a qualified individual with a disability just because he is in prison.[82] In *Yeskey*, the Department of Corrections argued that the words "eligibility" and "participation" "imply voluntariness on the part of" a person, and therefore, "qualified individuals" could *never* include "prisoners who are being held against their will."[83] The Supreme Court rejected this argument, finding that (1) the ADA does not require voluntariness, and (2) even if it did, some activities and services in prisons (such as use of the law library) *are* voluntary.[84] So prisoners are covered by the ADA and Section 504 if they can meet the definition of disability discussed in Section B(3), above, and can show that they are "qualified individuals."

The definition of "qualified individual" has several parts, each of which the prison might use to try to defeat your case. Below, Subsection (a) explains what it means generally to be a "qualified individual with a disability." Subsection (b) describes the meaning of "reasonable modifications" and the factors courts consider when deciding what is reasonable. Subsection (c) discusses auxiliary aids and services. Subsection (d) addresses the removal of barriers.

(a) Who is a "Qualified Individual with a Disability?"

To be a "qualified individual with a disability," you must meet "the essential eligibility requirements for … participation in programs or activities."[85] For example, if prisoners convicted of a certain offense are

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79. Americans with Disabilities Act, 42 U.S.C. § 12132 (2006); *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (Supp. 2007).

80. Americans with Disabilities Act, 42 U.S.C. § 12132 (2006); Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (Supp. 2007).

81. Americans with Disabilities Act, 42 U.S.C. § 12131(2) (2006) (defining "qualified individual with a disability") (emphasis added).

82. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210–11, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219–20 (1998) (holding that state prisoners are protected by the ADA).

83. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 211, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 220 (1998).

84. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 211, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 220 (1998).

85. Americans with Disabilities Act, 42 U.S.C. § 12131(2) (2006).

not allowed to participate in work release, then a person with a disability who is convicted of that offense is not "qualified" for that program.

There are some situations in which you will not be considered a "qualified individual" even if you meet program or activity requirements. You are not a "qualified individual" if the prison can show that, because of your disability, your participation makes you a "direct threat to the health or safety of others."[86] The appendix to the DOJ's Title II regulations defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[87]

If prison officials are trying to decide whether someone with a disability poses a direct threat, they must determine "the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will" reduce or eliminate the risk.[88] (The meaning of "reasonable modifications" is discussed in Subsection (b), below.) In making this determination, prison officials must use "reasonable judgment that relies on current medical evidence or on the best available objective evidence."[89] The prison may *not* rely on "generalizations or stereotypes about the effects of a disability"—instead, it must assess the particular individual with the disability.[90]

Courts use the direct threat analysis in Title II and Section 504 cases even though the direct threat language is not clearly stated in the laws.[91] The direct threat argument is a defense the prison may raise. Because the argument is a defense, the prison will have the burden of showing that you are a direct threat.[92] If the court accepts the prison's defense that you are a direct threat, you will not be considered a "qualified individual."

The direct threat defense to discrimination often comes up for people with infectious diseases, especially HIV. Several courts have decided that HIV-positive prisoners, although they are "individuals with a disability," are not "qualified" for various prison programs or activities.[93]

For example, in *Onishea v. Hopper*, the Eleventh Circuit rejected constitutional and Section 504 claims of prisoners who were not allowed to participate in prison recreational, religious, and educational programs because they were HIV-positive.[94] These prisoners could participate only in a limited number of programs, which were separate from the programs available to the general population.[95] The lower court had ruled that the HIV-positive prisoners were not "otherwise qualified" to participate in programs with the general population because of the possibility of high-risk behaviors like violence, intravenous drug use, and sex.[96] The Eleventh Circuit agreed, finding that the risk of HIV transmission is "significant" because of the severe consequences of HIV infection, even if the probability of transmission is low.[97]

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86. 28 C.F.R. pt. 35, app. A, at 553 (2007) (analyzing the ADA Title II regulations).

87. 28 C.F.R. pt. 35, app. A, at 553 (2007).

88. 28 C.F.R. pt. 35, app. A, at 553 (2007).

89. 28 C.F.R. pt. 35, app. A, at 553 (2007).

90. 28 C.F.R. pt. 35, app. A, at 553 (2007).

91. *See, e.g.*, Doe v. County of Centre, 242 F.3d 437, 447 (3d Cir. 2001) (explaining the "direct threat" analysis in an ADA Title II and § 504 case); Dadian v. Vill. of Wilmette, 269 F.3d 831, 840 n.6 (7th Cir. 2001) (stating that whether an individual is "otherwise qualified" depends on whether he poses a threat to the safety of others that cannot be reduced by reasonable accommodation); Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735 (9th Cir. 1999) (holding that a person who poses a direct threat or "significant risk" to others is not a qualified individual under Title II).

92. Dadian v. Vill. of Wilmette, 269 F.3d 831, 840 (7th Cir. 2001) (holding that the burden of showing a direct threat due to a disability is on the party that claims there is a direct threat).

93. *See* Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison," for additional information on the rights of HIV-positive prisoners.

94. Onishea v. Hopper, 171 F.3d 1289, 1296–97 (11th Cir. 1999) (reading § 504's definition of "individual with a disability" as not including a person "who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals"). The *Onishea* court relied on 29 U.S.C. § 705(20)(D) (2006), a section of the Rehabilitation Act that excludes from employment protection people who are a direct threat to others because they have a currently contagious disease or infection.

95. Onishea v. Hopper, 171 F.3d 1289, 1292–93 (11th Cir. 1999).

96. Onishea v. Hopper, 171 F.3d 1289, 1293, 1295 (11th Cir. 1999).

97. Onishea v. Hopper, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that "when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease …. [E]vidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk").

The *Onishea* opinion allows a prison to disqualify HIV-positive prisoners from participating in many programs, and significantly reduces Section 504 and Title II protections for these prisoners.[98] The *Onishea* court claimed to require judges to make program-by-program decisions about whether HIV-positive prisoners were qualified to participate.[99] But the ruling has had the effect of preventing HIV-positive prisoners from participating in most programs with the general population.

Other courts have looked at specific programs to decide whether HIV-positive prisoners are qualified. In *Bullock v. Gomez,* the court allowed an HIV-positive prisoner, excluded from the conjugal visit program along with his HIV-positive wife, to bring an ADA claim because there were disputed facts as to whether he was otherwise qualified for the program.[100] In *Doe v. Coughlin*, the court looked at specific program requirements before deciding that an HIV-positive prisoner was not qualified for the family reunion program because the program required applicants to be free of communicable diseases.[101]

Looking at disability discrimination cases brought by HIV-positive prisoners in your circuit will give you an idea of how a court is likely to look at your discrimination claim. Also, for more information on segregation (separation) of HIV-positive prisoners from the general population, and other issues of special interest to HIV-positive prisoners, see Chapter 26 of the *JLM*, "Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison."

5. Your Right to "Reasonable Modifications" of Prison Policy under the ADA

The ADA requires state and local entities to make "reasonable modifications" to policies, rules, and practices so that people with disabilities can participate in public programs and services.[102] A reasonable modification should allow you, as a person with a disability, to take part in a program or activity, or gain access to a facility. Reasonable modifications may be simple—for example, creating an exception to the rule forbidding prisoners from storing food in their cells, so that a diabetic person can keep his "blood sugar at an appropriate level."[103] Other modifications are more complicated.

Whether a modification is considered "reasonable" will depend on the specific circumstances and the modification you are asking for. To decide what is a "reasonable modification," courts weigh the needs of prisoners with disabilities against the structural, financial, and administrative concerns of the prison. In particular, courts look at: (1) whether the modification will "fundamentally alter" a program or activity,[104] (2) the cost of the modification, and (3) the burden the modification would have on administration of the prison.[105] Some courts also look at (4) penological concerns, such as safety.[106]

The defendant prison has the burden of showing that a modification would "result in a fundamental alteration in the nature of a service, program, or activity or in undue [extreme] financial and administrative burdens."[107] But you have to be prepared for the prison to make these kinds of arguments. Even if the prison

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98. Onishea v. Hopper, 171 F.3d 1289, 1305 (11th Cir. 1999) (Barkett, J., dissenting). A *dissenting* opinion is an opinion, written by a judge on the court, that disagrees with the court's decision. A dissenting opinion is not controlling law, but it may suggest arguments other courts will make in future rulings.

99. Onishea v. Hopper, 171 F.3d 1289, 1293 (11th Cir. 1999).

100. Bullock v. Gomez, 929 F. Supp. 1299, 1305 (C.D. Cal. 1996) (finding that the prison's reasons for excluding the prisoner from the conjugal visit program—transmission of tuberculosis and other strains of HIV—might not be justified, given that evidence showed low risk of transmission). The court allowed the prisoner's case to go forward, but the final outcome is unknown.

101. Doe v. Coughlin, 71 N.Y.2d 48, 61, 518 N.E.2d 536, 544, 523 N.Y.S.2d 782, 790 (1987).

102. Americans with Disabilities Act, 42 U.S.C. § 12131(2) (2006).

103. This example was taken from the Disability Rights Section, U.S. Dept. of Justice, Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement (2003), *available at* http://www.ada.gov/q%26a_law.htm (last visited March 10, 2010). Contact information for the DOJ can be found at footnote 10.

104. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164 (2007).

105. 28 C.F.R. §§ 35.150(a)(3), 35.164 (2007).

106. *See, e.g.,* Randolph v. Rodgers, 170 F.3d 850, 859 (8th Cir. 1999) (noting that the prison could present evidence that providing an interpreter for a deaf prisoner at disciplinary hearings created safety and security concerns); Love v. Westville Corr. Ctr, 103 F.3d 558, 561 (7th Cir. 1996) (noting that the prison could justify its refusal to make reasonable accommodations because of the overall demands of running a prison).

107. *See* 28 C.F.R. § 35.130(b)(7) (2007) (defining the general application of fundamental alteration defense); 28 C.F.R. § 35.150(a)(3) (2007) (defining the fundamental alteration and undue burden defenses for existing facilities); 28 C.F.R. § 35.164 (2007) (defining the fundamental alteration and undue burden defense to providing effective communication). Furthermore, the "decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for

succeeds in showing that changes would fundamentally alter a program, or cause an undue financial or administrative burden, it must still "take any other action" that would "ensure that individuals with disabilities receive the benefits or services provided" by the prison.[108] This means they are supposed to come up with other ways for you to get the benefits offered. The following Subsections describe the fundamental alteration defense, the undue burden defense, and the penological interests defense to prisoners' ADA and Section 504 claims.

(a) Modifications *are Not Reasonable* if They Result in a Fundamental Alteration to the Prison's Programs, Services, or Activities

A prison does not have to make modifications to a service, program, or activity if doing so would "fundamentally alter the nature of the service, program, or activity."[109] A fundamental alteration has to be so big that something essential is lost. This allows prisons to balance the rights of disabled prisoners against the integrity of its services, programs, and activities.[110] If you are seeking a change that would make it difficult for the prison to provide the particular service, program, or activity to other prisoners, this could be considered a fundamental alteration that the prison does not have to provide.[111]

(b) Modifications *are Not Reasonable* if They Cause Undue Financial or Administrative Burden

Prisons also do not have to make modifications that would result in "undue financial and administrative burdens."[112] For example, in *Onishea v. Hopper*, discussed above, the court found that hiring additional guards to prevent high-risk behavior (so that HIV-positive prisoners could participate in programs with the general population) would not be a "reasonable accommodation," because it would be too expensive, causing undue financial burden.[113] In *Spurlock v. Simmons*, the court said it would be an undue burden on prison officials if a deaf prisoner were allowed unlimited access to a TDD (a telephone for people with hearing disabilities), since prison staff had to unlock the office containing the TDD every time the prisoner needed to make a call.[114]

The DOJ seems to have thought that the undue burden test would be hard for the prison to pass—-that it would apply only in "the most unusual cases."[115] Recent courts (as in *Onishea* and *Spurlock*) may be allowing defendant prisons to pass the test in situations the DOJ would not consider unusual.

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reaching that conclusion." 28 C.F.R. §§ 35.150(a)(3), 35.164 (2007).

108. 28 C.F.R. §§ 35.150(a)(3), 35.164 (2007).

109. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164 (2007).

110. *See* Galusha v. N.Y. State Dept. of Envtl. Conservation, 27 F. Supp. 2d 117, 123 (N.D.N.Y. 1998) (noting that the Supreme Court struck this balance in Alexander v. Choate, 469 U.S. 287, 300, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 671 (1985)).

111. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 604, 119 S. Ct. 2176, 2189, 144 L. Ed. 2d 540, 560 (1999) ("[s]ensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities"). *See also* Raines v. Florida, 983 F.Supp 3d 1362, 1372 (N.D. Fla. 1997) (rejecting the prison's defense that allowing disabled prisoners into the work portion of the Incentive Gain Time program would fundamentally alter the program's incentives).

112. 28 C.F.R. §§ 35.150(a)(3), 35.164 (2007).

113. Onishea v. Hopper, 171 F.3d 1289, 1303–04 (11th Cir. 1999).

114. Spurlock v. Simmons, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000) (holding that a deaf prisoner had "meaningful access" to TDD when he was allowed to use it at least twice a week, and more frequently if he had a legitimate reason).

115. 28 C.F.R. pt. 35, app. A, at 564 (2007) (discussing 28 C.F.R. § 35.150 and noting that "Congress intended the 'undue burden' standard in Title II to be significantly higher than the 'readily achievable' standard in Title III" and that "the program access requirement of Title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases"); *see also* Disability Rights Section, U.S. Dept. of Justice, Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement, Question 22 (2003), *available at* http://www.ada.gov/q%26a_law.htm (last visited Nov. 7, 2009) (noting that new jails and prisons "must be made fully accessible to, and usable by, individuals with disabilities"; that there is "no undue burden limitation for new construction;"; and that "if an agency alters an existing facility for any reason—including reasons unrelated to accessibility—the altered areas must be made accessible to individuals with disabilities"). Contact information for the DOJ can be found at footnote 10.

(c) Modifications are *Not Reasonable* if they impact Overall Institutional Concerns (Penological Interests)

The ADA regulations only mention fundamental alterations and undue burdens as arguments prisons can use to avoid making modifications for prisoners with disabilities. However, courts have permitted prisons to make a third argument to avoid making those modifications: "overall institutional requirements," such as "[s]ecurity concerns, safety concerns and administrative" needs.[116] In considering these institutional requirements, some courts strongly presume that prison policies are acceptable.[117] (This is called "deference to prison management.") In jurisdictions that use this approach, you will have to overcome this strong presumption that the prison's concerns are legitimate.[118]

(d) If You have Diabetes: The *Turner* Test in ADA and Section 504 Claims

Circuit courts have used the *Turner v. Safley*[119] test in ADA and Section 504 cases to decide when a prison policy can legally discriminate against prisoners with disabilities. Under this test, prison policies are acceptable if they are "reasonably related to legitimate penological interests," meaning that the policies make sense and are related to a valid prison concern or goal.[120] Some courts have used this test to decide what is a "reasonable" modification under the ADA for prisoners with disabilities.[121]

The *Turner* test is usually used to decide prisoners' *constitutional* claims, not *statutory* claims like the ADA and Section 504. Some experts believe the *Turner* test is inappropriate in ADA cases.[122] It is better for prisoners when courts do *not* use *Turner*, because the ADA and Section 504 require defendants to make any reasonable accommodations for prisoners' disabilities. Also, "reasonable" accommodations or modifications

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116. Love v. Westville Corr. Ctr., 103 F.3d 558, 561 (7th Cir. 1996) (noting that the prison could have attempted to justify its refusal to make reasonable accommodations because of the overall needs of running a prison); Miller v. King, 384 F.3d 1248, 1266 (11th Cir. 2004) ("courts must be mindful of the necessary balance between the ADA's worthy goal of integration and a prison's unique need for security, safety, and other penological concerns"), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006).

117. Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994) (noting that separation of powers, especially with regard to state penal systems, favors judicial deference to prison authorities).

118. Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (noting that the prisoner has the burden of refuting the defense that there were legitimate penological interests behind prison action); *see also* Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).

119. Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79–80 (1987) (establishing a reasonableness test for courts to apply to prisoners' constitutional challenges to prison regulations).

120. Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79–80 (1987). In *Turner*, the Supreme Court identified four factors used to determine the "reasonableness" of a challenged prison regulation: (1) whether there is a " 'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether there are other ways a prisoner could exercise the right at issue; (3) "the impact [that] accommodation … will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there are "ready alternatives" to the regulation. The *Turner* test generally is used when prisoners claim that their constitutional rights have been violated. For further discussion of the *Turner* test, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and § 1331 to Obtain Relief from Violations of Federal Law."

121. *See*, *e.g.*, Thompson v. Davis, 295 F.3d 890, 894 n.4 (9th Cir. 2002) (noting that a prison might be able to give legitimate penological justifications for considering certain disabilities in parole decisions, particularly when the disability is a history of substance abuse); Randolph v. Rodgers, 170 F.3d 850, 859 (8th Cir. 1999) (noting that a prison should be allowed to present evidence that providing an interpreter for a deaf prisoner at disciplinary hearings created security concerns); Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999) (allowing the use of a test almost identical to the *Turner* test, despite explicitly stating that the *Turner* test "does not, by its terms, apply to" the ADA); Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 487 (7th Cir. 1997) (noting that what is "reasonable" or an "undue" burden is different in the prison context and that security concerns are relevant to whether accommodations for disabled prisoners are "feasible"); Gates v. Rowland, 39 F.3d 1439, 1447–48 (9th Cir. 1994) (applying the *Turner* test to uphold a policy of excluding HIV-positive prisoners from food service assignments); Kaufman v. Carter, 952 F. Supp. 520, 532 (W.D. Mich. 1996) (finding it sensible that prisoners' ADA rights are limited by "legitimate penological interests").

122. *See* Christopher J. Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims Under the Americans with Disabilities Act*, 98 Mich. L. Rev. 482, 495–98 (1999) (arguing that (1) *Turner*'s rationale regarding the restrictions on constitutional rights are not applicable to statutory rights, because statutes represent congressional determinations of policy and resource allocation; (2) statutory rights allow Congress to provide guidance to prison administrators and allow flexibility and modification if the statute is unworkable; and (3) legislation like the ADA provides much detail to courts and prison administrators, whereas constitutional rights necessarily are dependent on judicial determinations).

under the ADA often include expensive physical renovations or other expenditures.[123] In comparison, the *Turner v. Safley* reasonableness standard prescribes only "*de minimis* [minor] cost" solutions. (So a prison would have to make more accommodations for you under the ADA and Section 504, and fewer and cheaper accommodations under *Turner*.) However, some courts have held that the ADA/Section 504 standard must be interpreted consistently with the *Turner* standard,[124] or at least may be influenced by the *Turner* standard.[125]

Gates v. Rowland[126] is an early case in which a court applied the *Turner* test to a prisoner's Section 504 claim. In *Gates*, HIV-positive prisoners sued under Section 504 to be allowed to work as food preparers and servers in a prison food service program. The prison argued that it was justified in excluding the prisoners based solely on their HIV status because other prisoners "frequently have irrational suspicions or phobias" about people with HIV, and these suspicions or phobias cannot be reversed by educating prisoners about HIV.[127] Prison officials claimed that allowing HIV-positive prisoners to serve food could lead to violence against HIV-positive food workers and the prison staff.[128]

The *Gates* court concluded that the *Turner* test was the correct test for deciding prisoners' rights under Section 504, even though the *Turner* test normally is used only for prisoners' constitutional claims.[129] Under the *Turner* test, the court upheld the policy discriminating against HIV-positive prisoners, stating that the prison had a "reasonable basis for [the] restriction based on legitimate penological concerns."[130]

Courts that follow the *Gates* approach often—but not always—uphold challenged discriminatory conduct.[131] In your complaint, be sure to provide the court with appropriate language from the ADA, Section 504, and the regulations for these laws. The ADA and Section 504 (as written by Congress) and the ADA regulations (as implemented by the DOJ) generally protect your rights as a prisoner with disabilities more than many courts recognize. You should emphasize the extent to which the laws and regulations plainly protect your rights.[132]

(e) If Your Claim Involves Architectural Barriers at the Prison

If your complaint is about physical access within your prison, keep in mind that the ADA implementing regulations do not allow the undue burden defense for facilities built or significantly altered after January 26, 1992.[133] Such facilities are considered "new construction." For example, if you are housed in a cellblock built or significantly altered since 1992, and you cannot use your wheelchair to get into the bathroom because the doorway is too narrow, the prison cannot say, "It would cost too much to enlarge the doorway." If you are in, or need to access, a unit, cellblock, or compound created or significantly altered after 1992—even

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123. *But see* Olmstead v. L.C. by Zimring, 527 U.S. 581, 607, 119 S. Ct. 2176, 2190, 144 L. Ed. 2d 540, 562 (1999) (holding that a state's ADA obligations are determined "taking into account the resources available to the State").

124. Gates v. Rowland, 39 F.3d 1439, 1446–47 (9th Cir. 1994) (holding the *Turner* standard applicable under the ADA). *Contra* (decided exactly the opposite in) Amos v. Md. Dept. of Public Safety & Corr. Servs., 178 F.3d 212, 220 (4th Cir. 1999) (rejecting application of *Turner* as inconsistent with *Yeskey*), *dismissed as settled*, 205 F.3d 687 (4th Cir. 2000).

125. Onishea v. Hopper, 171 F.3d 1289, 1300–01 (11th Cir. 1999) (en banc) (holding that the *Turner* standard can be "properly considered" when applying the ADA).

126. Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994).

127. Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994).

128. Gates v. Rowland, 39 F.3d 1439, 1447–48 (9th Cir. 1994).

129. Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).

130. Gates v. Rowland, 39 F.3d 1439, 1448 (9th Cir. 1994).

131. *See, e.g.*, Chisolm v. McManimon, 275 F.3d 315, 327 (3d Cir. 2001) (refusing to decide whether the *Turner* test is appropriate in ADA and § 504 claims, but noting that the prison's mention of "security" concerns, without evidence that these security concerns were real, would not be enough under the *Turner* test even if the test were used); Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (finding that the state failed to meet its burden under the *Turner* test by not presenting "*any* justification, rational or not," for its parole hearing policies that discriminated against prisoners and parolees with hearing and vision impairments, and learning and developmental disabilities).

132. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694, 703 (1984) (holding that when Congress gives authority to an agency to interpret a law through regulations, the regulations have "controlling weight unless they are arbitrary, capricious," or are clearly contrary to the law as written by Congress).

133. 28 C.F.R. § 35.151(a)–(b) (2007) ("Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992").

if the rest of the prison was built before 1992—and your complaint is about your ability to physically access those parts of the facility, your complaint should (1) cite to the regulations and (2) state that significant changes have been made since 1992.

If you have a disability that restricts your movement or requires that you use a cane, wheelchair, or other device, many courts have said prisons must make reasonable accommodations for your disability. Some courts have found that the ADA does not create any right for a prisoner to be housed at a specific prison.[134] But at least one court has found that if there is a specific unit for treatment of prisoners with particular disabilities, it is a violation of the ADA and Section 504 to transfer of eligible prisoners out of, or to refuse to transfer eligible prisoners into, that unit—even for disciplinary, safety, medical, or mental health reasons—unless the prison can provide the treatment at other facilities.[135]

Even if no special unit exists for prisoners with disabilities, prisons and jails must make reasonable accommodations for prisoners with mobility impairments. Courts have found that using bathroom facilities is a basic prison activity, and that prisons violate the ADA and Section 504 if they do not provide prisoners with disabilities with things like shower chairs, handrails, guard rails, and shower hoses.[136] An architectural barrier that restricts access or creates risks of injury to prisoners with disabilities also violates the ADA.[137] In your complaint, make sure to describe any barriers carefully and in detail; do more than just state that they exist.[138]

(f) Provision of Auxiliary Aids and Services

The ADA and Section 504 also require your prison or jail to provide you with auxiliary (extra) aids or services to help you, as a prisoner with a disability, participate in the programs and activities of the prison or jail. As with modifications, the prison or jail only has to provide these aids or services if they are reasonable. Examples of aids and services for hearing-impaired people include:

> (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually

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134. Garrett v. Angelone, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff'd*, 107 F.3d 865 (4th Cir. 1997) (finding that "inmates have no constitutional right to be housed in any particular prison or housing unit").

135. Clarkson v. Coughlin, 898 F. Supp. 1019, 1050–51 (S.D.N.Y. 1995).

136. *See, e.g.*, United States v. Georgia, 546 U.S. 151, 157, 126 S. Ct. 877, 881 ("[I]t is quite plausible that the alleged deliberate refusal of prison officials to accommodate Goodman's disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted 'exclu[sion] from participation in or ... den[ial of] the benefits of' the prison's services, programs, or activities.'"); Pierce v. County of Orange, 526 F.3d 1190, 1196 (9th Cir. 2008) (holding that "because of physical barriers that deny disabled inmates access to certain prison facilities (bathrooms, showers, exercise and other common areas), and because of disparate programs and services offered to disabled versus non-disabled inmates, the County is in violation of the ADA"); Kiman v. N.H. Dept. of Corrs., 451 F.3d 274, 286–87 (1st Cir. 2006) (holding that denial of access to a shower chair (as well as other necessary accommodations) to a prisoner with disabilities raised an issue of material fact regarding defendant's failure to provide the prisoner with reasonable accommodations as required by the ADA); Grant v. Schuman, No. 96-3760, 1998 U.S. App. LEXIS 16852, at *7–8 (7th Cir. July 16, 1998) (*unpublished*) (allowing a prisoner with paralysis and nerve pain to proceed with an ADA claim regarding lack of handrails in toilet and shower areas); Cotton v. Sheahan, No. 02 C 0824, 2002 U.S. Dist. LEXIS 20539, at *9 (N.D. Ill. Oct. 23, 2002) (*unpublished*) (allowing prisoner who used wheelchair to bring the claim that he was denied access to a shower); Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032–33 (D. Kan. 1999) (noting a possible ADA violation even though the prisoner was able to use most of the services, because doing so required exceptional and painful exertion against his doctor's orders); Cooper v. Weltner, No. 97-3105-JTM, 1999 U.S. Dist. LEXIS 17292, at *19–20 (D. Kan. Oct. 27, 1999) (*unpublished*) (allowing a prisoner who used a wheelchair to bring an ADA claim that the prison discriminated against him by failing to provide assistive devices for the shower); Kaufman v. Carter, 952 F. Supp. 520, 532–33 (W.D. Mich. 1996) (allowing a bilateral amputee prisoner to go forward with his claim that the jail violated the ADA by failing to provide an accessible shower and toilet); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 U.S. Dist. LEXIS 21063, at *11–12 (M.D. Ala. Apr. 27, 1993) (*unpublished*) (holding that the ADA required the city jail to make its showers accessible to and usable by disabled prisoners).

137. *See, e.g.*, Montez v. Romer, 32 F. Supp. 2d 1235, 1243 (D. Colo. 1999) (allowing prisoners to go forward with an ADA and § 504 suit claiming that physical barriers in the prison created safety risks).

138. *See, e.g.,* Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987) ("complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of litany of general conclusions that shock but have no meaning"); Carrasquillo v. City of New York, 324 F. Supp. 2d 428, 443 (S.D.N.Y. 2004) (dismissing the suit because the prisoner's claim did not allege that he was prevented from accessing the law library and infirmary).

> delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.[139]

Examples of aids and services for people with visual impairments include: "[q]ualified readers, taped texts, audio recordings, Brailled materials, [and] large print materials."[140] Other aids and services might include providing a prisoner who is an amputee with a wheelchair, shower seat, and similar assistive devices.[141]

If you meet all of the eligibility requirements for a program, but cannot participate without an aid, services such as those mentioned above, or other devices or services, then the ADA requires the prison to provide those aids and services that will allow you to participate. However, as with modifications, a prison may justify not providing aids and services by saying the request is not reasonable, and then using the undue burden defense, or even the *Turner* test, to justify its action or lack of action.

Prisoners with hearing impairments have been particularly successful with ADA and Section 504 claims (arguing that prisons discriminated by failing to provide auxiliary aids and services to help them communicate). Courts have found that prisons violated the ADA and Section 504 by failing to provide qualified interpreters during reception and classification, counseling sessions, administrative and disciplinary hearings, and medical treatment and diagnosis.[142] Some courts also have found that a lack of interpreters in such settings violates prisoners' constitutional due process, Eighth Amendment, and privacy rights.[143] The term *qualified interpreter* is defined as "an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."[144] So a prison guard who knows only basic sign language is not a qualified interpreter, because he is neither impartial nor able to interpret effectively. Also, someone who knows Signed English is not a qualified interpreter for a hearing-impaired prisoner who communicates in American Sign Language, and vice versa.[145]

Access to interpreters is not the only service that hearing-impaired prisoners have demanded successfully under the ADA and Section 504. The ADA also requires that public entities (1) provide persons with disabilities the opportunity to request the auxiliary aids and services of their choice, and (2) give "primary consideration to the requests of the individual with disabilities."[146] The regulations require the prison to notify persons with disabilities of their ADA protections,[147] and to have a grievance process for

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139. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3556.

140. 28 C.F.R. § 35.104 (2009).

141. *See* Schmidt v. Odell, 64 F. Supp. 2d. 1014, 1031–33 (D. Kan. 1999) (allowing a double amputee prisoner to go forward with his ADA and § 504 suit against a county jail that delayed in providing him with a shower chair and refused to transfer him to a jail that had enough space for him to use a wheelchair).

142. Clarkson v. Coughlin, 898 F. Supp. 1019, 1034–35 (S.D.N.Y. 1995) (holding that not providing hearing-impaired prisoners with qualified interpreters and other assistive devices for numerous programs, services, and activities violates the ADA and § 504); Bonner v. Ariz. Dept. of Corr., 714 F. Supp. 420, 423 (D. Ariz. 1989) (holding that not providing a deaf, mute, and vision-impaired prisoner with a qualified interpreter for prison counseling, medical treatment, and disciplinary and administrative hearings violates § 504 unless the prison can prove that the prisoner could communicate effectively without a qualified interpreter); *see also* Duffy v. Riveland, 98 F.3d 447, 453–56 (9th Cir. 1996) (allowing a deaf prisoner to go forward with his claim that the prison failed to provide him with a qualified interpreter for classification and disciplinary hearings, in violation of the ADA and § 504).

143. Clarkson v. Coughlin, 898 F. Supp. 1019, 1033, 1042 (S.D.N.Y. 1995) (holding that, by failing to provide qualified interpreters or other assistive devices necessary for medical and mental health treatment, the Department of Corrections and prison officials violated deaf prisoners' 14th Amendment substantive due process right and constitutional right to privacy, and the 8th Amendment's ban on cruel and unusual punishment).

144. 28 C.F.R. § 35.104 (2007).

145. Clarkson v. Coughlin, 898 F. Supp. 1019, 1026–27, (S.D.N.Y. 1995) (indicating that an interpreter who uses Signed English is not qualified to interpret for a prisoner who uses American Sign Language).

146. 28 C.F.R. § 35.160(b)(2) (2007); *see* Disability Rights Section, U.S. Dept. of Justice, Technical Assistance Manual, Title II, ADA, *available at* http://www.ada.gov/taman2.html (last visited March 10, 2010) (stating that the individual's preferences should be considered when deciding what aids to provide for him).

147. 28 C.F.R. § 35.106 (2007) (describing the requirement that public entities notify people with disabilities of their rights under the ADA); *see also* 28 C.F.R. § 35.163(a) (2007) ("[a] public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities").

people who believe the prison has failed to make programs and services accessible to disabled individuals.[148] In *Clarkson v. Coughlin*, the court held that the prison violated the ADA and Section 504 by failing to provide various adaptations for the deaf, including TDDs, closed-caption decoders for televisions, and fire alarms that alert people visually.[149] Other courts have held that failure to provide TDD for the deaf fiancée of a prisoner may be a violation of the ADA.[150]

6. What are "Services, Programs, or Activities?"

Under both the ADA and Section 504, if reasonable modifications to services, programs, or activities would allow you to participate, prison authorities cannot exclude you from participating because of your disability. Almost everything you do in prison—from your work assignment to your use of the recreation yard to your use of the library to your visitation privileges—is a program or service offered by the prison.[151] Prisoners with disabilities have argued that prisons and jails must accommodate their needs in the use of the following programs: boot camp,[152] conjugal visitation programs,[153] libraries and law libraries,[154] educational programs,[155] vocational training,[156] job opportunities,[157] the commissary and dispensary,[158] transition programs,[159] dining halls,[160] visitation,[161] telephone calls,[162] church services,[163] eligibility for

148. 28 C.F.R. § 35.107(b) (2007) ("[A] public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.").

149. Clarkson v. Coughlin, 898 F. Supp. 1019, 1047 (S.D.N.Y. 1995). *But see* Spurlock v. Simmons, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000) (holding that providing a deaf prisoner with only limited telephone access, while permitting other prisoners unlimited access, did not violate the ADA because the deaf prisoner's request was unreasonable). *Clarkson* also held that deaf female prisoners were discriminated against on the basis of their sex because New York had a special prison unit that could accommodate many of the needs of deaf and hearing-impaired male prisoners, but did not have a similar unit for female prisoners. Clarkson v. Coughlin, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995).

150. Niece v. Fitzner, 922 F. Supp. 1208, 1216 (E.D. Mich. 1996) (finding a possible ADA violation in prison officials' refusal to provide accommodations for a prisoner to communicate with his deaf fiancée).

151. *See* Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (stating that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners").

152. *See, e.g.*, Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215, 219 (1998) (noting that the prison's motivational boot camp for first-time offenders is a program).

153. *See, e.g.*, Bullock v. Gomez, 929 F. Supp. 1299, 1303–04 (C.D. Cal. 1996) (noting that the prisoner was able to show that he was excluded from the conjugal visit program, although the issue of whether he was "otherwise qualified" was not yet resolved).

154. *See, e.g.*, Love v. Westville Corr. Ctr, 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding the decision that a quadriplegic prisoner's ADA rights had been violated when he was denied access to prison libraries).

155. *See, e.g.,* Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 483 (7th Cir. 1997) ("[T]here is no doubt that an educational program is a program."). While *Crawford* recognizes educational programs as programs, some courts have held that the ADA does not require a prison to implement a specific type of rehabilitation or education program that is not already available. Garrett v. Angelone, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff'd*, 107 F.3d 865 (4th Cir. 1997).

156. *See, e.g.*, Montez v. Romer, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting that prisoners argue that they were unable to participate in vocational training because the prison did not accommodate their disabilities).

157. *See, e.g.*, Montez v. Romer, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (noting that prisoners argue that they were excluded from employment programs because of their disabilities); Love v. Westville Corr. Ctr., 103 F.3d 558, 560 (7th Cir. 1996) (upholding the decision that a quadriplegic prisoner's rights under the ADA had been violated when he was denied access to "work programs").

158. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding the decision that a quadriplegic prisoner's ADA rights had been violated when he was denied access to the prison commissary); Kiman v. N.H. Dept. of Corr., 451 F.3d 274, 286–87 (1st Cir. 2006) (finding that access to medication is one of the "services, programs, or activities" covered by the ADA).

159. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding the decision that a quadriplegic prisoner's rights under the ADA were violated when he was denied access to transition programs).

160. *See, e.g.*, Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 483 (7th Cir. 1997) (noting that use of the dining hall is an activity under the ADA); Rainey v. County of Delaware, No. CIV.A.00-548, 2000 U.S. Dist. LEXIS 10700, at *5 (E.D. Pa. Aug. 1, 2000) (*unpublished*) (permitting the claim that a disabled prisoner was given insufficient time to travel to the dining hall, thereby depriving him of food).

161. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding a decision that a quadriplegic prisoner's ADA rights were violated when he was denied access to "visitation facilities that were open to the general inmate population"); Love v. Westville Correctional Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (allowing a prisoner who used a wheelchair to bring the claim that being housed in an infirmary unit cut off his access to many

trustee status,[164] substance abuse classes,[165] access to reading materials and television,[166] college classes,[167] and access to medical care.[168] At least one court has determined that granting parole is an "activity," and thus the actions of the parole board must comply with the ADA.[169] Even disciplinary measures (such as shackling) have been challenged as violating the ADA and Constitution when, although they are applied to all prisoners, they have a disparate impact on prisoners with disabilities.[170] Prison disciplinary hearings are also subject to the ADA.[171]

Because programs and services vary from prison to prison, the ADA and Section 504 define programs and activities very broadly. Rarely have courts dismissed a suit because the activity in question did not qualify as a program.[172] If you have a disability, are qualified for the activity or program (even if it is not listed above), and the prison refuses to allow you to participate, you may have a claim under the ADA and Section 504.

7. State Accessibility Laws and Regulations

Many states have accessibility and anti-disability discrimination statutes similar to the ADA. If you live in a state with a law that provides such protection, you should sue under state law, as well. Most states require public and government facilities to be physically accessible to people with disabilities.[173] Some states

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prison facilities, including visitation rooms).

162. Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–33 (S.D.N.Y. 1995) (granting summary judgment under the ADA where deaf prisoners were denied amplified headsets or telephone communication devices for the deaf).

163. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding a decision that a quadriplegic prisoner's ADA rights were violated when he was denied access to church services).

164. *See, e.g.*, Dean v. Knowles, 912 F. Supp. 519, 522 (S.D. Fla. 1996) (allowing an asymptomatic HIV-positive prisoner to bring a discrimination suit against prison officials who denied him trustee status).

165. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding a decision that a quadriplegic prisoner's ADA rights were violated when he was denied access to substance abuse programs); Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–33 (S.D.N.Y. 1995) (granting summary judgment under the ADA where deaf prisoners were denied access to substance abuse programs).

166. *See, e.g.*, Walker v. Snyder, 213 F.3d 344, 345 (7th Cir. 2000) (stating that the district court had found an ADA violation in the prison's failure to provide books on tape); *overruled on other grounds*, 324 F.3d 906 (7th Cir. 2003); Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–33 (S.D.N.Y. 1995) (granting summary judgment under the ADA where deaf prisoners were denied a closed-caption decoder for televisions).

167. *See, e.g.*, Love v. Westville Corr. Ctr., 103 F.3d 558, 558–59 (7th Cir. 1996) (upholding the decision that a quadriplegic prisoner's ADA rights were violated when he was denied access to prison educational programs).

168. Most courts have held that the ADA does not provide a cause of action for inappropriate medical care. *See, e.g.*, Moore v. Prison Health Servs., Inc., 24 F. Supp. 2d 1164, 1168 (D. Kan. 1998) (holding that a claim of inadequate medical care is not appropriate under the ADA), *aff'd,* 201 F.3d 448 (10th Cir. 1999). However, courts have upheld claims alleging discriminatory access to medical care because of the prisoner's disability. *See, e.g.*, Roop v. Squadrito, 70 F. Supp. 2d 868, 877 (N.D. Ind. 1999) (allowing an inmate to go forward with ADA claim that, among other things, the prison did not dispense his medication properly because of his HIV); McNally v. Prison Health Servs., 46 F. Supp. 2d 49 (D. Me. 1999) *reh'g denied*, 52 F. Supp. 2d 147, 148 (D. Me. 1999) (allowing a prisoner to go forward with his claim that the prison violated the ADA by refusing to administer HIV medication because of his HIV status). The 8th Amendment may provide an alternative cause of action for inappropriate or inadequate medical care. *See, e.g.*, Clarkson v. Coughlin, 898 F. Supp. 1019, 1032–33 (S.D.N.Y. 1995) (holding that failure to provide sign language interpreters prevented deaf prisoners from receiving adequate medical care, in violation of their due process and 8th Amendment rights).

169. Thompson v. Davis, 295 F.3d 890, 898–99 (9th Cir. 2002) (holding that parole proceedings are subject to the ADA's requirements).

170. Armstrong v. Davis, 275 F.3d 849, 859 (9th Cir. 2001) (affirming the district court's injunction ordering a prison to stop shackling, during parole hearings, prisoners with hearing impairments or who used sign language).

171. Duffy v. Riveland, 98 F.3d 447, 455 (9th Cir. 1996) (holding that prison disciplinary hearings are subject to the ADA's requirements).

172. *But see* Aswegan v. Bruhl, 113 F.3d 109, 110 (8th Cir. 1997) (holding that cable television is not a "service, program or activity" within the meaning of the ADA), *aff'd*, Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997).

173. *See, e.g.*, Ala. Code §§ 21-4-1 to 4 (2008); Alaska Stat. § 35.10.015 (2006); Ariz. Rev. Stat. Ann. §§ 41-1492.0 to 1492.05. (2008); Cal. Civ. Code § 54 (2007); Conn. Gen. Stat. Ann. § 46a-7 (2004); Del. Code Ann. tit. 16 § 9502 (2003); Fla. Stat. § 255.21 (2007), §§ 553.501 to 553.513 (2007); Ga. Code Ann. §§ 30-3-2 to 5 (2007); Haw. Rev. Stat. Ann. § 103-50 (2006); Kan. Stat. Ann. §§ 58-1303 to 1304 (2006); Ky. Rev. Stat. Ann. § 198B.260 (2007); La. Rev. Stat. Ann. §§ 40:1731 to 1736 (2008); Me. Rev. Stat. Ann. Tit. 5, § 4591 (2002 & Supp. 2007); Mass. Gen. Laws ch. 22, § 13A (2003); Mo. Ann. Stat. § 8.620 (2008); Mont. Code Ann. § 50-60-201 (2008); N.J. Stat. Ann. § 52:32-4 (2001 & Supp. 2008); N.M. Stat. § 28-7-3 (2008); N.Y. Pub. Bldgs. § 51 (2007); N.C. Gen. Stat. § 168-2 (2007); N.D. Cent. Code. §§ 48-01.2–24 (2007); Ohio. Rev. Code. Ann. § 3781.111 (2006); Okla. Stat. tit. 61, § 11 (2008); Or. Rev. Stat. §§ 447.210–280 (2007); Pa. Stat.

have laws that clearly require state services or programs to provide modifications or accommodations for people with disabilities.[174] When researching state laws to see if they apply to you—if they cover the type of discrimination you are encountering—be sure to (1) read the statutory language carefully, and (2) review cases interpreting the statute. Some state laws have broader definitions of "disability" than the ADA does. Also, the constitutional challenges to the ADA (discussed at the beginning of this Chapter) do not apply to state accessibility statutes.

C. Enforcing Your Rights under the ADA and Section 504

This Part discusses other issues you should consider when deciding whether to file a claim. These issues are (1) finding an attorney; (2) filing a complaint with the DOJ instead of in court; (3) the damages you can ask for; and (4) whether you can also sue under your state's antidiscrimination laws.

Before deciding to file a lawsuit under the ADA, Section 504, or any other civil rights statute, you should read Chapter 14 of the *JLM*, about the Prison Litigation Reform Act ("PLRA"). If you fail to follow the PLRA's requirements, you may lose your good time credit and/or your right to bring future claims without paying the full filing fee. Make sure your attorney also knows about the PLRA; many attorneys do not.

1. Finding an Attorney

There are not enough lawyers willing and able to represent prisoners, in part because most prisoner lawsuits do not pay lawyers well. But the ADA and Section 504 *do* allow the recovery of attorney's fees[175]: attorneys (and plaintiffs who are representing themselves) can ask for attorney's fees from defendants after winning a case. Courts have found that the PLRA rule that limits recovery of attorney's fees in prisoner lawsuits[176] does *not* apply to ADA or Section 504 claims.[177] Even if you do not have a lawyer, you should ask for compensation for lawyer's fees under the ADA and Section 504. You are also entitled to recover your court or *in pauperis* fees.

If you decide to sue under the ADA and Section 504, you should contact lawyers or disability rights groups in the area to see if they can assist you. You also might want to contact your state's Protection & Advocacy ("P&A") organization for advice and/or representation. P&As, which are usually non-profits, advocate on behalf of persons with disabilities, including those in criminal and civil institutions.[178] Your

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Ann. tit. 35, § 7210.102 (2008); R.I. Gen. Laws § 37-8-15 (2007); S.C. Code Ann. §§ 10-5-210 to 330 (2007); S.D. Codified Laws § 5-14-12 (2004); Tenn. Code Ann. §§ 68-120-201 to 205 (2006); Tex. Gov't Code Ann. §§ 469.001 to 469.003 (2004); Utah Code Ann. §§ 26-29-1 to 4 (2007); Vt. Stat. Ann. tit. 20, §§ 2900–2907 (2007); Wash. Rev. Code §§ 70.92.100–170 (2007); Wis. Stat. Ann. § 101.13 (2004).

A number of states have laws that simply require equal rights: people with disabilities have full and free use of facilities. *See, e.g.,* Ark. Code Ann. § 20-14-303 (2005); Colo. Rev. Stat. § 24-34-601 (2008); Iowa Code § 216C.3 (2007); Md. Code Ann. Human Servs. § 7-704 (2007); Mich. Comp. Laws. § 37.1102 (2008); Minn. Stat. § 363A.11 (2008); Neb. Rev. Stat. § 20-127 (2007); Nev. Rev. Stat. § 233.010 (2007); N.H. Rev. Stat. Ann. § 167-C:2 (2007); Va. Code Ann. § 51.5–44 (2006); Wyo. Stat. Ann. § 35-13-201 (2007).

174. *See, e.g.*, Conn. Gen. Stat. § 46a-7 (2008); Fla Stat. § 110.215 (2008); 775 Ill. Comp. Stat. 5/5-101, 102 (2001 & Supp. 2008); La. Rev. Stat. Ann. §§ 46-2252 to 2254 (2008); Md. Code. Ann. Human Servs. §§ 7-127 to 132 (2007); N.C. Gen. Stat. § 168A-7 (2007); Or. Rev. Stat. § 410.060 (2007); R.I. Gen. Laws § 42-87-2 (2007); S.C. Code Ann. § 43-33-520 (2007); S.D. Codified Laws § 20-13-23.7 (2004); Tex. Hum. Res. Code Ann. §§ 22.010–.011 (Vernon 2001); Utah Code Ann. § 62A-5-102 (2006); Va. Code Ann. § 51.5-40 (2005).

175. 29 U.S.C. § 794a(b) (2006) ("[i]n any action or proceeding to enforce or charge a violation of [the Rehabilitation Act] ..., the court, in its discretion, may allow the prevailing party ... reasonable attorney's fee as part of the costs"); Americans with Disabilities Act, 42 U.S.C. § 12205 (2006) ("In any action or administrative proceeding commenced pursuant to this Chapter, the court or agency, in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs."); *see also* 28 C.F.R. pt. 35, app. A., at 572 (2007) (discussing 28 U.S.C. § 35.175 and specifying that "attorneys fees" include "litigation expenses and costs," including "items such as expert witness fees, travel expenses, etc.").

176. Prison Litigation Reform Act, 42 U.S.C. § 1997e(d) (2006) (discussing attorney's fees in prisoner suits).

177. Armstrong v. Davis, 318 F.3d 965, 974 (9th Cir. 2003) (holding that the PLRA restrictions on attorney's fees do not apply to claims brought under the ADA or § 504 because the two laws have their own attorney's fees provisions); Beckford v. Irvin, 60 F. Supp. 2d 85, 88 (W.D.N.Y. 1999) (holding that the PLRA's restrictions on attorneys fees do not apply to prisoners' ADA claims).

178. Protection and Advocacy of Individual Rights (PAIR), 29 U.S.C. § 794e(a)(1) (Supp. 2007) (supporting "a system in each State to protect the legal and human rights of individuals with disabilities"); Protection and Advocacy for Individuals with Mental Illness ("PAIMI"), 42 U.S.C. §§ 10803, 10805 (2006) (requiring that each state establish systems "designed to protect and advocate the rights of individuals with mental illness and investigate incidents of abuse and neglect of individuals with mental illness," and noting that the systems "shall have the authority to ... pursue

P&A may help you by providing information, referrals, or advice; helping you file your complaint; or even representing you. To find the P&A in your area, contact:

The National Disability Rights Network
900 Second St., NE, Suite 211
Washington, D.C. 20002
Tel. (202) 408-9514

2. Filing a Complaint

If you believe you have been discriminated against because of your disability, you can file a complaint with the DOJ[179] and/or bring a lawsuit in court.[180] Neither Title II nor Section 504 requires you to file with the DOJ, but the PLRA may require you to file with the DOJ before you sue in court. In New York, prior to the 2005 *Rosario v. Goord* decision, several federal courts had held that prisoners must file a complaint with the DOJ before filing a complaint in federal court, because the PLRA requires prisoners to exhaust all administrative remedies.[181] However, in a 2005 decision by the Second Circuit Court of Appeals, the New York Department of Correctional Services ("DOCS") said it would stop requiring prisoners to file their ADA claims with the DOJ before bringing suits in federal court.[182] Since most courts have not decided whether the PLRA's administrative exhaustion requirement demands that prisoners first file with the DOJ, you probably should do it anyway, to avoid having your ADA or Section 504 lawsuit dismissed. For more information on the PLRA, see Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

3. Filing a Claim with the DOJ

Starting from the date of the discrimination you experienced, you have 180 days to file a complaint with the DOJ.[183] The DOJ will either investigate the complaint,[184] or, if you include a Section 504 claim and the DOJ thinks another agency can investigate better, the DOJ will refer your complaint to that other agency.[185] If the agency or DOJ finds a violation of your rights, it will try to negotiate with the prison to get the prison to comply with the law.[186] If the prison does not comply, the agency will refer your case to the U.S. Attorney General's office.[187] The Attorney General can sue the prison, but he does not have to—and, in most cases, he will not.

To file a disability discrimination complaint, contact the DOJ and ask for a "Title II of the Americans with Disabilities Act Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form."[188] The contact information for the DOJ is:

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administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State"); Protection and Advocacy for Persons with Developmental Disabilities ("PADD"), 42 U.S.C. § 15043 (2006) (listing the system's requirements).

179. 28 C.F.R. § 35.170(a) (2007).

180. 28 C.F.R. § 35.172(b) (2007).

181. *See*, *e.g.*, Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 992, 152 L Ed. 2d 12, 26 (2002) (holding that the PLRA requires prisoners to exhaust all administrative remedies before filing an ADA claim); Burgess v. Garvin, No. 01-Civ. 10994, 2004 U.S. Dist. LEXIS 14419, at *3, *9 (S.D.N.Y. Aug. 19, 2003) (*unpublished*) (holding that the PLRA requires prisoners to exhaust all administrative remedies, including DOJ remedies, before filing an ADA claim: "The plain language of [the PLRA] requires the prisoner to exhaust 'such administrative remedies as are available.' It is not limited to administrative redress within the prison system in which the prisoner is being held, or to administrative remedies provided by any particular sovereign"), *reconsideration granted on other grounds by* 2004 WL 527053 (S.D.N.Y. Mar. 16, 2004); William G. v. Pataki, 2005 U.S. Dist. LEXIS 16716, at *4 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) ("[t]he DOJ remedies, to the extent that they are available to Plaintiffs, must be exhausted pursuant to the plain language of the PLRA").

182. Rosario v. Goord, 400 F.3d 108, 109 (2d Cir. 2005) (*per curiam*) (stating that DOCS does not intend to challenge lawsuits on the ground that administrative remedies have not been exhausted because complaints were not first filed with the DOJ). *But see* William G. v. Pataki, 2005 WL 1949509, at *4 (S.D.N.Y. Aug. 12, 2005) (where a court, post-*Rosario*, applied the DOJ exhaustion requirement to a proposed class action on behalf of parole detainees with disabilities housed in New York city jails, and where defendants were not DOCS but the State of New York and the New York State Division of Parole and Offices of Mental Health and of Alcohol and Substance Abuse Services).

183. 28 C.F.R. § 35.170(a)–(b) (2007).

184. 28 C.F.R. § 35.172(a) (2007).

185. 28 C.F.R. § 35.171(a)(2)(ii) (2007).

186. 28 C.F.R. § 35.173(a)(2) (2007).

187. 28 C.F.R. § 35.174 (2007).

188. Form DOJ - ADA-II OMB No. 1190-0009 (exp. 4-30-07), Title II of the Americans with Disabilities Act § 504

U.S. Department of Justice
950 Pennsylvania Ave., NW
Disability Rights Section - NYAV
Washington, D.C. 20530
Tel. (800) 514-0301
TTY (800) 514-0383

If you do not have time to request a form, send a letter to the DOJ that includes the following:

(1) Your name, full address, and telephone number;
(2) The name of the institution that discriminated against you (e.g., the prison);
(3) The address and phone number of the institution that discriminated against you;
(4) The date(s) that you encountered the discrimination (and whether the discrimination is ongoing);
(5) A description of the acts of discrimination, including the names of any individuals who discriminated against you;
(6) Whether you have filed a complaint or formal grievance, and, if you have, what the status is of your complaint or grievance;
(7) Whether you have complained to any other agencies (such as a state human rights commission or another bureau of the Department of Justice) or filed with a court about the discrimination (and if you have complained or filed, give the names and addresses of the agencies or courts and the date you filed the other claim);
(8) Whether you plan to file with another agency or court, and, if you plan to file, the address of the agency or court (even if you say you do not plan to file with any other agency or court, you can change your mind and file later on); and
(9) Your signature and the date.[189]

4. Filing a Lawsuit

As mentioned above, the ADA and Section 504 do not require that you file with the DOJ, although, because of the PLRA, you may have to file with the DOJ. If you are in a jurisdiction that does not require you to file first with the DOJ, you may go directly to court. If you do file with the DOJ, you can bring a lawsuit even if the DOJ does not find a violation of your rights. The statute of limitations (deadline) for filing a lawsuit under Title II and Section 504 depends on your state. Because neither law has its own statute of limitations, most federal courts use the statute of limitations for personal injury claims in the state.[190] Other federal courts use the statute of limitations for the most similar state law.[191] Note that some of these deadlines[192] are fairly long (six years in Minnesota),[193] while others are very short (180 days in North Carolina).[194]

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of the Rehabilitation Act of 1973 Discrimination Complaint Form, *available at* http://www.ada.gov/t2cmpfrm.htm (last visited March 10, 2010).

189. Form DOJ - ADA-II OMB No. 1190-0009 (exp. 4-30-07), Title II of the Americans with Disabilities Act § 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form, *available at* http://www.acdl.com/pdfs/Title%20II%20Complaint%20Form.pdf .

190. *See, e.g.*, Everett v. Cobb County Sch. Dist., 138 F.3d 1407, 1409 (11th Cir. 1998) (holding that Georgia's two-year personal injury statute of limitations applies to ADA and § 504 claims since Georgia has no law "identical to the Rehabilitation Act").

191. Wilson v. Garcia, 471 U.S. 261, 266–67, 105 S. Ct. 1938, 1942, 85 L. Ed. 2d 254 (1985) (applying the "settled practice" of using the statute of limitations from an analogous state law when the federal law provided no statute of limitations); *see also* Wolsky v. Med. Coll. of Hampton Rds., 1 F.3d 222, 223-24 (4th Cir. 1993) (holding that the statute of limitations for the most similar state statute should be applied to Rehabilitation Act suits).

192. In New York, three years. Noel v. Cornell Univ. Med. Coll., 853 F. Supp. 93, 94 (S.D.N.Y. 1994). In California, one year, although the issue remains to be definitively settled. Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137 at n.1 (9th Cir. 2002). In Illinois, two years. Winfrey v. City of Chicago, 957 F.Supp. 1014, 1023 (N.D. Ill., 1997). In Georgia, two years. Everett v. Cobb Co. Sch. Dist., 138 F.3d 1407, 1409 (11th Cir. 1998). In Texas, two years. Hickey v. Irving Ind. Sch. Dist., 976 F.2d 980, 982 (5th Cir. 1992). In Pennsylvania, two years. Disabled in Action of Penn. v. Se. Penn. Transp. Co., 539 F.3d 199, 208 (3d Cir. 2008). In Louisiana, one year. Joseph v. Port of New Orleans, No. CIV. A. 99-1622, 2002 U.S. Dist. LEXIS 4133, 2002 WL 342424, at *4912 (E.D. La., 2002) (unpublished).

193. Faibisch v. Univ. of Minn., 304 F.3d 797, 802 (8th Cir. 2002) (holding that Minnesota's six-year personal injury statute of limitations applies to Rehabilitation Act suits).

194. McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 132 (4th Cir. 1994) (holding that the statute of limitations for Rehabilitation Act claims is determined by the most similar state law; in North Carolina, the most similar state law was a state antidiscrimination law with a deadline of 180 days, so the deadline for filing a § 504 complaint

5. What Kind of Damages Can You Seek Against a State

What you can win in court depends on the facts of your case, and on whether you sue under Title II or Section 504. You should carefully consider what you want the court to do before you file your suit.

(a) Money Damages

Courts are divided over whether you can sue a state for money damages under the ADA and Section 504. This is because they are split as to states' Eleventh Amendment immunity (also known as *sovereign immunity*).

Under the Eleventh Amendment, states (but not federal and local government) have what is called immunity.[195] This means individuals cannot sue them for money in federal court—unless Congress creates an exception. (You can always sue states for injunctive relief.) It is true that both the ADA and Section 504 apply to state prisoners.[196] But it is not clear whether states have waived their immunity, so that you can sue them for money damages under those laws.

States do not want to have to pay money when they lose lawsuits. So they argue that, in enacting the ADA and Section 504, Congress did not have the authority to create an Eleventh Amendment exception to sovereign immunity. Therefore, states argue, people bringing claims under the ADA and Section 504 should not be able to win money damages against the states. Once courts decide that states cannot be sued for *money damages*, individuals suing states can only receive *injunctive relief*,[197] discussed in subsection (a), above.

(i) Sovereign Immunity and the ADA

The Supreme Court has taken the middle road between allowing and not allowing state prisons to be sued for money damages under Title II of the ADA. Recently, in *Tennessee v. Lane*, the Supreme Court held that states may be sued for money damages for violations of Title II, at least when the violations relate to court access for a disabled person.[198] (Prior to *Lane*, most federal courts had held that states could not be sued for money damages at all.[199]) Then, in *United States v. Georgia*, the Supreme Court held that prisoners

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became 180 days). The *McCullough* court noted that it was following its decision in Wolsky v. Medical College of Hampton Rds., 1 F.3d 222, 223-24 (4th Cir. 1993), where the court found that, because (1) Virginia had its own act protecting disabled individuals, and (2) that act had the same purpose as the federal Rehabilitation Act, the Virginia Act was the most analogous statute, and its one-year statute of limitations should be used (rather than the statute of limitations for personal injury suits). McCullough v. Branch Banking & Trust Co., 53 F.3d 127, 130 (4th Cir. 1994).

195. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 3639, 121 S. Ct. 955, 9625, 148 L. Ed. 2d 866, 87780 (2001).

196. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 221 (1998) (holding that Title II of the ADA applies to prisoners in state prisons); Harris v. Thigpen, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (ruling that § 504 applies to prisoners in state prisons because state prisons receive money from the federal government); Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988) (ruling that § 504 applies to state correctional institutions that receive federal funding).

197. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006); Miller v. King, 384 F.3d 1248, 1263–67 (11th Cir. 2004), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006).

198. Tennessee v. Lane, 541 U.S. 509, 531, 124 S. Ct. 1978, 1993, 158 L. Ed. 2d 820, 842 (2004).

199. Prior to *Lane*, the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals ruled that individuals may not receive money damages under Title II. *See* Kiman v. N.H. Dept. of Corr., No.01-134-B, 2001 U.S. Dist. LEXIS 21894 (D.N.H. Dec. 19, 2001) (*unpublished*) (agreeing with the Second, Fifth, and Tenth Circuits that, under Garrett, the 11th Amendment deprives courts of jurisdictions to hear Title II claims against states), *aff'd*, 332 F.3d 29 (1st Cir. 2003) (*en banc*), *vacated*, 541 U.S. 1059, 124 S. Ct. 2387, 158 L. Ed. 2d 961 (2004); Wessel v. Glendening, 306 F.3d 203, 215 (4th Cir. 2002) (holding that "[a]lthough Congress properly and clearly expressed its intent to [abrogate state sovereign immunity], it acted on the basis of an inadequate record and imposed a remedy that is neither congruent nor proportional to the problem it identified"), *overruled by* Constantine v. Rectors & Visitors of George Mason Univ., 441 F.3d 474 (4th Cir. 2005); Reickenbacker v. Foster, 274 F.3d 974, 983 (5th Cir. 2001) (holding that Title II and § 504 are not proportional and congruent responses to legislative findings of unconstitutional discrimination by the States against the disabled), *overruled by* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277 n.14 (5th Cir. 2005); Thompson v. Colorado, 278 F.3d 1020, 1034 (10th Cir. 2001) (holding that Title II cannot be found to be a proportional and congruent response to constitutional violations if Congress has not identified a history and pattern of unconstitutional discrimination by the states); Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000) (holding that, like Title I, Title II is barred by the 11th Amendment), *overruled by* Bruggeman v. Blagojevich, 324 F.3d 906, 912–13 (7th Cir. 2003); Alsbrook v. City of Maumelle, 184 F.3d 999, 1002 (8th Cir. 1999) (finding that Title II is not a valid exercise of Congress' power under § 5 of the 14th Amendment, and so Arkansas retains its 11th Amendment immunity). The Second Circuit has ruled that individuals may not receive money damages under Title II of the ADA unless they can show that the state

may sue states for money damages under Title II, at least in situations where the alleged misconduct *actually* violates the parts of the Constitution that apply to the states.[200] (In that case, the plaintiff alleged Eighth Amendment violations;[201] however, the ruling is broad, and applies to more than just the Eighth Amendment.) The court did not say whether the Eleventh Amendment waiver also applies to ADA violations that do not involve constitutional violations.[202]

So the current rule is that prisoners may sue states for money damages under Title II when a state prison system (1) violates any of the rights that are part of the Fourteenth Amendment *and* (2) violates Title II.[203] (The Fourteenth Amendment includes most of the rights in the first eight amendments to the Constitution.) It appears that, after *Lane* and *Georgia,* lower courts will take a case-by-case approach, considering the particular circumstances, in determining whether the plaintiff can sue the state for money damages.[204] And, of course, some courts will be more likely than others to permit money damages.[205]

If you are considering bringing a disability discrimination claim under Title II, you should look at how the decisions in *Lane* and *Georgia* have been analyzed and interpreted by other courts, disability rights organizations, and academics. See Chapter 2 of the *JLM* for information on performing legal research.

(ii) Sovereign Immunity and Section 504

Courts are divided over whether states are protected by sovereign immunity under Section 504. Most Courts of Appeals that have addressed this issue have held that you *can* seek monetary damages under Section 504.[206] But the Second Circuit has held that you *might* not be able to get monetary damages from

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acted with "discriminatory animus or ill will" toward the disabled. Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98, 111 (2d Cir. 2001). The Sixth Circuit has allowed money damages against the state under Title II only if the discrimination amounted to a violation of an individual's due process rights under the 14th Amendment. Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003) (holding that "it was reasonable for Congress to conclude that it needed to enact [the ADA] to prevent states from unduly burdening" rights protected by the 14th Amendment), *aff'd*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). Only the Ninth Circuit has held that individuals may sue the state for money damages under Title II. Hason v. Med. Bd. of Cal., 279 F.3d 1167, 1171 (9th Cir. 2002) (holding that Congress validly abrogated states' 11th Amendment immunity when enacting Title II).

200. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006).

201. United States v. Georgia, 546 U.S. 151, 160–61, 126 S. Ct. 877, 883, 163 L. Ed. 2d 650, 661 (2006) (Stevens, J., concurring).

202. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006); Miller v. King, 384 F.3d 1248, 1263–67 (11th Cir. 2004), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006).

203. United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006).

204. *See* United States v. Georgia, 546 U.S. 151, 159, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 660 (2006). In *United States v. Georgia*, the Supreme Court held that lower courts were in the best position to determine (1) which aspects of the State's alleged conduct violated Title II of the ADA, and (2) to what extent such conduct also violated the 14th Amendment. Additionally, the Supreme Court held that when lower courts find that the State's conduct violated Title II but did not violate the 14th Amendment, lower courts should determine whether Congress intended that people should still have a right to sue the states for money damages.

Since *United States v. Georgia*, a number of courts have allowed prisoners to sue for monetary damages when they establish both that (1) the state prison system violated Title II of the ADA, and (2) the actions of the state prison system violated prisoners' 14th Amendment rights. Degrafinreid v. Ricks, 417 F. Supp. 2d 403, 409 (S.D.N.Y. 2006) (ruling that a prisoner could bring a claim for money damages against his prison system for confiscating and destroying his hearing aid; the prison's actions might have violated the prisoner's 8th Amendment right to be free from cruel and unusual punishment). However, when a State's actions violate Title II but not the Constitution, courts have been hesitant to allow the prisoner to sue for monetary damages. *See, e.g.*, Miller v. King, 384 F.3d 1248, 1264–65 (11th Cir. 2004), *vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006) (holding that Title II damages suits may only be brought where a "fundamental right" is affected, and so the prisoner could not bring a Title II damages suit against state); Flakes v. Franks, 322 F. Supp. 2d 981, 983 (W.D. Wisc. 2004) (noting that it was not clear whether the prisoner's Title II claim for money damages would be proper).

205. *See, e.g.*, Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 792–93 (9th Cir. 2004) (upholding a prior decision permitting a prisoner to bring a Title II claim for damages against the state); *see also* Carasquillo v. City of New York, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (noting that *Lane* permits Title II claims for money damages against state and local governments, but dismissing the claim on other grounds).

206. *See* Garrett v. Univ. of Ala., 344 F.3d 1288, 1293 (11th Cir. 2003) (explaining that states waive their 11th Amendment immunity to § 504 suits when they receive federal funds); A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 238 (3d Cir. 2003) (stating that Congress clearly required states to waive their immunity if states accepted federal funding); Doe v. Nebraska, 345 F.3d 593, 604 (8th Cir. 2003) (holding that the state clearly waived its immunity in accepting federal funds); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (stating that "it is clear that a state waives its immunity from suit under the Rehabilitation Act by accepting federal funds"); Carten v. Kent State Univ., 282 F.3d

states under Section 504, since states only agreed to be sued for money damages under Title II, and not Section 504.[207]

Overall, though, the arguments supporting Section 504 sovereign immunity are weak. This is because so many state agencies receive federal funding, and Congress only offers them federal funding in exchange for complying with Section 504—and thus waiving their state's sovereign immunity. And so even Second Circuit courts would find that, in reality, most states have waived their sovereign immunity under Section 504, and can be sued for money damages. Nevertheless, in some courts, you may not be able to get money damages against a state under Section 504.[208]

(iii) Some Practical Tips

Generally, it is easier to receive money damages—to convince the court that the state has waived its sovereign immunity—under Section 504 than under the ADA. However, this area of the law is changing. *If you plan to file a Title II or Section 504 lawsuit, you should research this issue thoroughly to determine current law in your circuit.* See Chapter 2 of the *JLM*, "Introduction to Legal Research," for help determining what is "current law." (Although Shepardizing cases is a good place to start, you should do additional research to make sure you are using up-to-date laws.)

If you find that you live in a federal circuit that prohibits money damages in such suits, you still can file a lawsuit against the state. However, you will be able to receive only injunctive and/or declaratory relief, and not money damages.[209] And even if you are able to sue for money damages, you cannot receive punitive damages under Title II or Section 504.[210]

You should probably cite both the ADA and Section 504 when filing your claim (so long as both of those laws apply to you). Then, if the Supreme Court ever rules that Congress exceeded its power in enacting one of those laws, your claim for money damages still will be viable against a state prison if (1) it includes claims against the law that is still in effect, and (2) you are in a jurisdiction that allows suits for money damages under the law that is still in effect.

(b) Injunctive Relief

Even when you cannot sue the state for money damages, you can ask for injunctive relief.[211] (Injunctive relief is when the court orders the prison to take certain actions—for example, to provide interpreters to hearing-impaired prisoners during disciplinary hearings[212]; or not to take certain actions—for example, to

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391, 398 (6th Cir. 2002) (finding, as it did in an earlier case, that the state "unambiguously waived Eleventh Amendment immunity against Rehabilitation Act claims when it agreed to accept federal funds pursuant to" a federal act requiring states that accept such funds to waive their immunity); *see also* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 289 (5th Cir. 2005) (*en banc*) (holding that, by accepting federal financial assistance, the state could be sued under § 504, which required that states waive their immunity from § 504 lawsuits if they received federal funds).

207. Garcia v. State Univ. of N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 114 (2d Cir. 2001) (*overruled on other grounds by* Castells v. Fisher, 2007 U.S. Dist. LEXIS 30188 (E.D.N.Y. 2007)). *Garcia* does not say that the state can never be sued for money damages under § 504, but it requires that the state have known it could be sued for money damages by accepting federal financial assistance. It is not clear at what point courts will find that states *knew* they could be sued. *See* Press v. S.U.N.Y. at Stony Brook, 388 F. Supp. 2d 127, 132 (E.D.N.Y. 2005) (discussing subsequent treatment of *Garcia*). As such, if you are in the Second Circuit, you may want to include a claim for money damages under § 504. But keep in mind the "three strikes" provision of the PLRA (*see* Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," to learn more about the PLRA).

208. *See, e.g.,* Howard v. Bureau of Prisons, Civil Action No. 3:05-CV-1372, 2008 WL 318387, at *5.

209. Remember that in lawsuits against the federal government, you can seek only injunctive relief (a court-ordered act or prohibition) and declaratory relief (the judge's determination of each party's rights). You cannot get money damages.

210. Barnes v. Gorman, 536 U.S. 181, 189, 122 S. Ct. 2097, 2102–03, 153 L. Ed. 2d 230, 238–39 (2002) (stating that "punitive damages may not be awarded … in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act").

211. *See, e.g.*, Randolph v. Rodgers, 253 F.3d 342, 345 (8th Cir. 2001) (noting that a "private party may seek prospective injunctive relief in federal court against a state official, even if the state is otherwise protected by Eleventh Amendment immunity") (Eleventh Amendment immunity, discussed in subsection (b), below, can prevent you from getting money damages from states). When you sue a state official, in his official capacity, for injunctive relief, it is called an *Ex parte Young* suit. *Ex parte Young* is the Supreme Court case allowing state officials to be sued for injunctive relief even when the state cannot not be sued in federal court. *Ex parte* Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

212. Duffy v. Riveland, 98 F.3d 447, 454–55 (9th Cir. 1996) (holding that a deaf prisoner was disabled, could make a claim under § 504, and might be entitled to a certified interpreter at disciplinary hearings).

stop excluding prisoners with HIV from certain programs.[213]) If you are seeking injunctive relief, you *must* make your claim for an injunction against individual prison officials in their *official capacities.*[214] Under the ADA and Section 504, you cannot sue individual officials in their *individual capacities*. For example, if you sue Prison Warden John Smith, you will be suing him as The Warden (who represents the state), not as Mr. John Smith (who just represents himself). Although *the state* will be providing the injunctive relief the court orders, the law requires you to request the injunctive relief from *specific officials*. (If you are suing a *county*, however, you can ask for injunctive relief directly from the county or the county jail.)

6. Filing an ADA or Section 504 Claim Against a County, City, or Town

The Eleventh Amendment/sovereign immunity challenges to the ADA and Section 504 do not apply to local entities like counties, cities, and towns.[215] So you can ask for money damages (as well as injunctive relief) if you sue a county, city, or town for violating your rights under these laws. Also, if you are in a private prison that receives federal financial assistance, you can sue the prison for money damages and injunctive relief under Section 504. But punitive damages are never available under Title II or Section 504.[216]

7. Filing in State or Federal Court

Most suits about the rights of prisoners with disabilities have been brought in federal court. However, in recent years, the Supreme Court has weakened the protections of the ADA (and federal courts have followed the Supreme Court). So *state* courts may be an appealing alternative. As explained above, state laws (1) can incorporate or expand ADA protections, and (2) do not have the constitutional weaknesses of the ADA and Section 504. If you are in a state where federal case law has limited your ability to sue the state, you should research the possibility of filing in state court and using state law. You should make sure to find out how your state's courts have dealt with prisoner suits brought after the decisions in *Lane* and *Georgia* (discussed in subsection (c), above), which dealt with Eleventh Amendment/sovereign immunity.

D. Conclusion

If you are a prisoner with a physical or mental disability, Section 504 and the ADA (and maybe state law as well) guarantee you certain rights and protections. To realize your protections under these laws, you must meet the elements of the two laws. You may be able to hire an attorney to assist you with your complaint, because both Section 504 and the ADA allow you to recover attorney's fees. Although you might not be able to recover money damages, you may be able to change the practices that are denying you a particular prison service, program, or activity. Before filing your complaint, make sure to refer to Chapter 14 of the *JLM* for information about the PLRA (which may impose additional requirements before filing a lawsuit). Also, if you claim a violation of a state statute, make sure you meet your state's statute of limitations.

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213. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," which discusses the different types of relief and remedies available in a lawsuit.

214. Henrietta D. v. Bloomberg, 331 F.3d 261, 287–88 (2d Cir. 2003) (distinguishing between individual and official capacity, and explaining that defenses that apply to individuals do not apply to entities); Bruggeman v. Blagojevich, 324 F.3d 906, 912–13 (7th Cir. 2003) (explaining that *Ex Parte Young* permits state officials (and not just *states*) to be sued in their official capacities for injunctive relief); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1187–88 (9th Cir. 2003) (finding "no difference between declaring that a named officer in her official capacity represents the 'State' for purposes of the Fourteenth Amendment, and declaring that the same officer represents a 'public entity' under Title II," and "holding that Title II's statutory language does not prohibit Miranda B.'s injunctive action against state officials in their official capacities"); Carten v. Kent State Univ., 282 F.3d 391, 395–96 (6th Cir. 2002) (affirming that *Ex Parte Young* creates "an exception to Eleventh Amendment immunity for claims for injunctive relief against individual state officials in their official capacities," so that the plaintiff chose his defendant correctly in this suit); Randolph v. Rodgers, 253 F.3d 342, 345 (8th Cir. 2001) (affirming lower court's ruling that prison officials could be sued in their official capacities despite 11th Amendment immunity); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866, 884 n.9 (2001) (noting that its decision that states may not be sued for money damages under ADA Title I does not prevent a person from bringing a claim for injunctive relief).

215. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369, 121 S. Ct. 955, 965, 148 L. Ed. 2d 866, 880 (2001) (noting that "the Eleventh Amendment does not extend its immunity to units of local government," so local entities are "subject to private claims for damages under the ADA").

216. Barnes v. Gorman, 536 U.S. 181, 189, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230, 239 (2002) (stating that, "[b]ecause punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act").

A JAILHOUSE LAWYER'S MANUAL

Chapter 29: Special Issues for Prisoners with Mental Illness

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CHAPTER 29

SPECIAL ISSUES FOR PRISONERS WITH MENTAL ILLNESS*

A. Introduction

This Chapter will explain your rights as a prisoner with a mental illness. Part A discusses basic information you will need in order to understand how the law applies to prisoners with a mental illness (including the definitions of important terms such as "mental illness" and "treatment"). Part B explains your right to receive treatment for a mental illness. Part C explains how and when you can refuse unwanted treatment and transfers, as well as the consequences of transfer for hospitalization. Part D details conditions of confinement, and how they intersect with mental health issues. Part E outlines considerations for pretrial detainees with mental illness. Part F describes resources available to you as a prisoner.

For more information on topics that might be important to prisoners with mental illness, see Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," and Chapter 28, "Rights of Prisoners with Disabilities." You should also read Part E of Chapter 23 to learn more about your right to medical privacy.

In addition, if you decide to pursue any claim based on your rights in federal court, you *must* read *JLM*, Chapter 14, "The Prison Litigation Reform Act." Failure to follow the requirements of the Prison Litigation Reform Act can lead to loss of your good-time credits, loss of your right to bring future claims in federal court without immediately paying the full filing fee, or other negative consequences. Also, if you plan to bring a federal constitutional challenge, you should read Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law." "Section 1983" (42 U.S.C. § 1983) is the law that allows you to sue when your constitutional rights are violated. Though this manual is intended to help you file your own lawsuit, keep in mind that it is always useful, if possible, to get assistance with your claims from a family member, friend, fellow prisoner, or lawyer. For advice on how to find a lawyer to help with your civil claims against the prison, please see Part C of Chapter 4 of the *JLM*, "How to Find a Lawyer."

1. Defining "Mental Illness" and "Treatment"

(a) What Is Mental Illness?

This Chapter is written for prisoners with behavioral or psychological illnesses and diagnosable symptoms or risks. You might have heard people use the terms mental illness, serious mental illness, major mental illness, mental disorder, mental abnormality, mental sickness, serious and persistent mental illness, or mentally retarded. People (including courts and legislatures) use the terms as if they mean the same thing, but they do not. Many people say "mentally ill prisoners" or "prisoners with a mental illness" when they are referring to different groups of people, such as those who are not guilty by reason of insanity ("NGIs"), those incompetent to stand trial, or those with developmental disabilities (low intellectual function that usually starts at childhood). When you read this Chapter, pay close attention to the way different terms are used to mean different things. The differences between different terms are important for you and your lawsuit.

There are many kinds of "mental illness," but some common types include Bipolar Disorder, Borderline Personality Disorder, Major Depression, Obsessive-Compulsive Disorder ("OCD"), Panic Disorder, Post-Traumatic Stress Disorder ("PTSD"), and Schizophrenia. Others include Dissociative Disorders, Dual Diagnosis or MICA (Mentally Ill and Chemically Addicted—mental illness with substance abuse), Eating Disorders, Schizoaffective Disorder, Tourette's Syndrome, and Attention-Deficit/Hyperactivity Disorder.[1] This Chapter will not discuss the separate issues of NGIs, sexual offenders, prisoners with developmental disabilities or prisoners with gender identity issues. For a discussion of matters related to sex offenders, see Chapter 32 of the *JLM*, "Special Considerations for Sex Offenders."

Many state laws define mental illness to include only behavioral or psychological problems with noticeable symptoms. According to the American Psychiatric Association ("APA"), a person has a mental

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1. *See* Nat'l Alliance on Mental Illness, *About Mental Illness: By Illness*, http://www.nami.org/Template.cfm?Section=By_Illness (last visited Jan. 31, 2010).

disorder if he suffers from (1) a behavioral or psychological pattern or series of symptoms, and (2) a present symptom, disability, or significantly increased risk of suffering death, pain, disability, or an important loss of freedom.[2] This definition of mental disorders does not cover psychological responses to particular events (like the death of a loved one) or behavior like sexual offenses.[3] Mental illnesses may last for varying periods of time. Some last for a short period and then disappear; others are ongoing. Although courts have recognized that immediate psychological trauma (sudden, serious stress) also deserves mental health treatment,[4] generally "serious" mental illnesses last longer, affect behavior, and have noticeable symptoms or risks.

To fit within most state law definitions of mental disorder, prisoners must show (1) a behavioral or psychological problem; (2) an accompanying symptom; and (3) a diagnosis of mental illness by a professional.[5] For instance, in New York, "mental illness" means having "a mental disease or mental condition which is [expressed as] … a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care and treatment."[6] Like the APA approach, some state laws specifically exclude sexual offenses, substance abuse, and mental retardation from the definition of mental illness.[7]

(b) What the Law and This Chapter Mean by "Treatment"

The definition of "treatment" under the law generally includes three steps: (1) diagnosis (a finding by a doctor or mental health specialist that there is a mental illness), (2) intervention (a decision to treat the illness with therapy, drugs, or other care), and (3) planning (developing a method to relieve suffering or find a cure).[8]

Whether a particular medical action qualifies as "treatment" depends on whether it is medically necessary and whether it will substantially help or cure your medical condition. Medical necessity usually involves a serious medical need, which "could well result in the deprivation of life itself" if untreated.[9] The test to determine whether treatment is "necessary" is not whether a prisoner suffers from mental illness but rather whether that mental illness "requires care and treatment."[10]

The law assumes that doctors are best able to make medical choices to treat mental illness. Therefore, whether something is appropriate treatment is a decision that judges and lawmakers leave to medical professionals. Just because a prisoner or a judge prefers a particular course of action to treat mental illness

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2. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders at xxi (4th ed. 1994).

3. *See*, *e.g.*, Kansas v. Crane, 534 U.S. 407, 412–13, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 862 (2002) (requiring the state to distinguish between dangerous sexual offenders with a mental illness who require commitment and "ordinary" criminals); Seling v. Young, 531 U.S. 250, 253, 121 S. Ct. 727, 730, 148 L. Ed. 2d 734, 740 (2001) (distinguishing for civil commitment purposes between sexually dangerous individuals and sexually violent offenders who have a mental disorder).

4. *See* Carnell v. Grimm, 872 F. Supp. 746, 755–56 (D. Haw. 1994) (holding that "an officer who has reason to believe someone has been raped and then fails to seek medical *and psychological* treatment for the victim after taking her into custody manifests deliberate indifference to a serious medical need" (emphasis added)), *appeal dismissed in part*, *aff'd in part*, 74 F.3d 977, 979 (9th Cir. 1996) (finding that the 8th Amendment prohibition of cruel and unusual punishment, which includes denying medical and psychological care, applies to pretrial detainees).

5. *See*, *e.g.*, Tex. Health & Safety Code Ann. § 571.003(14) (Vernon 2003 & Supp. 2007) ("[I]llness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior.").

6. N.Y. Correct. Law § 400(6) (McKinney 2003). Additionally, the private settlement agreement in the case Disability Advocates, Inc. v. New York State Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) includes a definition of "serious mental illness" that provides a heightened level of care for prisoners in Special Housing Units and keeplock. The heightened level of care is required to begin after several different programs and facilities, including the residential mental health unit, are constructed. After the settlement, New York passed a statute defining "serious mental illness" for prisoners who are in disciplinary segregated confinement in a way that closely resembles the settlement agreement's definition. The effective date of this part of the new statute is no later than July 1, 2011 and might be earlier based on when new residential mental health units are completed. *See* Press Release, Governor Spitzer Signs Legislation to Enhance the Care and Treatment of Prisoners With Serious Mental Illness (Jan. 31, 2010), *available at* http://www.ny.gov/governor/press/0129082.html.

7. *See*, *e.g.*, Ala. Code § 22-52-1.1(1) (LexisNexis 2006) (stating that mental illness "excludes the primary diagnosis of epilepsy, mental retardation, substance abuse, including alcoholism, or a developmental disability").

8. Fred Cohen, The Mentally Disordered Inmate and the Law 6-4 (1998).

9. Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972) (quoting McCollum v. Mayfield, 130 F. Supp. 112, 115 (N.D. Cal. 1955)).

10. *See*, *e.g.*, U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969).

does not mean that this is a *necessary* course of treatment under the law.[11] In New York, the Commissioner of the Department of Correctional Services, in cooperation with the commissioner of mental health (the head of the department that handles mental illness issues), is responsible for establishing programs in correctional facilities for the treatment other than hospitalization. Although programs need only be as the Commissioner of the Department of Correctional Services "deem[s] appropriate" for treatment of prisoners with mental illness, the law does require that "[i]nmates with serious mental illness shall receive therapy and programming in settings that are appropriate to their clinical needs while maintaining the safety and security of the facility.[12] Although adequate medical and health services must always be provided,[13] states require different levels of psychiatric care, as not all types of care are necessary for treatment.[14]

You do not have a right to decide your treatment plan,[15] although you do have the right to mental health care that meets standards of the medical profession,[16] the right to information about your treatment's risks and alternatives, and a limited right to refuse treatment (see Part C of this Chapter). Once a decision to treat your mental illness has been made, you cannot specify which care alternatives (such as medication, counseling, or therapy) you should receive.[17] You may, however, be able to protect yourself against unfair medical treatment by challenging the necessity of a certain treatment.

2. Understanding Treatment Facilities

There are three basic types of psychiatric care that are used to treat prisoners:[18]

(1) Acute (or crisis) care, which is twenty-four hour care for prisoners whose symptoms of psychosis, suicide risk, or dangerousness justify intensive care and forced medication;
(2) Sub-acute (or intermediate) care, usually outside of a hospital for prisoners suffering from severe and chronic conditions that require intensive case management, psychosocial interventions (treatment that is both social and psychological), crisis management, and psychopharmacology (drugs that affect the mind) in a safe and contained environment; and
(3) Outpatient care, which is provided in the general population for prisoners who can function relatively normally. It can—but does not have to—include medication, psychotherapy, supportive counseling, and other interventions.

The most common type of care prisoners receive is outpatient care. If you require more intensive care, you may be treated in a hospital within the prison system or at an off-site hospital set up specifically to treat people with mental illnesses. The severity of mental illness, the types and availability of facilities, and the doctor's medical diagnosis will all factor into your placement.

The Division of Forensic Services at the New York State Office of Mental Health ("OMH") runs the New York psychiatric facility system. There are four forensic psychiatric care centers. One of them, Central New

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11. *See* Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) ("We disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment."); *see also* Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975) (stating choices in medical care must be capable of characterization as cruel and unusual punishment before they will be considered "mistreatment").

12. N.Y. Correct. Law § 401 (McKinney 2003).

13. Estelle v. Gamble, 429 U.S. 97, 103–04, 97 S. Ct. 285, 290–91, 50 L. Ed. 2d 251, 259–60 (1976) (citing Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)) ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.").

14. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 31-201.01(B) (2002) ("In addition to the medical and health services to be provided pursuant to [this statute], the director *may* ... provide to prisoners psychiatric care and treatment." (emphasis added)).

15. *See* Barrett v. Coplan, 292 F. Supp. 2d 281, 285–86 (2003) (noting the right to adequate medical care "does not mean that an inmate is entitled to the care of his or her choice, simply that the care must meet minimal standards of adequacy"); *see also* Estelle v. Gamble, 429 U.S. 97, 107–08, 97 S. Ct. 285, 292–93, 50 L. Ed. 2d 251, 262 (1976) (rejecting a prisoner's mistreatment claim that more should have been done in the way of diagnosis and treatment, and that there were better options not pursued).

16. Barrett v. Coplan, 292 F. Supp. 2d 281, 285 (2003).

17. *See*, *e.g.*, Barrett v. Coplan, 292 F. Supp. 2d 281, 285–86 (2003) (noting the right to adequate medical care "does not mean that an inmate is entitled to the care of his or her choice, simply that the care must meet minimal standards of adequacy"); *see also* Estelle v. Gamble, 429 U.S. 97, 107, 97 S. Ct. 285, 293, 50 L. Ed. 2d 251, 262 (1976) (rejecting a prisoner's claim of mistreatment based on the number of care options that were not pursued).

18. These general definitions are taken from Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness* 136 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf (last visited Jan. 31, 2010).

York Psychiatric Center, is both a regional forensic unit and the inpatient psychiatric hospital that services all prisoners in the state prisons and operates the many "satellite mental health units" and "mental health units" located within New York State prisons.[19] You should note that administrative segregation, such as solitary confinement or disciplinary segregated confinement in "special housing units" ("SHUs") or "keeplock," is not a treatment facility. Many mental health experts, advocates, and clinicians believe that these forms of isolated confinement make mental health conditions worse, and courts have recognized the harm they cause. For more information on isolation and mental health, please see Part D(1) of this Chapter.

(a) Treatment Facility Admissions in New York

In New York, whenever the doctor of a prison, jail, or other correctional institution believes you need hospitalization because of mental illness, the doctor must tell the facility superintendent, who will then apply to a judge for a commitment order. The judge will require two other doctors to examine you.[20] In New York City, the two doctors may examine you in your prison or you may be transferred to a county hospital for examination.[21] The doctors must certify (agree) that you have a mental illness and are in need of care or treatment for you to be hospitalized,[22] but first they must consider other treatment alternatives.[23] They must also consult your previous doctor if they know that you have been treated for mental illness in the past and if it is possible to do so.[24]

If the two doctors certify you need to be hospitalized to treat a mental illness, the prison superintendent will apply to a judge for permission to commit you.[25] You should receive notice of any court order and have some chance to challenge it.[26] In addition, your wife, husband, father, mother, or nearest relative must also receive notice of the decision to commit you; if you have no known relatives within the state, that notice must be given to any known friend of yours.[27] If you decide to challenge the decision, you have a right to know what the hospital's placement procedure is. You also have the right to counsel, a hearing, an independent medical opinion, and judicial review with a right to a jury trial.[28] However, you do not have a right to a hearing in an emergency, during which two doctors certify that your mental illness is likely to result in serious harm to you or to other prisoners.[29] In that case, you are still entitled to notice, counsel, an independent medical opinion, a hearing, and the right to a jury trial, but only *after* you arrive at a hospital.[30]

B. Your Right to Receive Treatment

This Part explains two doctrines (rules) that relate to your right to psychiatric medical care. Section 1 of this Part discusses your right to adequate medical care. This includes whether the prison must provide psychiatric care, and whether that care is adequate. Section 1 also mentions special considerations for prisoners with substance-related disorders and what medical treatment they should receive. Section 2 addresses your rights if psychiatric medical care is delayed or denied, instead of simply being inadequate.

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19. The New York Office of Mental Health's forensic facilities include Mid-Hudson Forensic Psychiatric Center, Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit located within Rochester Psychiatric Center, and Central New York Psychiatric Center and Northeast Regional Forensic Unit located within Central New York Psychiatric Center. Within State correctional facilities, OMH operates 19 satellite mental health units with crisis beds. Bureau of Forensic Services & Criminal Procedures, http://www.omh.state.ny.us/omhweb/forensic/BFS.htm (last visited Jan. 31, 2010).

20. N.Y. Correct. Law § 402(1) (McKinney 2003).

21. N.Y. Correct. Law § 402(2) (McKinney 2003).

22. *See generally* N.Y. Mental Hyg. Law §§ 9.01–9.63 (McKinney 2006); *see* U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) (suggesting that to be found in need of care and treatment through inpatient hospitalization, you must be found—after proper procedures—to be so mentally ill that you pose a danger to self or others).

23. N.Y. Correct. Law § 402(1) (McKinney 2003).

24. N.Y. Correct. Law § 402(1) (McKinney 2003).

25. N.Y. Correct. Law § 402(3) (McKinney 2003).

26. N.Y. Correct. Law § 402(3) (McKinney 2003).

27. N.Y. Correct. Law § 402(3) (McKinney 2003).

28. N.Y. Correct. Law § 402(3) (McKinney 2003).

29. N.Y. Correct. Law § 402(9) (McKinney 2003).

30. N.Y. Correct. Law § 402(9) (McKinney 2003).

1. What to do if the Psychiatric Medical Care you Receive is Inadequate

You have a right to adequate medical care and treatment. Under the Eighth Amendment of the Constitution,[31] the government has an obligation to provide medical care to those people whom it is punishing by incarceration.[32] This right includes the regular medical care that is necessary to maintain your health and safety. Many states also have state statutes requiring prisons to provide medical care to prisoners.[33] For more information about this general right, read Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

(a) Your Right to Adequate Psychiatric Care

Mental health care is governed by the same deliberate indifference/serious needs analysis as physical health care. Most federal circuits have held the right to adequate medical care specifically includes any *psychiatric* care that is necessary to maintain your health and safety.[34] In *Bowring v. Godwin*, an important early decision, the Fourth Circuit explicitly extended the right to medical care to mental illness treatment, noting that there is "no underlying distinction between the right [of a prisoner] to medical care for physical ills and its psychological or psychiatric counterpart."[35]

The *Bowring* court developed a three-part test to determine whether psychiatric care is necessary for a prisoner. Under the test, a prisoner who suffers from a mental illness is likely to have a right to mental health treatment if a health care provider determines that:

(1) the prisoner's symptoms are evidence of a serious disease or injury;
(2) that disease or injury is curable, or can be substantially improved; and
(3) the likelihood of harm to the prisoner (in terms of safety and health, including mental health) is substantial if treatment is delayed or denied.[36]

However, the right to psychiatric treatment is still subject to reasonable medical costs and a reasonable length of time for treatment.[37] Therefore, psychiatric treatment will be given to the prisoner on the basis of what is necessary, not what is desirable.[38]

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31. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (emphasis added)).

32. Estelle v. Gamble, 429 U.S. 97, 103–04, 97 S. Ct. 285, 290–91, 50 L. Ed. 2d 251, 259–60 (1976) (holding that the 8th Amendment prohibits denying needed medical care).

33. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 31-201.01(D) (2002); Ga. Code Ann. § 42-5-2 (1997 & Supp. 2006).

34. *See* Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (finding prisoner entitled to psychiatric treatment where a doctor has concluded that the prisoner has a serious disease that might be curable, and where delay might cause potential harm); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006) (holding that a prisoner's right to mental health care, not just physical medical care, is clearly established under the 8th Amendment); Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) ("The states have a constitutional duty to provide necessary medical care to their inmates, including psychological or psychiatric care."); Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) ("In balancing the needs of the prisoner against the burden on the penal system, the district court should be mindful that the essential test is one of medical necessity and not one simply of desirability."); Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994) ("[W]e now hold that the requirements for mental health care are the same as those for physical health care needs."); Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) ("The extension of the Eighth Amendment's protection from *physical* health needs, as presented in *Estelle* [*v. Gamble*], to *mental* health needs is appropriate because, as courts have noted, there is 'no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.'" (internal quotation marks omitted)); Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989) ("We think it plain that from the legal standpoint psychiatric or mental health care is an integral part of medical care. It thus falls within the requirement of *Estelle v. Gamble* ... that it must be provided to prisoners."); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) ("[M]ental health needs are no less serious than physical needs."); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979) (holding that prisoners with serious mental illness have a right to adequate treatment, and that psychiatric or psychological treatment should be held to the same standard as medical treatment for physical ills).

35. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

36. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977).

37. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) (stating that the right to treatment is limited by reasonable cost and time, and that the test is what is medically necessary, not what is "merely desirable"). *But see* Kosilek v. Maloney, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (noting that it is not permissible to deny a prisoner adequate medical care just because the treatment is costly).

38. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977).

You should note that the *Bowring* test is the law only in the Fourth Circuit. Other courts are likely to consider using the standard in similar cases,[39] especially because no court has issued a disagreeing opinion. However, the only courts that *must* apply the test are federal courts in the Fourth Circuit. You should still cite to *Bowring* if you are bringing a case in another federal jurisdiction, because the court in your circuit might find it persuasive. For more information on what you may cite in your jurisdiction, see Chapter 2 of the *JLM*, "Introduction to Legal Research."

(b) Your Right to Treatment for Substance Abuse

The American Psychiatric Association incorporates in its definition of mental illness "substance-related disorders," which include illnesses like substance use, abuse, and withdrawal.[40] The law, however, does not always consider such diseases as rising to the level of seriousness[41] needed to require prison authorities to provide medical care to treat them.[42] But, many courts have found that prisoners have the right to treatment for substance abuse in certain circumstances. The sections below describe these situations.

(i) You Have No Right to Drug and Alcohol Rehabilitation in Prison

As a general rule, you have no right to rehabilitation while in prison.[43] Individual states or corrections departments may decide that rehabilitation is an important goal and may implement programs to achieve that aim, but the Constitution does not require them to do so. One application of this rule is that there is no right to narcotics or alcohol treatment programs in prison.[44] However, courts have at times ordered prisons to implement drug and alcohol treatment programs where their denial would otherwise lead to conditions that were so bad that they violated prisoners' rights to medical care; prisoners often raise these issues successfully in the context of broader claims about unconstitutional conditions of confinement.[45] Additionally, at least one court has found that prisoners should be "free to attempt rehabilitation or the cultivation of new socially acceptable and useful skills and habits."[46] It might be possible to argue that failure to receive drug treatment violates that freedom.

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39. *See* Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) (citing the *Bowring* test).

40. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders at 176 (4th ed. 1994).

41. A prisoner having a "serious medical need" triggers an analysis under Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976), which provides that deliberate indifference to that serious medical need violates the 8th Amendment's ban on cruel and unusual punishment. Cases like Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977), have extended this rule requiring treatment to the psychiatric context, but only where the prisoner has an illness that might be curable and where delay might cause harm. For more information on your rights when necessary treatment has been denied or delayed, please see Part B(2) of this Chapter, "Denied or Delayed Treatment."

42. *See*, *e.g.*, Pace v. Fauver, 479 F. Supp. 456, 458–59 (D.N.J. 1979) ("The Court does not regard plaintiffs' desire to establish and operate an alcoholic rehabilitation program within ... [p]rison as a serious medical need for purposes of Eighth Amendment and § 1983 analysis."), *aff'd*, 649 F.2d 860 (3d Cir. 1981). *But see* Marshall v. US, 414 U.S. 417, 433 n.3, 94 S. Ct. 700, 709 n.3, 38 L. Ed. 2d 618, 629 n.3 (1974) (Marshall, J., dissenting) (citing Senate Report characterizing drug addiction as a disease); State v. Sevelin, 554 N.W.2d 521, 524, 204 Wis. 2d 127, 134 (Wis. Ct. App. 1996) ("The unambiguous meaning of 'medical care' includes treatment of all diseases. Alcoholism is a disease.")

43. Marshall v. United States, 414 U.S. 417, 421–22, 94 S. Ct. 700, 704, 38 L. Ed. 2d 618, 623 (1974) (finding no "fundamental right" to rehabilitation from narcotics addiction after conviction of a crime and confinement in a penal institution rather than in a civil facility); *see also* Hutto v. Finney, 437 U.S. 678, 686 n.8, 98 S. Ct. 2565, 2571 n.8, 57 L. Ed. 2d 522, 531 n.8 (1978) ("[T]he Constitution does not require that every aspect of prison discipline serve a rehabilitative purpose."); Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982) (lack of rehabilitative programs does not violate the Constitution).

44. *See*, *e.g.*, Pace v. Fauver, 479 F. Supp. 456, 460 (D.N.J. 1979) (holding that prison authorities and not the court should decide whether to provide alcoholism treatment to prisoners), *aff'd*, 649 F.2d 860 (3d Cir. 1981).

45. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 989 (D.R.I. 1977) (ordering prison to establish drug and alcohol treatment program conforming to public health standards); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 677 (S.D. Tex. 1975) (requiring prison to establish treatment program for prisoners suffering from alcoholism and drug abuse in consultation with trained specialist); Barnes v. Gov't of Virgin Islands, 415 F. Supp. 1218, 1235 (D.V.I. 1976) (ordering prison to introduce drug and alcohol rehabilitation program); *see also* Laaman v. Helgemoe, 437 F. Supp. 269, 316–17 (D.N.H. 1977) (finding prisons have a duty to provide opportunities to overcome incarceration's degenerative aspects).

46. Laaman v. Helgemoe, 437 F. Supp. 269, 316–17 (D.N.H 1977) (creating an affirmative right to rehabilitation programs where their absence causes significant deterioration).

There is also no right to methadone or to the establishment of methadone maintenance programs in prison.[47] On the other hand, a few courts have found that you *do* have the right to ongoing drug treatment from programs in which you already participate.[48] This right extends primarily to pretrial detainees unable to post bail.[49] Since such individuals have not yet been found guilty and are instead in jail because they cannot afford to post bail or have been determined to be a flight risk or danger to the community, they cannot be punished beyond detention and the necessary restraint of liberty that it entails.[50] Forced rehabilitation is seen as a punishment, as is the pain suffered when methadone is discontinued. For more information on your right to treatment as a pretrial detainee, please see Part E(1) of this Chapter.

(ii) Your Right to Avoid Deterioration (Getting More Sick) While Incarcerated

Many courts have held that even if you do not have an absolute constitutional right to treatment for certain illnesses like substance abuse, you do have a right to avoid having your illness get worse while you are in prison.[51] Though some courts have not found a right to avoid getting more sick while incarcerated, several have at least found that where conditions are "so bad that serious physical or psychological deterioration is inevitable," you can state an Eighth Amendment claim of cruel and unusual punishment.[52]

So, if your drug or alcohol addiction is likely to worsen your condition, you might be able to claim failure to receive adequate treatment violates your right to avoid deterioration while in prison. Even though different federal circuits have established differing rules as to the extent of that right, at a minimum, if your deterioration results from the State's intent to cause harm,[53] you can claim the State violated your rights.

(iii) Your Right to Care for Withdrawal from Drugs and Alcohol

Another exception to the general rule that prisons do not need to provide medical care for substance-related disorders is that prisons *do* need to provide care for withdrawal, which can be excessively painful and dangerous, and is therefore considered a serious medical condition.[54] Because of the seriousness of withdrawal symptoms, you are entitled to treatment.[55] Most of the cases have arisen in the context of

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47. *See*, *e.g.*, Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978) ("There is no constitutional right to methadone ...."); Hines v. Anderson, 439 F. Supp. 12, 17 (D. Minn. 1977) (finding even though prisons cannot take away prescriptions without doctor's approval, they are not required to administer methadone as part of a maintenance program).

48. *See* Norris v. Frame, 585 F.2d 1183, 1189 (3d Cir. 1978) (finding interference with pretrial detainee's status as recipient of methadone infringed his rights); Cudnik v. Kreiger, 392 F. Supp. 305, 312–13 (N.D. Ohio 1974) (holding that it violates due process to deny pretrial detainees methadone that they are already receiving as part of drug treatment).

49. Cudnik v. Kreiger, 392 F. Supp. 305, 312 (N.D. Ohio 1974) (holding that it violates due process to deny pretrial detainees methadone that they are already receiving as part of drug treatment).

50. *See* Cudnik v. Kreiger, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (explaining that since pretrial detainees are considered innocent in the eyes of the law, they should be entitled to all liberties they would have were they not imprisoned, except that which is necessarily lost through detention).

51. Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977) ("We believe that while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well-being."); Ramos v. Lamm, 639 F.2d 559, 566 (10th Cir. 1980) (extending the right to avoid deterioration established in *Battle* to medical care context); Laaman v. Helgemoe, 437 F. Supp. 269, 316 (D.N.H 1977) (holding prisoners have an interest in avoiding physical and mental deterioration). *But see* Reddin v. Israel, 561 F.2d 715, 718 (7th Cir. 1977) ("[T]he state need not avoid conduct which may result in detrimental psychological effects unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain.").

52. Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982).

53. *See* Reddin v. Israel, 561 F.2d 715, 718 (7th Cir. 1977) ("[T]he state need not avoid conduct which may result in detrimental psychological effects unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain.").

54. *See, e.g.*, Kelley v. County of Wayne, 325 F. Supp. 2d 788, 791 (E.D. Mich. 2004) ("Heroin withdrawal is a serious medical condition."); Morrison v. Washington County, 700 F.2d 678, 681 (11th Cir. 1983) (concluding *delirium tremens* is a severe form of alcohol withdrawal that should be monitored because of the risk of death).

55. Liscio v. Warren, 901 F.2d 274, 276 (2d Cir. 1990) (finding that failing to examine pretrial detainee for three days as his health visibly declined because of alcohol withdrawal could constitute deliberate indifference); Pedraza v. Meyer, 919 F.2d 317, 319–20 (5th Cir. 1990) (finding that pretrial detainee who had not received treatment for his heroin withdrawal symptoms could have stated a claim of deliberate indifference to serious medical needs); State *ex rel.* Walker v. Fayette County, 599 F.2d 573, 576 (3d Cir. 1979) (*per curiam*) (where pretrial detainee had informed jail that he was addicted to heroin, failure to treat him for withdrawal could show deliberate indifference).

pretrial detainees going through withdrawal just after arrest, but the courts have not explicitly limited the right to treatment to pretrial detainees; if a convicted prisoner is experiencing a serious medical need due to withdrawal, he should receive treatment.

2. What to do if Treatment is Denied or Delayed

The above Subsection discussed situations in which a prisoner claims that the medical care he received is inadequate. This Subsection instead focuses on your rights when needed treatment has been *deliberately* (purposely) denied or delayed.[56] Although courts do not like second-guessing doctors' decisions,[57] a prison official who denies or delays treatment knowing that you need that treatment might be violating your constitutional right to be free of "cruel and unusual punishment" under the Eighth Amendment.[58] A court that finds this deliberate denial or delay will intervene to help you.

(a) You Must Satisfy the Deliberate Indifference Standard

To state a successful claim for denial or delay of treatment, you must show that prison officials acted with "deliberate indifference" to your medical or mental health needs.[59] The Supreme Court has decided that a prison official shows deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety."[60] For example, a prisoner might submit evidence that prison officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs."[61]

A prison official can be deliberately indifferent by: (1) taking action (doing something); or (2) refusing to act (not doing something).[62] An example of an act showing deliberate indifference might be *knowingly* stopping hormone treatments for a prisoner with Gender Identity Disorder. An example of a deliberate omission might be refusing to provide a prisoner with essential medication.

Although the deliberate indifference standard has developed in the context of serious medical care, it also applies to medically necessary treatment for mental illnesses.[63] Therefore, deliberate indifference to the serious mental health needs of a prisoner violates the Eighth Amendment just as much as deliberate indifference to physical medical needs.[64]

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56. *See*, *e.g.*, Pinon v. Wisconsin, 368 F. Supp. 608, 610 (E.D. Wis. 1973) (explaining that courts usually refuse to second-guess whether a prisoner's treatment is adequate, but that the situation is different where the prisoner alleges that the facility has completely denied him treatment). See Part B(3) of Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care," for more information on delayed or denied medical treatment.

57. *See*, *e.g.*, Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (finding prisoner's disagreement with medical treatment did not rise to the level of violating his rights); Smith v. Marcantonio, 910 F.2d 500, 502 (8th Cir. 1990) (granting doctor immunity where prisoner disagreed with the doctor-ordered treatment).

58. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment.").

59. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("[A] prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

60. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (finding a violation only if an official knows of facts that demonstrate excessive risk to a prisoner's health and actually draws an inference of risk based on those facts, but then disregards that risk).

61. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (refusing to hold for plaintiff where he did not present this evidence).

62. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) ("In order to state a cognizable claim [of deliberate indifference], a prisoner must allege *acts or omissions* sufficiently harmful to evidence deliberate indifference to serious medical needs." (emphasis added)).

63. *See* Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) (reiterating that there is no underlying distinction between medical care for physical and psychological ills); Belcher v. City of Foley, 30 F.3d 1390, 1396 (11th Cir. 1994) (the right to treatment "encompasses a right to psychiatric and mental health care").

64. *See*, *e.g.*, Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002) ("Th[e] duty to provide medical care encompasses detainees' psychiatric needs."); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) ("A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills.").

Many deliberate indifference claims about inadequate prison mental health care are based on the facility's lack of adequate and qualified mental health staff.[65] Several courts have concluded that the lack of an on-site psychiatrist in a large prison is unconstitutional.[66] The failure to train correctional staff to work with prisoners with mental illness can also constitute deliberate indifference.[67]

Among the deficiencies in prison mental health care that courts have held actionable are the lack of or inadequate mental health screening on intake,[68] the failure to follow up with prisoners who have known or suspected mental disorders,[69] the failure to hospitalize prisoners whose conditions cannot adequately be treated in prison,[70] gross departures from professional standards in treatment,[71] and the failure to separate prisoners with severe mental illness from those without mental illness.[72] (Mixing prisoners with mental

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65. Greason v. Kemp, 891 F.2d 829, 837–40 (11th Cir. 1990) (prison clinic director, prison system mental health director, and prison warden could be found deliberately indifferent based on their knowing toleration of a "clearly inadequate" mental health staff); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) (doctor's failure to refer a suicidal prisoner to a psychiatrist could constitute deliberate indifference); Cabrales v. County of L.A., 864 F.2d 1454, 1461 (9th Cir. 1988) (deliberate indifference was established where mental health staff could only spend "minutes per month" with disturbed prisoners), *vacated*, 490 U.S. 1087, 109 S. Ct. 2425, 104 L. Ed. 2d 982 (1989), *reinstated*, 886 F.2d 235, 236 (9th Cir. 1989); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) ("woefully short" mental health staffing supported a finding of unconstitutionality), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability, since they could not reasonably have known their conduct in permitting overcrowding violated prisoners' rights); Tillery v. Owens, 719 F. Supp. 1256, 1302–03 (W.D. Pa. 1989) ("gross staffing deficiencies" and lack of mental health training of nurses supported finding of deliberate indifference), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Langley v. Coughlin, 715 F. Supp. 522, 539–40 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989) (use of untrained or unqualified personnel with inadequate supervision by psychiatrist supported constitutional claims); Inmates of Allegheny County Jail v. Peirce, 487 F. Supp. 638, 643 (W.D. Pa. 1980) (systemic deficiencies in mental health staffing can be held to constitute deliberate indifference); Ruiz v. Estelle, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980) (setting forth six components of a minimally adequate mental health treatment program), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982).

66. Balla v. Idaho State Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984) ("There must be at least the equivalent of one full-time psychiatrist to provide treatment to those inmates capable of deriving benefit and to establish written procedures whereby inmates are analyzed and their progress monitored.").

67. Langley v. Coughlin, 709 F. Supp. 482, 483–85 (S.D.N.Y. 1989) (finding deliberate indifference where, among other reasons, officers lacked proper training); Kendrick v. Bland, 541 F. Supp. 21, 25–26 (W.D. Ky. 1981) (incidents arising from failure to adequately train staff constituted cruel and unusual punishment); *see also* Sharpe v. City of Lewisburg, 677 F. Supp. 1362, 1367–68 (M.D. Tenn. 1988) (upholding jury verdict based on city and county's failure to train police to deal with mentally disturbed individuals).

68. Ruiz v. Estelle, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability, since they could not reasonably have known their conduct in permitting overcrowding violated prisoners' rights); Balla v. Idaho State Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984) (adopting the Ruiz v. Estelle elements of minimally adequate care, which include screening on intake); Inmates of Allegheny County Jail v. Peirce, 487 F. Supp. 638, 642–44 (W.D. Pa. 1980); Pugh v. Locke, 406 F. Supp. 318, 324 (M.D. Ala. 1976), *aff'd in part and modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057; 57 L. Ed. 2d 1114 (1978).

69. Clark-Murphy v. Foreback, 439 F.3d 280, 289–92 (6th Cir. 2006) (holding certain staff members were not entitled to qualified immunity for failing to get psychiatric assistance for an obviously psychotic prisoner); Terry *ex rel.* Terry v. Hill, 232 F. Supp. 2d 934, 943–44 (E.D. Ark. 2002) (holding lengthy delays in transferring detainees with mental illness to mental hospital were unconstitutional); Arnold *ex rel.* H.B. v. Lewis, 803 F. Supp. 246, 257 (D. Ariz. 1992) (finding 8th Amendment violation in part because of the lack of an adequate system for referring prisoners with behavioral problems to psychiatric staff).

70. Arnold *ex rel.* H.B. v. Lewis, 803 F. Supp. 246, 257–58 (D. Ariz. 1992) (holding that prison officials' actions constituted deliberate indifference to serious medical needs which violated the Eighth Amendment).

71. Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) (care that "so deviated from professional standards that it amounted to deliberate indifference" would violate the Constitution); Greason v. Kemp, 891 F.2d 829, 835 (11th Cir. 1990) ("grossly inadequate psychiatric care" can be deliberate indifference); Waldrop v. Evans, 871 F.2d 1030, 1033–35 (11th Cir. 1989) ("grossly incompetent or inadequate care"—here, that prisoner's medication was discontinued abruptly and without reason—can constitute deliberate indifference); Langley v. Coughlin, 715 F. Supp. 522, 540–41 (S.D.N.Y. 1989) ("consistent and repeated failures ... over an extended period of time" could establish deliberate indifference).

72. Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 560–61 (1st Cir. 1988) (transferring a prisoner with mental illness to general population in a crowded jail with no psychiatric facilities constituted deliberate indifference);

illness with those who do not have mental illnesses might violate the rights of both groups.[73]) Courts have also held that housing prisoners with mental illness under conditions of extreme isolation is unconstitutional.[74] Another recurring situation is stopping psychiatric medications without reason, often with disastrous results.[75]

Also remember that the deliberate indifference standard applies to a *significant denial or delay*[76] of adequate medical care. If you feel that you have been denied mental health treatment, or if you feel that it has been unnecessarily delayed, and you wish to claim deliberate indifference, you must:

(1) state facts that are sufficient to allege a serious medical need for which medical care has not been provided; and
(2) assert that a prison official must have been aware of the need for medical care, or at least of facts which might have led the official to believe there was a need for medical care.[77]

Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) (prisoners with mental health problems must be placed in a separate facility and not in the administrative/punitive segregation area), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991) (finding qualified immunity protected mayor and correctional officials from liability); Langley v. Coughlin, 709 F. Supp. 482, 484–85 (S.D.N.Y. 1989) (placement of prisoners with mental illness in punitive segregation resulted in conditions that might violate the 8th Amendment), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Tillery v. Owens, 719 F. Supp. 1256, 1303–04 (W.D. Pa. 1989) (Constitution requires separate unit for those with severe mental illness, i.e., those who will not take their medication regularly, maintain normal hygienic practices, accept dietary restrictions, or report symptoms of illness), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Finney v. Mabry, 534 F. Supp. 1026, 1036–37 (E.D. Ark. 1982) (Constitution requires separate facility for the "most severely mentally disturbed" prisoners); Inmates of Allegheny County Jail v. Peirce, 487 F. Supp. 638, 644 (W.D. Pa. 1980) (jail must establish a separate area for prisoners who "are seriously disturbed and require observation, protection, or restricted confinement"); *see also* Morales Feliciano v. Hernandez Colon, 697 F. Supp. 37, 48 (D.P.R. 1988) (prisoners with mental illness may not be housed in a jail for more than 24 hours), *aff'd on other grounds sub nom.* Morales-Feliciano v. Parole Bd. of P.R., 887 F.2d 1 (1st Cir. 1989); Delgado v. Cady, 576 F. Supp. 1446, 1452, 1456 (E.D. Wis. 1983) (upholding the housing of psychotic prisoners in segregation unit and finding unconstitutional the *coerced* double celling of suicidal prisoners with other prisoners: "[I]t is cruel and unusual punishment to *force* an inmate to share a cell with a suicidal person solely to act as a prophylactic agent. It is the duty of the staff and not the inmates to provide surveillance over suicidal inmates.").

73. DeMallory v. Cullen, 855 F.2d 442, 444–46 (7th Cir. 1988) (the allegation of a prisoner without mental illness that he was knowingly housed in a high-security unit with prisoners with mental illness, who caused filthy and dangerous conditions, stated an 8th Amendment claim against prison officials); Nolley v. County of Erie, 776 F. Supp. 715, 738 (W.D.N.Y. 1991) (finding that the *automatic* segregation of an HIV-positive prisoner with prisoners with mental illness violated the prisoner's due process rights because of "the stigma associated with being involuntarily placed in [the segregated ward, which was] known to house inmates who were ... psychologically unstable [in addition to HIV-positive, because] both of these classifications could have engendered serious adverse consequences for her" therefore, her confinement "was qualitatively different from the punishment normally suffered by a person convicted of a crime."), *rev'd in part on other grounds*, 798 F. Supp. 123 (W.D.N.Y. 1992); Tillery v. Owens, 719 F. Supp. 1256, 1303 (W.D. Pa. 1989) (citing increased tension for prisoners without mental illness and danger of retaliation against those with mental illness), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Langley v. Coughlin, 709 F. Supp. 482, 484–85 (S.D.N.Y. 1989), *appeal dismissed*, 888 F.2d 252 (2d Cir. 1989); Langley v. Coughlin, 715 F. Supp. 522, 543–44 (S.D.N.Y. 1988); *see* Hassine v. Jeffes, 846 F.2d 169, 178 n.5 (3d Cir. 1988) (holding prisoners could seek relief from the consequences of other prisoners' failure to receive adequate mental health services).

74. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of prisoners with serious mental illness from "supermax" prison, where inmates spend all but four hours per week in their cells); Madrid v. Gomez, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995) (holding keeping prisoners with mental illness or those at a high risk for suffering injury to mental health in Pelican Bay isolation unit unconstitutional), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999). *But see* Scarver v. Litscher, 434 F.3d 972, 976–77 (7th Cir. 2006) (holding that prison officials who were not shown to have known that keeping a psychotic prisoner under conditions of extreme isolation and heat would aggravate his mental illness could not be found deliberately indifferent).

75. *See* Greason v. Kemp, 891 F.2d 829, 831–33 (11th Cir. 1990) (prisoner killed himself); Waldrop v. Evans, 871 F.2d 1030, 1032 (11th Cir. 1989) (prisoner blinded and castrated himself). *Cf.* Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999) (holding 8th Amendment requires prison officials to provide prisoners with mental illness with a supply of medication upon release). *But see* Campbell v. Sikes, 169 F.3d 1353, 1367–68 (11th Cir. 1999) (holding discontinuation of medication by doctor who misdiagnosed a prisoner, having not obtained her medical records but having read a summary, was not deliberate indifference).

76. *See, e.g.*, Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346–47 (3d Cir. 1987) (holding that prison officials are deliberately indifferent if they delay care "in order to make [you] suffer," or if they "erect arbitrary and burdensome procedures that result in interminable delays" to care) (internal citations omitted).

77. Farmer v. Brennan, 511 U.S. 825, 845–46, 114 S. Ct. 1970, 1983–84, 128 L. Ed. 2d 811, 831–32 (1994).

A court will find you suffered deliberate indifference if you are able to show both of these requirements. To further explain these elements, we examine each part of a deliberate indifference claim in more detail.

(i) You Must Show Serious Medical Need

The first part of your deliberate indifference claim must include facts that show you had a serious medical need for which you did not receive treatment. A medical need is "serious" when there is a substantial risk that you will suffer serious harm if you do not receive adequate treatment.[78] Courts have also defined a "serious medical need" as one that a doctor has diagnosed as requiring treatment or one that is so obvious that a non-doctor could easily recognize the need.[79] For example, where a prisoner has attempted suicide, the court has found a serious medical need.[80]

(ii) You Must Show Actual Knowledge of Your Serious Medical Need

For the second part of your deliberate indifference claim, you must show prison officials *actually knew* you needed mental health care but still failed to treat you.[81] In *Farmer v. Brennan*, the Supreme Court explained a prison official "knows" of a risk when he is not only aware of facts that would lead to the conclusion that the prisoner faces a substantial risk of serious harm but also actually comes to that conclusion.[82] In other words, this part of the deliberate indifference test is subjective (from the point of view of that particular prison official); he must actually believe you will suffer some serious harm before a court will find he had knowledge of the risk.[83] But, if the risk is *so* obvious, a jury can assume the prison official knew of the risk. For example, the *Farmer* Court noted that if a plaintiff shows the risk of prisoner attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it," that could be enough to show actual knowledge of the risk.[84]

(b) What *Does Not* Count as Deliberate Indifference?

Courts will refuse to find deliberate indifference in some situations. The deliberate indifference standard is meant to address "unnecessary and wanton infliction of pain."[85] Acts or omissions that are not purposeful, or where the prison officials had no reason to know you might suffer serious harm, will not satisfy the standard.[86] A complaint alleging inadequate psychiatric care because officials did not pursue treatment the prisoner would have chosen will not meet the deliberate indifference standard.[87] This is because prison officials have the right to exercise discretion in deciding what treatment is adequate for a serious medical

78. Harrison v. Barkley, 219 F.3d 132, 136 (2d Cir. 2000).

79. *See*, *e.g.*, Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203 (1st Cir. 1990).

80. *See e.g.*, Perez v. Oakland County, 466 F.3d 416, 423–25 (6th Cir. 2006) (finding that the prisoner's suicide attempts raised a genuine issue as to whether the treating doctor had been deliberately indifferent to a serious medical need); Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001) (holding that the "serious need" element was met where the prisoner suffered from a mental illness that led him to commit suicide, and finding that mental illness more generally poses a serious medical need).

81. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[A] prison official cannot be found liable under the Eighth Amendment … unless the official knows of and disregards an excessive risk to inmate health or safety.").

82. Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994). ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment").

83. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

84. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981–82, 128 L. Ed. 2d 811, 829 (1994) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

85. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

86. Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) ("An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.").

87. *See* United States v. DeCologero, 821 F.2d 39, 42 (1st Cir. 1987) ("[T]hough it is plain that an inmate deserves *adequate* medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy.").

need. In view of this discretion, courts will not find deliberate indifference when prison officials were merely negligent,[88] made a mistake, or had a difference of opinion regarding adequate medical care.[89]

Similarly, a complaint based on malpractice (improper or negligent treatment by a doctor) or misdiagnosis (a medical mistake) will not meet the high deliberate indifference standard.[90] Thus, "a complaint that a doctor has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."[91] You may instead be able to file a medical malpractice claim alleging negligence. See *JLM*, Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," for more information about negligence and how to file a tort claim.

(c) How to Bring a Deliberate Indifference Claim Under Section 1983

If you think your case does meet the standard for deliberate indifference, you may bring a claim of deliberate indifference to your personal health and well-being under 42 U.S.C. § 1983 ("Section 1983"). You can use Section 1983 to sue cities and local governments for constitutional violations, including, for instance, the government body controlling the institution where the violation took place.[92] For detailed information on bringing a claim under this law, please read Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law." If you plan to file your suit in federal court, you should also read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

You can also use Section 1983 to challenge inadequate prison medical care as an Eighth Amendment violation.[93] To prove inadequacy, you must show: (1) you have a mental health need that is serious enough that denial of treatment violates the Constitution; and (2) the prison was "deliberately indifferent" to this serious mental health need.[94] You must show the policy or custom at the prison directly caused the constitutional violation.

In the context of a mental health complaint, you should keep a few things in mind. First, if you believe you suffer from a mental illness and want medical treatment, you should tell prison officials. If you are afraid you will hurt yourself or other people, you should tell prison officials that too. Prison officials can only be held accountable under the deliberate indifference standard if they have actual knowledge of, or some other reason to believe, that you have a mental illness that requires treatment.[95]

C. What to do if you Receive Unwanted Treatment

While the previous Parts of this Chapter focused on your right to receive medical treatment for your mental illness, this Part discusses treatment that you do not want. You should also look at Part C(5)(a) and (E)(1) of Chapter 23 of the *JLM*, "Your Right to Adequate Medical Care."

1. You Have the Right to Informed Consent

You have a right to receive enough information about a potential medical treatment to make a reasonable decision whether to try the treatment.[96] After you learn about the treatment, you can choose

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88. Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994) ("[D]eliberate indifference entails something more than mere negligence, [but] the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.").

89. *See* Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995) (finding that, except in exceptional circumstances, a prisoner's disagreement with his medical treatment is not enough for a deliberate indifference claim).

90. *See*, *e.g.*, Domino v. Tex. Dept. of Crim. Justice, 239 F.3d 752, 756 (5th Cir. 2001) ("It is indisputable that an incorrect diagnosis by prison medical personnel does not suffice to state a claim for deliberate indifference."); United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864, 867 (2d Cir. 1970) (finding that the "faulty judgment on the part of the prison doctor in choosing to administer one form of the same medication instead of another" is not deliberate indifference).

91. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976).

92. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694–95, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978).

93. Gil v. Vogilano, 131 F.Supp.2d 486 (S.D.N.Y. 2001).

94. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994).

95. R.T. V. Gross, 298 F.Supp.2d 289, 297-99 (N.D.N.Y. 2003) (finding that prison official who did not believe an inmate's symptoms were serious could not be deliberately indifferent).

96. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (holding that since prisoners have a right to refuse treatment, they have a right to get enough information about the treatment "to make an informed decision" whether to accept or refuse it). To prove that officials violated this right, you must show: (1) government officials did not tell you enough about the treatment for you to make an informed decision, (2) because you couldn't make an informed decision, you were given treatment that you would have refused if you had been informed, and (3) the prison officials acted with deliberate

whether or not to give permission for the doctor to treat you.[97] This right is known as "informed consent," and it means that you have the right to learn about all treatment options and the risks associated with each option *before* you allow mental health doctors or other caregivers to treat you. Informed consent is a way of making sure that you understand, before you start the treatment, what a treatment includes, and what effects it may have on you.[98] Informed consent is an important part of your right to refuse treatment.[99] If you do not give your consent, you are refusing treatment; however, informed consent does have some limits. If you pose a danger to yourself or others, the doctor may be able to treat you in a manner that the doctor believes will immediately help and benefit you.[100]

Doctors have a duty to obtain informed consent from patients, including prisoners,[101] before treating them. A doctor must almost always inform you of options and risks when there is penetration of the body (such as with a scalpel, needle, or pill).[102] Also, when the direct side effects of treatment are painful or serious, your informed consent is usually required.[103] Some states specifically require by law that doctors consider alternative forms of care,[104] and inform you of the procedures and risks associated with each. You should research what the law is in your state.

You should carefully consider whether or not to give your consent to receive treatment. State law varies as to whether informed consent for one treatment will extend to all risks associated with a particular procedure or any additional procedures that a doctor believes will help you. In New York, if you have not consented to a previous treatment, doctors cannot imply consent to a separate course of treatment, even in an emergency.[105] The rule in California is that consent to a previous treatment does not mean consent to another course of treatment; there, a court held that a prisoner who consented to shock treatment did not necessarily consent to administration of drugs that produced nightmares.[106]

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indifference to your right to your right to be informed. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006).

97. *See In re* Ingram, 689 P.2d 1363, 1368, 102 Wash. 2d 827, 836 (1984) (en banc) (finding a person has a right to choose one medical treatment over another, or to refuse treatment, even if the treatment she refuses is more likely to cure her); Schloendorff v. Society of N.Y. Hospital 211 N.Y. 125, 130 105 N.E. 92, 93 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault."), *superseded by statute on other grounds*; Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 738–39, 370 N.E.2d 417, 424 (1977) (finding that both the constitution and other laws protect a person from "nonconsensual invasion of his bodily integrity").

98. Zebarth v. Swedish Hosp. Med. Ctr., 499 P.2d 1, 8, 81 Wash. 2d 12, 23 (1972) (en banc) (defining "informed consent" as enough information to let a patient decide his treatment "by reasonably balancing the probable risks against the probable benefits."); *see* Clarkson v. Coughlin, 898 F. Supp. 1019, 1048 (S.D.N.Y. 1995) (referring to New York's statutory definition of informed consent, which requires the medical professional to tell the patient about "such alternatives [to the treatment or medication in question] and the reasonably foreseeable risks and benefits involved as a reasonable [medical or dental] ... practitioner under similar circumstances would have disclosed in a manner permitting the patient to make a knowledgeable evaluation") (citing N.Y. Pub. Health Law § 2805-d(1) (McKinney 1993)).

99. Pabon v. Wright, 459 F.3d 241, 246 (2d Cir. 2006) (holding prisoner's constitutionally protected liberty interest in refusing medical care encompasses a right to receive information that would enable a reasonable person to decide).

100. *See* Washington v. Harper, 494 U.S. 210, 225–26, 110 S. Ct. 1028, 1039, 108 L. Ed. 2d 178, 201 (1990) (holding that in order to protect other prisoners, a prison can give anti-psychotic medication against a prisoner's will).

101. *See* U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969) (finding a constitutional violation of prisoner's rights where he received different procedural treatment than civilians receive).

102. *See* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269, 110 S. Ct. 2841, 2846, 111 L. Ed. 2d 224, 236 (1990) ("[T]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."); *See also* N.Y. Pub. Health Law § 2805-d(1) (McKinney 2007).
informed consent is generally required for medical treatment."); N.Y. Pub. Health Law § 2805-d (McKinney 2007).

103. *See, e.g.*, Clites v. State, 322 N.W.2d 917, 922–23 (Iowa Ct. App. 1982) (en banc) (rejecting administration of "major tranquilizers" to patient with a mental illness without consent where the medical industry standard required written consent from patient or guardian).

104. N.Y. Correct. Law §§ 402(2) (McKinney 2007) (Stating that before committing an imate, a doctor must "consider alternative forms of care and treatment available"); *see also* Cobbs v. Grant, 502 P.2d 1, 9–10, 8 Cal. 3d 229, 242–43 (1972) (finding doctors must reasonably disclose alternatives to a proposed treatment plan and the risks of any treatment).

105. *In re* Storar, 52 N.Y.2d 363, 376, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272 (1981), *superseded by statute on other grounds*.

106. Mackey v. Procunier, 477 F.2d 877, 877–79 (9th Cir. 1973).

2. Medication Over Prisoner's Objection

Medication is one form of treatment. Prisoners have a limited right to refuse antipsychotic or psychotropic drugs.[107] Such medications help cure certain symptoms of mental illness but also alter a person's perception, emotions, or behavior. For example, psychotropic drugs can have serious side effects, such as nightmares and muscle tics (sudden movements). The law provides protection against undue administration of such serious drugs by giving prisoners the right to refuse treatments that interfere to a great degree with the body. However, this right is not absolute—there are some circumstances when medication can be administered, even over your objection.[108]

(a) Your Right to Refuse Medication Under the Due Process Clause

Under the Due Process Clause of the United States Constitution, "no State shall … deprive any person of life, liberty, or property, without due process of law."[109] Some deprivations are so important that the Constitution requires states to establish processes to ensure that you are not deprived unfairly. For example, in *Vitek v. Jones*,[110] the Supreme Court found that characterizing a prisoner as mentally ill and moving him to a psychiatric hospital were such serious ("grievous") losses that the State was required to have procedural protections in place to make sure that the loss was fair.[111] These losses included the harm to the prisoner's reputation and the change in conditions of confinement.[112]

Similarly, before the State can force you to take medication, it must have procedural protections in place to make sure you are not receiving the medication randomly or unfairly. You must receive procedures, including notice and a hearing, before you can be involuntarily medicated.[113] A decision to treat you with drugs triggers procedural due process protections because drugs can produce serious and irreversible side effects[114] that represent a significant State intrusion into your body.[115]

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107. Washington v. Harper, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 1036–37, 108 L. Ed. 2d 178, 197–98 (1990) (holding antipsychotic drugs can be administered only if "a mental disorder exists which is likely to cause harm if not treated" and if one psychiatrist has prescribed and another reviewed the treatment); Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224, 242 (1990) ("[P]risoners possess 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.'") (quoting Washington v. Harper, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990)).

108. Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1039–40, 108 L. Ed. 2d 178, 201–02 (1990) (holding that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest") OK. The government may also medicate criminal defendants to make them competent to stand trial for certain serious charges, as long as the treatment is medically appropriate, unlikely to have serious side effects, and necessary "significantly to further important governmental trial-related interests." Sell v. United States, 539 U.S. 166, 179, 123 S. Ct. 2174, 2184–2185 , 156 L. Ed. 2d 197, 211 (2003); *See* United States v. Baldovinos, 434 F.3d 233, 241–42 (4th Cir. 2006) (finding that involuntarily medicating a mentally ill defendant was not in his best interests but was solely done to make him competent to stand trial, but upholding the conviction based on the federal plain error rule after finding that the mistake did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings), *cert. denied*, 546 U.S. 1203, 126 S. Ct. 1407, 164 L. Ed. 2d 107 (2006).

109. U.S. Const. amend. XIV, § 1.

110. Vitek v. Jones, 445 U.S. 480, 487–90, 100 S. Ct. 1254, 1261–62, 63 L. Ed. 2d 552, 561–63 (1980).

111. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

112. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

113. Washington v. Harper, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 1036–37, 108 L. Ed. 2d 178, 198 (1990); *see*, *e.g.*, Mills v. Rogers, 457 U.S. 291, 299 n.16, 102 S. Ct. 2442, 2448 n.16, 73 L. Ed. 2d 16, 23 n.16 (1982) (noting that involuntary administration of psychotropic drugs bears on liberty interests), *cert. denied,* 484 U.S. 1010, 108 S. Ct. 709, 98 L. Ed. 2d 660 (1988).

114. Washington v. Harper, 494 U.S. 210, 229–30, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178, 203–04 (1990) (describing the side effects of antipsychotic drugs, including severe spasms and neurological dysfunction); *see* Nat'l Alliance on Mental Illness, *About Medications*, http://www.nami.org/template.cfm?section=About_Medications (last visited March 10, 2010); Nat'l Inst. of Mental Health, U.S. Dept. of Health & Human Servs., *Medications*, (2002), *available at* http://www.nimh.nih.gov/health/publications/medications/medications.pdf. To order National Institute of Mental Health publications, call (301) 443-4513 or (866) 615-6464 (toll-free), or (301) 443-8431 (TTY), or write to the National Institute of Mental Health, Office of Communications, 6001 Executive Blvd., Room 8184, MSC 9663, Bethesda, MD 20892-9663.

115. Youngberg v. Romeo, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 37 (1982) ("[Liberty] from bodily

(b) Your Right to Refuse Medication Based on State Law

Your right to refuse medication may come not only from the Constitution, but also from state laws that specifically require procedural protections (such as notice and a hearing) before you can be forcibly medicated.[116] If your state has such a law, it must follow the procedures set out by the law.[117] If the State wishes to avoid the process that is laid out by state law, it must have a rational reason for doing so, or the avoidance will be considered a due process violation. In other words, the State must show that it has legitimate reasons, reasonably related to its interests, before it may take away an expectation that was granted through its own law.

Unless the State can show both that a prisoner has a mental illness and is dangerous,[118] or that a state rule has so many protections that it is unlikely that the prisoner will receive medication unfairly,[119] it cannot force a prisoner to take medication without some procedural protections.

(c) Your Right to Refuse Medication Under the Eighth Amendment

In some circumstances, you also have a right to refuse medication under the Eighth Amendment, which prohibits cruel and unusual punishment.[120] Administration of drugs as a means of punishment (rather than as treatment) is unconstitutional.[121]

Forcible treatment with psychotropic medication that causes pain or fright can constitute cruel and unusual punishment, violating the Eighth Amendment.[122] The district court in *Souder v. McGuire* cited cases in the Eighth and Ninth Circuits[123] that held that treating prisoners with drugs without consent may raise Eighth Amendment claims. In those cases, the courts found that drugs causing pain or fright could invade the body and mental processes to an unconstitutional degree.

While some courts have emphasized that an allegation that you were given a particular kind of medicine is not enough to prove that giving you the drug was cruel and unusual (and thus a violation of the Eighth Amendment),[124] the Supreme Court has held that states may not avoid the obligations of the Eighth Amendment just by calling a medical act a "treatment."[125]

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restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (quoting Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 18, 99 S. Ct. 2100, 2109, 60 L. Ed. 2d 668, 682–83 (1979)); Washington v. Harper, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178, 203 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.").

116. *See*, *e.g.*, Wash. Rev. Code Ann. § 71.05.215(1) (West 2008 & Supp. 2009) ("Right to Refuse Antipsychotic Medication").

117. Washington v. Harper, 494 U.S. 210, 221, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990) (finding that a Washington state policy requiring a finding of mental illness and dangerousness before a prisoner can be forcibly medicated with antipsychotic drugs "creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist"); Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561–62 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.").

118. Washington v. Harper, 494 U.S. 210, 232–33, 110 S. Ct. 1028, 1042–43, 108 L. Ed. 2d 178, 204–05 (1990) (finding that a state policy was consistent with Due Process because review of medical treatment required asking (1) whether the prisoner had a mental illness, and (2) whether the mental illness made the prisoner a danger to himself or to others, and it required constant monitoring of drug dosage).

119. Washington v. Harper, 494 U.S. 210, 222, 235, 110 S. Ct. 1028, 1037, 1044, 108 L. Ed. 2d 178, 198, 207 (1990) (upholding a state policy that required psychiatric evaluation, notice, and hearing for a prisoner before forcible medication); *see also* Lappe v. Loeffelholz, 815 F.2d 1173, 1176 (8th Cir. 1987) (finding that prisoner's constitutional rights were not violated by a treatment transfer where he had access to written notice, an adversarial hearing with an independent decision maker, and legal counsel).

120. U.S. Const. amend. VIII.

121. Washington v. Harper, 494 U.S. 210, 241, 110 S. Ct. 1028, 1047, 108 L. Ed. 2d 178, 211 (1990) ("Forced administration of antipsychotic medication may not be used as a form of punishment.").

122. Souder v. McGuire, 423 F. Supp. 830, 831–32 (M.D. Pa. 1976) ("[I]nvoluntary administration of drugs which have a painful or frightening effect can amount to cruel and unusual punishment, in violation of the Eighth Amendment.").

123. Knecht v. Gillman, 488 F.2d 1136, 1140 (8th Cir. 1973) (holding that a drug that caused prisoners to vomit for 15 minutes to an hour "can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it"); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (finding that "serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes" could be raised where a prisoner who had consented to shock treatment was given extra drugs, without his consent, that caused fright and nightmares).

124. *See*, *e.g.*, Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970) ("It is only where an inmate's complaint of

(d) Limitations on Your Right to Refuse Medication

The right to refuse medication does not mean that the State can never medicate you against your will. Instead, it means that the State must provide a process (such as a hearing) that reduces the chance that the decision to medicate you will be random or arbitrary.

One important limitation on a prisoner's right to refuse medication is danger or emergency. Prisons may administer psychotropic drugs over a prisoner's objection if the prisoner poses a danger to himself or others. Receiving medication against your will is called "medication over objection." In *Washington v. Harper*,[126] the Supreme Court upheld a state policy allowing treating a prisoner without consent if a licensed psychiatrist found that the prisoner suffered from a mental disorder, and the prisoner was "gravely disabled"[127] or posed a "likelihood of serious harm"[128] to himself or others. Therefore, situations in which a prisoner presents a danger to himself or the general prison population are an exception to the right to refuse treatment. A good example is a Kansas prisoner who objected to psychotropic medication but was not allowed to refuse treatment because he had previously destroyed his prison cell and started fights with other prisoners.[129]

There are a few other limitations on a prisoner's right to refuse treatment. A prisoner may receive medication over objection despite objections or religious beliefs if the State can prove that its interests are legitimate.[130] Also, the State may give drugs to a prisoner over his objections if the court feels that enough procedural protections are in place to ensure that the decision to treat with drugs was reasonable.[131] You should also note that, in some cases, if a doctor finds that medication is necessary and in the prisoner's medical interest, then the State does not have to grant a prisoner's request to stop taking the drugs so that he can prove he can do without them.[132]

A determination of whether the right to refuse is limited in any given case "must be defined in the context of the inmate's confinement."[133] This means that the court will review your current prison conditions, the threat of danger that you pose to yourself or others, and the procedures that the State has in place to protect you from an unfair decision to treat you with drugs.[134]

(e) How Do Courts Decide Whether State Interests Are Legitimate?

To determine whether or not the State may rightfully force a prisoner to take medication due to a situation of danger or emergency, courts apply what is called the *Turner v. Safley* rational basis test. With this test, the court tries to see if the State's decision to treat a non-consenting prisoner with psychotropic

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improper or inadequate medical treatment depicts conduct so cruel or unusual as to approach a violation of the Eighth Amendment's prohibition of such punishment that a colorable constitutional claim is presented.").

125. *See* Trop v. Dulles, 356 U.S. 86, 95, 78 S. Ct. 590, 595, 2 L. Ed. 2d 630, 639 (1958) (finding that substance—not a label—determines the meaning of a statute).

126. Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

127. Wash. Rev. Code Ann. § 71.05.020(17) (West 2008 & Supp. 2009) (defining that term as a condition resulting from a mental disorder where there is a danger of serious physical harm from inability to provide for one's "essential human needs" like health or safety, or where there is a severe decrease in function evidenced by repeated and increasing loss of control over actions).

128. Wash. Rev. Code Ann. § 71.05.020(23) (West 2008 & Supp. 2009) (defining the term as a substantial risk that a person will physically harm himself, others, or property of others evidenced by threats or suicide attempts or actual harm to himself, others, or property).

129. Sconiers v. Jarvis, 458 F. Supp. 37, 38–39 (D. Kan. 1978).

130. Smith v. Baker, 326 F. Supp. 787, 787–88 (W.D. Mo. 1970) (denying relief to a prisoner who objected to administration of drugs "against [his] will and religious belief"), *aff'd*, 442 F.2d 928 (8th Cir. 1971).

131. *See*, *e.g.*, Lappe v. Loeffelholz, 815 F.2d 1173, 1176 (8th Cir. 1987) (finding that prisoner's constitutional rights were not violated by a treatment transfer where he had written notice, an adversarial hearing with an independent decision maker, and legal counsel).

132. *See*, *e.g.*, Sullivan v. Flannagan, 8 F.3d 591, 592 (7th Cir. 1993) (finding the Illinois Department of Corrections, which had forced prisoner to take mind-altering drugs against his will for five years after he was determined to be a danger to others, was not constitutionally required to give him a chance to stop taking the drugs to prove he didn't need them).

133. Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990).

134. *See* Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990) (holding that certain procedures, such as having different psychiatrists prescribe and review medication, ensure "that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement").

drugs is "reasonably related to legitimate penological interests."[135] Legitimate State interests include the health and safety of the public, the prisoner, and the general prison population. The rational basis test presumes that State interests are legitimate. This means that a court will consider the State's choice to medicate a prisoner reasonable unless it does not serve one or more of these legitimate State goals.

There are some common arguments that prisoners use to counter the presumption that the State's actions are the result of a legitimate interest. One challenge to medication over objection is that the decision to medicate is unfair or arbitrary (random or not supported by a reason).[136] In such cases, courts consider a competing risk that the determination of danger will be incorrect and may cause harm to the prisoner's reputation.[137] In order to avoid mistakes in determining if there is a danger, taking the drugs must be in the prisoner's medical interest and can only be for treatment purposes.[138]

In addition, states must provide certain procedural safeguards to ensure that the decision to medicate is not arbitrary or erroneous. Common safeguards include (1) an administrative hearing before an independent decision maker (someone not involved in the prisoner's treatment but who may come from within the institution);[139] (2) written notice;[140] (3) the right to be present at an adversary hearing;[141] and (4) the right to present and cross-examine witnesses.[142] While the State may provide a lawyer to represent the prisoner in administrative hearings, providing a non-attorney adviser may satisfy due process.[143]

3. Challenging Transfers for Treatment

(a) What Is a Treatment Transfer?

Many treatments are available for prisoners and sometimes these treatments must be administered at a site outside of the prison, requiring that the prisoner be transferred from his present location in order to be treated. A prisoner may submit to the transfer or voluntarily agree to various forms of treatment including medication, counseling, therapy, or commitment to a psychiatric center. Or, in some cases, the prisoner may be treated involuntarily. This Section explains when the prison can and cannot transfer you for treatment if you refuse to consent to the transfer.

Prisoners who suffer from a mental illness may be treated at one of several possible locations. For more detail on these facilities, please see Part A(2) above. Transferring you to a facility that has a significantly different quality than the general conditions of prison confinement might violate your constitutional rights.

(b) Procedural Safeguards Under the Due Process Clause

Lawful imprisonment may take away some of your rights, but you still have a right to basic protections.[144] In certain circumstances, basic procedures must be in place to protect against unfair actions on the part of the State. For more on procedural due process, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings," and Chapter 23, "Your Right to Adequate Medical Care." A hearing and written notice are two common examples of procedures that might be required, often before a prisoner can be involuntarily committed to a psychiatric hospital.[145]

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135. Washington v. Harper, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990) (citing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded by statute on other grounds*).

136. *See*, *e.g.*, Washington v. Harper, 494 U.S. 210, 217, 110 S. Ct. 1028, 1034, 108 L. Ed. 2d 178, 195 (1990) (challenging as arbitrary a decision allowing treatment with antipsychotic drugs against the will of a prisoner with mental illness without a judicial hearing).

137. Vitek v. Jones, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565–66 (1980) (finding that characterization of mental illness, transfer, and treatment had "stigmatizing consequences").

138. Washington v. Harper, 494 U.S. 210, 227, 110 S. Ct. 1028, 1040, 108 L. Ed. 2d 178, 202 (1990).

139. Vitek v. Jones, 445 U.S. 480, 494–96, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552, 566–67 (1980).

140. Vitek v. Jones, 445 U.S. 480, 494–96, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552, 566–67 (1980).

141. Vitek v. Jones, 445 U.S. 480, 494–96, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552, 566–67 (1980).

142. Vitek v. Jones, 445 U.S. 480, 494–96, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552, 566–67 (1980).

143. Washington v. Harper, 494 U.S. 210, 236, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990).

144. Wolff v. McDonnell, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974, 41 L. Ed. 2d 935, 950 (1974) ("[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.").

145. Vitek v. Jones, 445 U.S. 480, 495–96, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552, 566–67 (1980); *see*, *e.g.*, Washington v. Harper, 494 U.S. 210, 235, 110 S. Ct. 1028, 1044, 108 L. Ed. 2d 178, 207 (1990) (reviewing a Washington state policy which required a hearing and notice of that hearing). *See also* Superintendent, Mass. Corr. Inst. at Walpole v.

Prison to hospital transfers might mean a significant change in living conditions and type of confinement. A determination of mental illness by a doctor and subsequent transfer does not automatically mean that a prisoner has a mental illness for the purposes of other laws in the state.[146] Still, there is a chance that the prisoner might suffer harm to his reputation. When the risk of harm is high, your constitutional right to due process might be triggered.

In addition, if the State tries to avoid the requirements imposed by its own laws, then a law giving you the right to procedures before transfer will also trigger due process protections. Where state regulations require a finding of mental illness before transfer, the State creates an "objective expectation" in the prisoner that there will be a procedure to determine whether or not a mental illness exists.[147] Without such procedures, the prisoner could suffer a due process violation. In sum, due process protection may be required because of the risk of harm (physical or reputational) to you from a particular state act or because the State gave you an expectation through the law it created that some particular act would be followed. The due process protection to which you are entitled is the same, no matter how your liberty interest is implicated.[148]

In *Vitek v. Jones*, the Supreme Court found that a Nebraska statute requiring a finding of mental illness before transfer to an outside mental facility created an expectation among prisoners that transfer would occur *only* if they were found to have mental illness.[149]

Under *Vitek*, the State must adequately protect your liberty interests (if it has created them through state law) in the transfer process by providing:

(1) Written notice that the prison is considering your transfer;
(2) A hearing;
(3) An opportunity to present witness testimony and cross-examine state witnesses at the hearing;
(4) An independent decision maker;
(5) A written statement by the decision maker stating the reasons and evidence relied on for your transfer;
(6) Legal assistance from the State if you cannot afford your own; and
(7) Effective and timely notice of rights (1) through (6).[150]

All of these protections are triggered if your liberty interests are implicated *and* there is a chance that you will suffer a serious loss. Failure to provide them violates your rights.

(i) Are Your Liberty Interests Implicated?

Courts determine whether the State can deprive you of a liberty interest by balancing the interests of the State (for example, prison safety) with your liberty interest in freedom from random deprivations (for example, the right to agree or disagree to medication). If the interest of the prisoner is found to be stronger

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Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985) (noting that when a prisoner is entitled to due process, Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) requires that the inmate receive "(1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.").

146. *See In re* Will of Stephani, 250 A.D. 253, 254–57, 294 N.Y.S. 624, 624 (3d Dept. 1937) (finding that a prisoner who had died while confined in a mental hospital was not necessarily incompetent to write his will, even though the New York Surrogate's Court Act required that to be valid, someone writing his will "at the time of executing it, was in all respects [mentally] competent to make a will, and not under any restraint").

147. Vitek v. Jones, 445 U.S. 480, 489–90, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–63 (1980) (holding that the prisoner had a state-created liberty interest because Nebraska law created an objective expectation that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison).

148. *See* Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990) (holding the Due Process Clause gives a person no greater right than that recognized under state laws that create a liberty interest).

149. Vitek v. Jones, 445 U.S. 480, 489–90, 100 S. Ct. 1254, 1262, 63 L. Ed. 2d 552, 562–63 (1980).

150. Vitek v. Jones, 445 U.S. 480, 494–95, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552, 566 (1980). However, you may not be entitled to all of these procedures. In Shakur v. Selsky, 391 F.3d 106, 119 (2d Cir. 2004), the Court held that "regardless of state procedural guarantees, the only process due an inmate is that minimal process guaranteed by the Constitution, as outlined in" Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (emphasis in original). As explained above in note 146, the minimal process may be limited to (1) advance written notice; (2) an opportunity for you to call witnesses and present documentary evidence in your defense; and (3) a written document from the fact-finder explaining the reasons for your transfer and the evidence relied on.

than the interest of the State, then the individual is entitled to due process protections.[151] Whether or not a prisoner has a state-created liberty interest depends on whether the loss the prisoner faces is serious.

Liberty interests are limited; prisoners are entitled to freedom from restraint only to the extent that restraint cannot exceed the conviction sentence in an unexpected manner.[152] This is true unless there is an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[153] So, for due process to apply, you must have both a liberty interest *and* a deprivation of that liberty that imposes a significant and atypical (unusual) hardship. Only if both of these factors are present are you entitled to due process protections[154] like written notice and a hearing. Transfer from one prison to another within the State's system does not necessarily create a liberty interest.[155]

The Equal Protection Clause of the Fourteenth Amendment of the Constitution prohibits states from denying any person equal protection of the laws. In other words, state laws must treat each person in the same manner as others in similar conditions and circumstances. In the context of mental health, the equal protection rights of prisoners who are being committed entitle them to substantially the same procedures as those available to free persons subjected to an involuntary commitment proceeding.[156] In *United States* ex rel. *Schuster v. Herold*, the Second Circuit found that a New York prisoner who was transferred from prison to an institution for the criminally insane was deprived of equal protection because there was an unlawful difference between procedural protections given to civilians facing involuntary commitment and those given to prisoners.[157] Therefore, to determine the procedural protections that apply in your state, you should

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151. Mathews v. Eldridge, 424 U.S. 319, 334–35, 96 S. Ct. 893, 902–03, 47 L. Ed. 2d 18, 33 (1976) (developing a three-part balancing test to determine whether state-provided procedural protections are sufficient).

152. Sandin v. Connor, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–30 (1995) (recognizing that while states may create liberty interests, these interests are generally limited to freedom from restraint that is significant and atypical rather than expected), *overruled on other grounds by* Cray v. Carey, 2006 U.S. Dist. LEXIS 43286 (E.D. Cal. June 26, 2006) (*unpublished*).

153. Sandin v. Connor, 515 U.S. 472, 484–45, 115 S. Ct. 2293, 2300–01, 132 L. Ed. 2d 418, 430–31 (1995) (finding that holding a prisoner in a segregated housing unit for 30 days "though concededly punitive, does not present a dramatic departure from the basic conditions of [prisoner's] indeterminate sentence"), *overruled on other grounds by* Cray v. Carey, 2006 U.S. Dist. LEXIS 43286 (E.D. Cal. June 26, 2006) (*unpublished*).

154. Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) ("To prevail, [the prisoner] must establish both that the confinement or restraint creates an 'atypical and significant hardship' under *Sandin*, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint."). *See also* Palmer v. Richards, 364 F.3d 60, 64 (2d Cir. 2004) ("Factors relevant to determining whether the plaintiff endured an 'atypical and significant hardship' include 'the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions' and 'the duration of the disciplinary segregation imposed compared to discretionary confinement.'" (quoting Wright v. Caughlin, 132 F.3d 133, 136 (2d Cir. 1998)).

155. *See* Montanye v. Haymes, 427 U.S. 236, 242, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471 (1976) (holding that "no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events"); Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (finding mere transfer of prisoner from one prison to another within the state's system does not implicate prisoner's liberty interests and does not violate due process). *But see* Wilkinson v. Austin, 545 U.S. 209, 223–24, 125 S. Ct. 2384, 2394-95, 162 L. Ed. 2d 174, 190-91 (2005) (noting that Ohio's Supermax facility "imposes an atypical and significant hardship under any plausible baseline" and thus prisoners have a liberty interest in not being confined in the facility).

156. U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) ("[W]e believe that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings ...."); *see also* Souder v. McGuire, 516 F.2d 820, 821–22 (3d Cir. 1975) (finding that "serious equal protection and due process issues" were raised regarding the constitutionality of a Pennsylvania mental health statute that gave the warden a choice whether or not to adopt certain procedures for the commitment of people already in a correctional facility even though the same procedures were mandatory for the involuntary commitment of "non-confined," civilian adults); Evans v. Paderick, 443 F. Supp. 583, 585 (E.D. Va. 1977) (rejecting defendant's argument that a Virginia civil commitment procedure was not required when the person to be committed is a state prisoner); People v. Arendes, 86 Misc. 2d 468, 470, 382 N.Y.S.2d 684, 686 (Sup. Ct. Queens County 1976) ("[W]here the issue in the first instance is mental illness itself or dangerousness, there is no valid ground to distinguish between a civilian and a prisoner since the issues have no connection to the circumstance of incarceration and the same psychiatric criteria will apply to all people to determine mental illness."); *cf.* Baxstrom v. Herold, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966) (holding that a New York state prisoner was denied equal protection of the laws by the statutory procedure that allowed him to be civilly committed at the expiration of his sentence without jury review available to all other civilly committed people in New York).

157. U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969).

review civil commitment laws in addition to laws that govern corrections facilities. We discuss procedural protections and treatment transfers later in this Chapter.

(ii) What is a Serious Loss?

Courts might consider transfers to be a serious loss because of three factors: (1) there is a high risk of stigma associated with a declaration of mental illness; (2) there is an actual change in the type of confinement; and (3) there is actual behavior modification treatment.[158] As with challenges to medication over objection, these changes require that the State provide procedural protections.

The test courts apply to determine if a loss is serious examines whether the loss is "significant and atypical."[159] Significant and atypical state actions are those actions *not* similar to prison conditions or those that substantially alter the environment, duration, or degree of the prison condition. For example, a prisoner who was placed in segregated confinement did not suffer a serious loss that implicated a liberty interest because the segregation was of the same duration and degree as that of his normal prison conditions.[160]

More specifically, under the *Vitek* standard, "significant and atypical" means that the loss suffered by the prisoner is different than the loss already suffered as a result of prison confinement.[161] So, the loss to the prisoner in *Vitek* was "serious" enough to require due process protections because he had reasonably developed an "objective expectation" based on the state law[162] and the risk that mistaken mental illness could damage the prisoner's reputation was great.[163] In another case, a loss of good-time credits was significant because such a loss of credits meant that there was a change in the length of the prison term.[164] Finally, confinement in a psychiatric prison unit might be far more restrictive than prison, and therefore might be considered a serious loss, implicating a liberty interest.[165]

(iii) When Due Process Procedures Are Not Required For Transfer

The protections discussed in the previous Subsection might not be necessary if the transfer is voluntary or on an emergency basis. Additionally, the Due Process Clause does not protect every change in your conditions of confinement, even if that change has a negative impact on you.[166] This is true even if the prisoner has a reasonable expectation that state actions will produce a particular result. In some jurisdictions, the law says that the State may not need to have procedures in place for you to participate in

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158. Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561 (1980).

159. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (holding that disciplinary segregation of a prisoner "did not present the type of atypical, significant deprivation" of a state-created liberty interest after comparing conditions inside and outside of disciplinary segregation in the prison and finding that the placement "did not work a major disruption in his environment"), *overruled on other grounds by* Cray v. Carey, 2006 U.S. Dist. LEXIS 43286 (E.D. Cal. June 26, 2006) (*unpublished*). *See also* Tellier v. Fields, 280 F.3d 69, 80 (2d Cir. 2000) (finding that as a factual matter, "a confinement of 514 days under conditions that differ markedly from those in the general population" may be 'atypical and significant.'").

160. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (finding segregated confinement that "mirrored" prison conditions was not significant and atypical), *overruled on other grounds by* Cray v. Carey, 2006 U.S. Dist. LEXIS 43286 (E.D. Cal. June 26, 2006) (*unpublished*); *see also* Frazier v. Coughlin, 81 F.3d 313, 317–18 (2d Cir. 1996) (finding no significant deprivation of a liberty interest to prisoner who failed to show that confinement conditions in a SHU were "dramatically different" from basic prison conditions). *But see* Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000) (holding that an extended confinement in the SHU may amount to a deprivation of a liberty interest).

161. Vitek v. Jones, 445 U.S. 480, 493, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 565 (1980) (finding "transfer of a prisoner to a mental hospital is [not] within the range of confinement justified by imposition of a prison sentence").

162. Vitek v. Jones, 445 U.S. 480, 489–90, 100 S. Ct. 1254, 1261–62, 63 L. Ed. 2d 552, 562–63 (1980).

163. Vitek v. Jones, 445 U.S. 480, 495, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552, 566 (1980).

164. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974) (holding that a state law allowing a reduction in sentence for good time, and providing that such credit would only be forfeited for serious misbehavior, created a recognizable liberty interest).

165. U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1078 (2d Cir. 1969) ("Not only did the transfer effectively eliminate the possibility of [the prisoner's] parole, but it significantly increased the restraints upon him, exposed him to extraordinary hardships, and caused him to suffer indignities, frustrations and dangers, both physical and psychological, [that] he would not be required to endure in a typical prison setting.").

166. Meachum v. Fano, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) ("[W]e cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause.").

clinical evaluations[167] (you are not considered to be under the same great hardship in this case as with commitment). In a few states, procedural protections do not have to occur before transfer, but may instead occur promptly after physical transfer.[168]

As with challenges to medication over objection, there are limits to a transfer challenge. Transfer to a mental health facility without a hearing is generally not a due process violation when a prisoner poses an immediate threat to himself or the general population.[169] These transfers are called emergency commitments. However, a hearing must be held as soon as possible after commitment.[170]

If it is determined you will be transferred to a psychiatric hospital or unit, you cannot challenge a transfer back to prison after treatment because no liberty interest existed.[171] For example, in Washington, D.C., prisoners may be moved, with the superintendent's certification, from psychiatric hospitals back to prisons after being restored to health.[172] In New York, administrative transfers from a state hospital to a prison do not violate due process because they are not considered to be punishment.[173] You should check the laws in your state to determine the necessary steps the state must take to transfer you back to prison.

4. If You Are Transferred to a Hospital or Other Treatment Facility

If you are transferred or committed to a psychiatric facility, you maintain many of the same rights you had in prison, including the right to treatment and the right to adequate medical care. Similarly, if you are confined in a hospital or treatment facility prior to serving your criminal sentence in prison, you may be entitled to have your time spent there count toward your sentence.

(a) How Long Will I Be Held?

Generally, the duration of commitment is left to the judgment of clinical mental health staff and prison officials, but it *cannot* be longer than your criminal sentence unless you are first granted significant due process protections.[174] Under New York State law, for example, the psychiatric hospital director may apply for a new commitment after your sentence expires.[175] If this happens in a state where there are requirements set up for a civil commitment proceeding, your criminal sentence is not relevant to any post-sentence confinement, and the State must provide the same procedural safeguards before committing or holding you for psychiatric care that it would if you were a non-prisoner.[176] This means that if the State determines you need further commitment and treatment after your prison sentence has ended, you will be treated as a non-prisoner. If the psychiatric hospital director successfully extends commitment past your term sentence, you have the right to another hearing before a jury to determine whether commitment to a civilian mental health facility is appropriate.[177]

(b) What Happens to My Good-Time Credits?

In some states, a prisoner may lose the opportunity to earn good-time credits after a mental illness determination and hospitalization.[178] The reasoning that many courts give for this policy is that the goals of

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167. *See* Trapnell v. Ralston, 819 F.2d 182, 184–85 (8th Cir. 1987) (finding there was no need for a pre-transfer hearing where the transfer was temporary and for evaluation purposes only); United States v. Jones, 811 F.2d 444, 448 (8th Cir. 1987) (finding "a temporary transfer for a psychological evaluation places no more of an imposition on a prisoner than does a transfer for administrative reasons," and transfers for administrative reasons do not require pre-transfer hearings).

168. Baugh v. Woodward, 808 F.2d 333, 336 (4th Cir. 1987).

169. *See, e.g.*, Mignone v. Vincent, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976).

170. *See, e.g.*, Mignone v. Vincent, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976).

171. Jackson v. Fair, 846 F.2d 811, 815 (1st Cir. 1988) (holding that as the prisoner did not have a liberty interest in remaining at a psychiatric hospital, no hearing was required before returning the prisoner to prison).

172. D.C. Code Ann. § 24-503(b) (LexisNexis 2005).

173. Cruz v. Ward, 558 F.2d 658, 660 (2d Cir. 1977).

174. Baxstrom v. Herold, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966) (holding that a New York prisoner "was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like [the prisoner], nearing the expiration of a penal sentence").

175. N.Y. Correct. Law § 402(10) (McKinney 2003).

176. Baxstrom v. Herold, 383 U.S. 107, 110, 86 S. Ct. 760, 762, 15 L. Ed. 2d 620, 623 (1966).

177. N.Y. Correct. Law § 402(11) (McKinney 2003).

178. *See, e.g.*, Urban v. Settle, 298 F.2d 592, 593 (8th Cir. 1962) (finding that a prisoner who has "been removed to a

hospitalization differ from the goals of imprisonment. Hospitalization is meant to treat prisoners with mental illness,[179] while incarceration is intended to punish and also rehabilitate.[180] However, the Eighth Circuit found that there is a difference between meritorious credits (credits that are given at the State's discretion) and statutory good-time credits (credits that a state statute specifically grants for particular behavior). Unlike discretionary credits, statutory credits come from state laws. Therefore, a loss of statutory credits based on a mental health assessment could violate your constitutional right to equal protection under the Fourteenth Amendment, which prohibits states from applying the law differently to different citizens in the same condition and circumstances.[181]

Even if the law in your jurisdiction does not permit you to continue to earn credits while you are hospitalized, your existing credits may be held in abeyance (paused) during treatment, meaning that all good-time credits that would have been credited are restored when you are transferred back to prison.[182] However, if you have existing credits, in many jurisdictions they will not apply until you are restored to health; in other words, you are not entitled to early release if you are still hospitalized on your early release date.[183] Other states, in contrast, do permit you to receive good-time credits even while in the hospital. For example, the Connecticut Supreme Court has found that the language of Connecticut's statute orders the corrections commissioner to apply earned good-time credit to *any* prisoner's sentence,[184] in keeping with the idea that the law should treat equally prisoners with mental illness confined in hospitals and those incarcerated in prisons.[185] Since the law varies according to the statutes of each jurisdiction, you should check the law in your state, or the United States Code if you are in federal prison, to determine what happens to your credits during transfer to a hospital.

(c) Can I Receive Credit for Pre-Sentence Confinement in a Hospital or Treatment Program?

Though the law varies significantly by state regarding whether you can receive custody or conduct credits for time spent and good behavior in institutions other than prisons, there are a few general rules you can use to determine if you are entitled to custody credit.[186] First, if the facility you are in before you receive

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hospital for defective delinquents" under federal law to determine mental competency is not entitled to receive further good time for conditional release purposes until, in the judgment of the superintendent of the hospital, he has become "restored to sanity or health"); Bush v. Ciccone, 325 F. Supp. 699, 701 (W.D. Mo. 1971) (holding under the express provisions of 18 U.S.C. § 4241, credit for good time is suspended as to a prisoner who has been found by a Board of Examiners to be insane or of unsound mind). *But see* Sawyer v. Sigler, 320 F. Supp. 690, 699 (D. Neb. 1970) (distinguishing between meritorious good time, which is permissive and may be withheld, and statutory good time, which cannot be denied without violating the Equal Protection Clause of the 14th Amendment if the withholding does not result from the prisoner's misconduct), *aff'd*, 445 F.2d 818 (8th Cir. 1971). The federal law that these cases mention has changed several times, so you should proceed with care, researching the current case and statutory law. If you are in state custody, you should check your state's statutes.

179. *See*, *e.g.*, People v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (Cal. Ct. App. 2006) (finding that where a prisoner was confined pretrial to treat him to restore his competency to stand trial, he could not later recover credit for that time).

180. People v. Smith, 175 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822–23 (Cal. Ct. App. 1981) ("The purposes of the provision for 'good time' credits ... are [to encourage prisoners] to conform to prison regulations … and to make an effort to participate in what may be termed 'rehabilitative activities' ... The rationale of 'good time' credit as a reward for behavioral conformity does not readily fit the company of the mentally disturbed." (quoting People v. Saffell, 599 P.2d 92, 97, 25 Cal. 3d 223, 233, 157 Cal. Rptr. 897, 903 (Cal. 1979)).

181. Cochran v. Kansas, 316 U.S. 255, 257, 62 S. Ct. 1068,1070, 86 L. Ed. 1453, 1455 (1942).

182. Dobbs v. Neverson, 393 A.2d 147, 150 n.9 (D.C. 1978)

183. *See, e.g.*, Dobbs v. Neverson, 393 A.2d 147, 154 (D.C. 1978) (holding a prisoner transferred from a prison to a hospital under the D.C. transfer statute is not entitled to statutory early release unless restored to mental health).

184. *See, e.g.*, Murray v. Lopes, 529 A.2d 1302, 1305–06, 205 Conn. 27, 34–35 (Conn. 1987).

185. Murray v. Lopes, 529 A.2d 1302, 1307–08, 205 Conn. 27, 36–38 (Conn. 1987).

186. Custody credit is statutory credit that prisoners may be awarded for their time spent in confinement prior to trial and sentencing. The reason that many states allow prisoners to count these days as part of their sentence is that it would be unfair to treat defendants who can post bail differently than those who do not and who therefore have to stay in jail. *See*, *e.g.*, People v. Callahan, 50 Cal. Rptr. 3d 677, 680–81, 144 Cal. App. 4th 678, 684 (Cal. Ct. App. 2006) (stating that the purpose of actual custody credit statute is to eliminate unequal treatment of indigent and non-indigent defendants). However, courts have taken differing approaches as to whether to grant that time to prisoners detained for reasons other than inability to post bail or bond, like psychiatric evaluation or drug treatment. This section will discuss some of these approaches so that you can figure out whether you are entitled to credit for any time you spent pre-sentence in an institution other than a jail.

your sentence is the "functional equivalent of a jail," you might be entitled to credit.[187] Second, some courts make distinctions based on whether the program you are in is voluntary[188] or involuntary.[189] These are general rules, though, so you should make sure to find out how courts have interpreted the law in your state.

(i) Credit for Time in a Mental Hospital

If you were housed in a hospital before being sentenced to prison, you might be entitled to custody credit for your time there. State statutes and courts' interpretations of those laws determine whether you can receive custody credits. Several states have found that, because time in these institutions is similar to being in jail, you should receive credit.[190] As one court stated, "The physical place of confinement is not important as the [defendant] continu[ing] to be in jail while held in custody at the hospitals. [The prisoner] was not free on bail, had no control over his place of custody and was never free to leave the hospitals. For all practical intents and purposes, he was still in jail."[191] But other courts have found prisoners housed in psychiatric hospitals pre-sentence underwent treatment rather than incarceration and therefore could not receive custody credits for that time.[192] These courts reason the two types of confinement are different in kind: imprisonment punishes, while hospitalization or civil commitment provide treatment.[193] So, some courts have found awarding credits for time in non-penal institutions toward prison sentences does not make sense.

(ii) Credit for Time in Drug Treatment

The law varies as to whether you may receive credit for time you spent in narcotics or alcohol treatment prior to serving your sentence. Some states permit credit,[194] and some states do not.[195] Additionally, like in

187. Maniccia v. State, 931 So.2d 1027,1030 (Fla. Dist. Ct. App. 2006).

188. Pennington v. State, 398 So.2d 815, 816 (Fla. 1981) (noting that the prisoner there was not entitled to credit for violating the terms of her probation, which included attending live-in drug treatment).

189. Maniccia v. State, 931 So.2d 1027,1030 (Fla. Dist. Ct. App. 2006) (holding that where confinement is coercive, a prisoner is entitled to credit for pre-sentence time in a "lockdown facility", even if the prisoner requested treatment there); Kansas v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (Kan. 1976) (*per curiam*) (finding a prisoner in pretrial custody at a hospital where he was not free to leave was effectively in jail and therefore entitled to custody credit for his time there).

190. *See, e.g.*, State v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (Kan. 1976) (*per curiam*) (holding that the word "jail" meant a place of confinement, and included a hospital that the prisoner was not free to leave); Maniccia v. State, 931 So.2d 1027, 1028 (Fla. Dist. Ct. App. 2006) (pretrial confinement in a "lockdown psychiatric hospital" entitles prisoner to credit for time served); Murray v. Lopes, 529 A.2d 1302, 1305, 205 Conn. 27, 33–34 (Conn. 1987) (holding that statute entitles prisoners confined pre-sentence to credit for time served); People v. Smith, 120 Cal. Rptr. 54, 56, 120 Cal. App. 3d 817, 822 (Cal. Ct. App. 1981) (finding prisoner entitled to credits for time spent in hospital when proceedings were suspended because he was incompetent to stand trial).

191. State v. Mackley, 552 P.2d 628, 629, 220 Kan. 518, 519 (Kan. 1976) (*per curiam*).

192. Harkins v. Wyrick, 589 F.2d 387, 391–92 (8th Cir. 1979) (finding prisoner's due process and equal protection rights were not violated when he was not credited for time undergoing evaluation and treatment at a hospital prior to serving his sentence); Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976) (holding it did not violate prisoner's rights to deny him credit for time in a psychiatric hospital, where the purpose was treatment rather than punishment, unless state law provides otherwise, which it did not); People v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (Cal. Ct. App. 2006) (finding that where a prisoner was confined pretrial to treat him to restore his competency to stand trial, he could not later recover credit for that time); Closs v. S.D. Bd. of Pardons and Paroles, 656 N.W. 2d 314, 317–19 (S.D. 2003) (because the time that prisoner spent in civil commitment was not punitive and because no South Dakota statute provided a right to credit for time served while awaiting trial, court refused to award credits); State v. Sorenson, 617 N.W. 2d 146, 147, 150 (S.D. 2000) (*per curiam*) (holding that prisoner was not entitled to credit for pre-sentence confinement to undergo psychiatric evaluation unless he was confined only because he could not afford to post bail).

193. *See* Kansas v. Hendricks, 521 U.S. 346, 361–62, 117 S. Ct. 2072, 2082, 138 L. Ed. 2d 501, 515 (1997); Harkins v. Wyrick, 589 F.2d 387, 392 (8th Cir. 1979) (holding that time in hospital was rehabilitative, not punitive); Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976) ("The state hospital was established for the confinement, treatment, and rehabilitation of the mentally ill ... [not] for purposes of punishment ... ."); People v. Callahan, 50 Cal. Rptr. 3d 677, 683, 144 Cal. App. 4th 678, 687 (Cal. Ct. App. 2006) (prisoner's confinement was "nonpenal and treatment-oriented").

194. *See, e.g.*, State v. Sevelin, 554 N.W.2d 521, 523, 204 Wis. 2d 127, 132–33 (Wis. Ct. App. 1996) (finding that state statute's definition of in "custody" for the purpose of determining whether the prisoner should get pre-sentence credit includes those temporarily outside of a correctional institution in order to receive medical care, which included treatment for alcoholism); Lock v. State, 609 P.2d 539, 543–46 (Alaska 1980) (interpreting statute granting credit for time "in custody" to include time in non-penal rehabilitation centers, since these institutions also involve restraints on liberty); People v. Rodgers, 144 Cal. Rptr. 602, 606, 79 Cal. App. 3d 26, 33 (Cal. Ct. App. 1978) (holding "custody" includes housing in live-in drug treatment, and so defendant was entitled to credit for time spent there); People v.

the hospitalization context, whether you may count the days in treatment toward your sentence often depends on the nature of the institution and the terms of your confinement there, such as whether or not you will be returned to prison if you fail to complete the program.[196] Typically, the court that sentences you is free to determine whether to award you credit.[197]

(d) How Does Commitment Affect Parole?

Although there is no constitutional right to parole,[198] the State may not use a mental illness as a reason to deny a parole hearing to a prisoner.[199] Even if you have been determined to have a mental illness, you have the right to a parole hearing and the same procedures that prisoners without mental illness have at their hearings.[200] You also should not be denied parole because you have a qualifying mental illness[201] but have not been provided with mental health care by the prison.[202] If state regulations provide for parole and specific conditions of parole, then you may have a constitutionally protected liberty interest in the procedures afforded by the statute.[203] For more information, please see Chapter 35: "Getting Out Early: Conditional & Early Release," and Chapter 32: "Parole" of the *JLM*. You should also check the laws of your state to determine whether procedural protections apply to parole denial.

D. Conditions of Confinement for Prisoners With Mental Illness

This Part explains how a prisoner's mental health may be a factor in determining conditions of confinement and in disciplinary proceedings. Section 1 details the rights of prisoners who are subjected to isolation and solitary confinement. This includes an explanation of the steps taken by many states to exclude prisoners with serious mental illness from isolated confinement and to increase mental health services for prisoners held in restrictive settings. Section 2 explains a prisoner's right to have mental health considered in disciplinary proceedings. Some states require that prison administrators consider a prisoner's mental health when deciding whether and how to sanction prisoners for disciplinary misconduct.

Strange, 283 N.W.2d 806, 808, 91 Mich. App. 596, 600–01 (Mich. Ct. App. 1979) ("[W]e believe that the circumstances under which defendant was ordered to the rehabilitation center amounts to a confinement analogous to jail.").

195. *See, e.g.*, Pennington v. State, 398 So. 2d 815, 816–17 (Fla. 1981) (holding that because "[h]alfway houses, rehabilitative centers, and state hospitals are not jails," prisoner who attended live-in drug treatment was not entitled to statutory credit for time spent there pretrial); Commonwealth v. Fowler, 930 A.2d 586, 597–98 (Pa. Super. Ct. 2007) (holding that prisoner was not "in custody," within the meaning of the statute granting credit for time in custody prior to sentence, where he participated in drug treatment program that did not involve lock-down but did require reinstatement of court case if the defendant breached the terms of his program); State v. Vasquez, 736 P.2d 803, 804 (Arizona,1987) (holding that in determining whether time spent in a facility constitutes "custody" to be included as jail credit, circumstances of placement are of greater significance than the nature of the facility itself).

196. *See, e.g.*, Lock v. State, 609 P.2d 539, 546 (Alaska 1980) (holding that prisoner would be returned to prison if he violated the terms of the drug treatment program).

197. *See*, *e.g.*, Commonwealth v. Fowler, 930 A.2d 586, 589 (Pa. Super. Ct. 2007) (stating that the sentencing court acted within its discretion in denying credit for time served in voluntary drug treatment program).

198. Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 2104, 60 L. Ed. 2d 668, 675 (1979) (finding that Nebraska parole statute created a protected liberty interest a prisoner may enforce).

199. *See*, *e.g.*, Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (finding a prisoner cannot be denied a parole hearing afforded to other prisoners solely because he is in a mental hospital); People *ex rel.* Newcomb v. Metz, 64 A.D.2d 219, 223, 409 N.Y.S.2d 554, 557 (3d Dept. 1978) (finding that mental competency is a factor to be considered during a parole revocation hearing, not an issue to be determined prior to the hearing).

200. *See*, *e.g.*, Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W. Va. 1976) (holding that liberty interest for the prisoner with mental illness included the right to a parole hearing and also the right to several procedural protections).

201. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (finding there is a right to psychological treatment provided "(1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial").

202. Bowring v. Godwin, 551 F.2d 44, 46 (4th Cir. 1977) (reversing dismissal of prisoner's complaint that he had been denied parole in part because of his mental illness, for which he had not received treatment).

203. *See* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7–8, 99 S. Ct. 2100, 2103–04, 60 L. Ed. 2d 668, 675–764 (1979) (finding Nebraska parole statute created a protected liberty interest a prisoner may enforce).

1. Isolation and Solitary Confinement

Isolating prisoners with mental illness in Special Housing Units (SHUs) or "keep-lock" for various reasons—among them protection or discipline—is a practice that courts have recognized as harmful.[204] Although isolation of prisoners with mental illness is not unconstitutional as a rule,[205] it is subject to Eighth Amendment limitations.[206] There are certain conditions under which isolating prisoners with mental illness can cross constitutional bounds. When those conditions exist, courts will be more likely to intervene to help prisoners. For instance, courts will grow more suspicious if prisoners are segregated indefinitely without review[207] or if psychological harm threatens.[208]

Several federal courts have found that, even though segregation does not by itself violate the Constitution, isolation can pose particular risks for those with mental illness or on the verge of developing mental illness.[209] For these groups, isolation can provide extreme stress and worsen their conditions,[210] and

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204. It has been known for many years that isolated confinement—the deprivation of human contact and other sensory and intellectual stimulation—can have disastrous consequences. *See In re* Medley, 134 U.S. 160, 169, 10 S. Ct. 384, 386, 33 L. Ed. 835, 839 (1890) (finding that "[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition (state of foolishness), from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community"); Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1988) ("there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant)."). Modern courts have reiterated these consequences in addressing present-day forms of isolated confinement. *See again* Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988) ("[T]he record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (citing expert's affidavit regarding effects of SHU placement on individuals with mental disorders); Baraldini v. Meese, 691 F. Supp. 432, 446–47 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev'd on other grounds sub nom.* Baraldini v. Thornburgh, 884 F.2d 615 (D.C. Cir. 1989); Bono v. Saxbe, 450 F. Supp. 934, 946 (D.C.Il.1978) ("Plaintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit."), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); Madrid v. Gomez, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (concluding, after hearing testimony from experts in corrections and mental health, that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU") *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

205. *See*, *e.g.*, Jackson v. Meachum, 699 F.2d 578, 583 (1st Cir. 1983) (finding that a prisoner with mental illness had no constitutional right to contact with other prisoners, even if it would have therapeutic value); Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) ("[W]e are not persuaded that the SHU, as currently operated, violates Eighth Amendment standards vis-à-vis all inmates."), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

206. *See e.g.* Helling v. McKinney, 509 U.S. 25, 34–35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32–33 (1993) holding that prison conditions that "posed an unreasonable risk of harm to [a prisoner's] future health" may violate the 8th Amendment.) ; Casey v. Lewis, 834 F. Supp. 1477, 1548–49 (D. Ariz. 1993) (condemning placement and retention of prisoners with mental illness on lockdown); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1989 (holding that psychiatric evidence that prison officials fail to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" raises a triable 8th Amendment issue); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989) (holding that inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area), *rev'd in part sub nom.* Brogsdale v. Barry, 926 F.2d 1184, 1191 (D.C. Cir. 1991).

207. *See* Hutto v. Finney, 437 U.S. 678, 685–87, 98 S. Ct. 2565, 2570–71, 57 L. Ed. 2d 522, 531–32 (1978) (length of time in isolation should be considered when determining whether confinement there violates the 8th Amendment ban on cruel and unusual punishment); Jackson v. Meachum, 699 F.2d 578, 584–85 (1st Cir. 1983) (suggesting courts should be more willing to inquire where a prisoner has been held for a long period without a time limit).

208. Jackson v. Meachum, 699 F.2d 578, 584–85 (1st Cir. 1983) (urging that officials continue to monitor prisoners in segregation and that courts intervene in cases where there is evidence of psychological harm).

209. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (finding the risk of isolating prisoners with mental illness or those likely to develop mental illness is unreasonable and violates the 8th Amendment), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison, which isolates prisoners); Gates v. Cook, 376 F.3d 323, 343 (5th Cir. 2004) ("[T]he isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment 'toxic' to the prisoners' mental health."); Inmates of Occoquan v. Barry, 650 F. Supp. 619, 630 (D.D.C. 1986) (holding that housing prisoners with mental illness in segregation unit is inappropriate) *on remand to* Inmates of Occoquan v. Barry, 717 F. Supp. 854, 868 (D.D.C. 1989.

therefore violates their rights.[211] However, to succeed on a claim that isolation violated your rights, you will need to show more than mild or generalized psychological pain.[212]

A growing number of states have taken steps, either independently or because of litigation, to exclude prisoners with serious mental illness from some isolated confinement housing areas and to increase mental health services for prisoners with serious mental illness who are held in restrictive settings. Courts have approved remedies, many in the form of settlement agreements, for prisoners with mental illness in isolation. In New Jersey, prisoners *must* be released from administrative segregation if they have a mental illness history and it appears that ongoing confinement there would harm them.[213] The Mississippi Department of Correction was ordered to provide yearly assessments and better mental health care for death row prisoners, who were subject to conditions of isolation.[214] In California, *Madrid v. Gomez* resulted in prisoners with serious mental illness being excluded from the Pelican Bay prison's SHU.[215] In Connecticut, the settlement of *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski* called for exclusion of prisoners with serious mental illness from the Northern Correctional Institution.[216] Similarly, *Austin v. Wilkinson* resulted in prisoners with serious mental illness being excluded from the Ohio State Penitentiary.[217] And, in Wisconsin, the settlement in *Jones'El v. Berge* excluded prisoners with serious mental illness from super-maximum security housing.[218]

In New York, advocates with the goal of improving mental health treatment in state prisons brought the case *Disability Advocates, Inc. v. New York State Office of Mental Health*.[219] The suit was brought statewide and alleged that one of the results of inadequate mental health treatment was that prisoners with mental illness were trapped in the disciplinary process and ended up in isolated confinement settings, which caused them to deteriorate psychiatrically. The case resulted in a private settlement agreement that includes among its provisions a minimum of two hours per day of out-of-cell treatment or programming for prisoners with serious mental illness confined in SHU, universal and improved mental health screening of all prisoners upon admission to prison, creation and expansion of residential mental health programs, required and improved suicide prevention assessments upon admission to SHU, and improved treatment and conditions for prisoners in psychiatric crisis in observation cells. A stated goal of this agreement is to treat rather than isolate and punish prisoners with serious mental health needs. This settlement applies *only* to New York State prisoners. Also, note that because this is a private settlement agreement, it does not create an individual cause of action, and a court did not order its terms. If you intend to bring a lawsuit based on the failure of New York to provide necessary mental health treatment to you in isolation, you must exhaust your administrative remedies and file a separate lawsuit. If you are a prisoner incarcerated in New York State and are concerned you are not receiving services required by the settlement, you may write to the lawyers who are enforcing this agreement. Appendix B contains a list of organizations to contact for help.

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210. Fred Cohen, The Mentally Disordered Inmate and the Law 11-8 (1998) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally.").

211. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (holding that confining those with marginal or full mental illness causes undue suffering for these groups), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

212. Madrid v. Gomez, 889 F. Supp. 1146, 1263–64 (N.D. Cal. 1995) (holding prisoners must show more than loneliness, boredom, or mild depression to state a claim of cruel and unusual punishment), *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

213. D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999).

214. Gates v. Cook, 376 F.3d 323, 342 (5th Cir. 2004) (ordering mental health examinations and care for death row prisoners) ("the Special Administrative Segregation Review Committee shall release the prisoner from Administrative Segregation if the prisoner has a history of mental illness and the Committee decides that continued confinement in the unit would be harmful to the prisoner's mental health").

215. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

216. Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski, No. 3:03-cv-1352 (RNC) (D. Conn. 2004) (private settlement agreement), *available at* http://www.aclu.org/FilesPDFs/-f07s2zl.pdf.

217. Austin v. Wilkinson, No. 01-cv-071 (N.D. Ohio 2004) (private settlement agreement), *available at* http://www.aclu.org/FilesPDFs/stipulation%20for%20injunctive%20relief.pdf.

218. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison, which isolates prisoners).

219. Disability Advocates, Inc. v. New York State Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) (private settlement agreement). A similar case, Disability Law Center, Inc. v. Mass. Dept. of Corr., et al., No. 07-10463 (D. Mass.), is currently pending in Massachusetts.

In early 2008, the New York Legislature passed and the Governor signed S.333/A.4870.[220] This statute amends various sections of the New York Correction Law, expanding on some of the provisions of the settlement agreement and adopting others. Notably, it defines "serious mental illness," provides for prisoners with serious mental illness to be diverted or removed from segregated confinement to residential mental health units, and provides them with improved mental health care. This law's passage makes the improvements to the system permanent, although most of the provisions of the legislation do not go into effect for several years.[221]

2. Your Right to Have Mental Health Considered in Disciplinary Proceedings

Mental health may be relevant in a prison disciplinary proceeding in three separate but related ways: whether the prisoner is mentally competent to proceed with the hearing; whether the prisoner was responsible for conduct at the time of the incident (or should not be held responsible because of his mental state at the time); and whether the prisoner's mental status should be considered to lessen the penalty or in determining what the penalty should be. When there is a connection between mental illness and disciplinary misconduct, a prisoner with serious mental illness might commit a disciplinary infraction that jeopardizes chances for parole, results in lost good time,[222] and results in isolated confinement.[223] Some states recognize the relevance of mental health and require that prison administrators consider a prisoner's mental health during disciplinary proceedings when deciding whether to sanction prisoners and, if so, how to sanction them. In New Jersey, the Department of Correction implemented disciplinary regulations following a lawsuit stating hearing officers must submit the names of any prisoners facing disciplinary hearings to mental health staff to find out whether mental illness might have played a role in the prisoners' behavior.[224] The hearing officer must decide whether to request a psychiatric evaluation, to take all information into account, and then to consider referring the prisoner to a mental health unit instead of disciplining him.[225]

The New York State courts recognize that evidence of a prisoner's poor mental health at the time of the incident that resulted in disciplinary charges should be considered at prison disciplinary hearings.[226] The

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220. Press Release, Governor Spitzer Signs Legislation to Enhance the Care and Treatment of Prisoners With Serious Mental Illness (Jan. 29, 2008), *available at* http://www.ny.gov/governor/press/0129082.html.

221. Most of the provisions of the new law, which will be added to N.Y. Correct. Law § 137(6), will not go into effect until two years after the date that the Commissioner of Correctional Services certifies to the legislative bill drafting commission that the first residential mental health unit constructed by the Department of Correctional Services is completed and ready to receive inmates, but no later than July 1, 2011.

222. The effect is a longer period of incarceration for these prisoners because of psychiatric disabilities. Suits challenging these practices have included claims based on the Americans with Disabilities Act and Rehabilitation Act. For more information on bringing suit under these acts, see *JLM*, Chapter 28, "Rights of Prisoners With Disabilities."

223. Some courts clearly recognize the psychological effects of prolonged isolation as relevant to determining whether the discipline imposed constitutes an atypical and significant hardship under Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–30 (1995), *overruled on other grounds by* Cray v. Carey, 2006 U.S. Dist. LEXIS 43286 (E.D. Cal. June 26, 2006) (*unpublished*). *See*, *e.g.*, Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000) (advising district courts in the Second Circuit that, in cases challenging SHU confinement, evidence of psychological effects of prolonged confinement in isolation is relevant); Lee v. Coughlin, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (finding that 376 days in SHU was atypical and significant and also observing that "[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies"); McClary v. Kelly, 4 F. Supp. 2d 195, 205–08 (W.D.N.Y. 1998) (holding that evidence of psychological harm (both expert and the plaintiff's own testimony) created a triable issue under the *Sandin* "atypical and significant" standard).

224. D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999).

225. D.M. v. Terhune, 67 F. Supp. 2d 401, 403 (D.N.J. 1999).

226. Huggins v. Coughlin, 155 A.D.2d 844, 845, 548 N.Y.S.2d 105, 107 (3d Dept. 1989) (determining that the hearing officer is required to consider the prisoner's mental condition in making the disciplinary disposition when the inmate's mental state is at issue because "that principle is in conformity with the well-established proposition that evidence in mitigation of the penalty to be imposed or that which raises a possible excuse defense to the charged violation is relevant and material in a disciplinary proceeding"), *aff'd* 76 N.Y.2d 904, 905, 563 N.E.2d 281, 282, 561 N.Y.S.2d 910, 911 (1990); People *ex rel.* Reed v. Scully, 140 Misc. 2d 379, 382, 531 N.Y.S.2d 196, 199 (Sup. Ct. Oneida County 1988) ("[T]he mental competence and mental illness of a prisoner must be considered during the prison disciplinary process where a Penal Law § 40.15 adjudication has been made or a well-documented history of serious psychiatric problems calls the prisoner's mental health into question."); *see also* Powell v. Coughlin, 953 F.2d 744, 749 (2d Cir. 1991) (upholding Office of Mental Health policy that testimony at prison disciplinary hearings provided by clinical staff concerning a prisoner's mental health status must be done outside the presence of the prisoner, as reasonably related to legitimate penological interests (citing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96

seriousness of the offense or the number of incidents should not interfere with a determination that alleged misconduct was caused by deteriorating mental health.[227] Litigation in New York[228] led to amendment of state-wide regulations that govern procedures at prison disciplinary hearings. The amendments contain criteria that establish when a prisoner's mental state must be considered at the hearing,[229] and that the hearing officer must ask the prisoner and other witnesses about the prisoner's condition and interview an Office of Mental Health doctor concerning the prisoner's condition at the time of the incident and the time of the hearing.[230] The amendments also created committees with full-time mental health staff at the maximum security prisons.[231] The committees review SHU prisoners every two weeks and may recommend restoration of privileges, reduction of SHU term, housing reassignment, medication adjustment, or commitment to a psychiatric hospital.[232] Mental illness is taken into consideration in determining whether to dismiss, make a finding of guilt, or less any penalty imposed.[233] Recent litigation, *Disability Advocates, Inc. v. New York State Office of Mental Health*,[234] resulted in a private settlement agreement that provides for additional changes to the disciplinary process including expansion of case management committees to additional prisons, multiple reviews of SHU sentences for prisoners receiving mental health services, restrictions on charging prisoners with serious mental illness for acts of self-harm, and restrictions on punishing prisoners with serious mental illness with the "loaf" (a restricted diet). These changes are contained in a private settlement agreement. They apply *only* to New York State prisoners. Also, note that the private settlement agreement does not create an individual cause of action and its terms were not ordered by the court. If you intend to bring a lawsuit based on the failure of New York to follow these procedures, you must exhaust your administrative remedies and file a separate lawsuit. If you are a prisoner incarcerated in New York State and are concerned that you are not receiving considerations required by the settlement, you may write to the lawyers who are enforcing this agreement. Appendix B contains a list of organizations to contact for help.

For more information on your rights at disciplinary hearings, please see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings." In addition, because much of the information in this section is specific to New York and New Jersey, you should research the law in your own state if you live elsewhere.

E. Special Considerations for Pretrial Detainees

Pretrial detainees are individuals in custody who have not yet been convicted. Because they are considered "innocent until proven guilty,"[235] they enjoy many of the rights they would have were they not in jail. Put another way, pretrial detainees, unlike convicted prisoners, may not be punished, and can claim that jail practices subjecting them to punishment violate their due process rights to be found guilty before punishment is inflicted.[236] In *Bell v. Wolfish*, the Supreme Court declared that the Due Process Clause of the

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L. Ed. 2d 64, 79 (1987), *superseded by statute on other grounds*); the requirement is now part of New York State regulations, N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6(c) (2007)).

227. People *ex rel.* Gittens v. Coughlin, 143 Misc. 2d 748, 750, 541 N.Y.S.2d 718, 719 (Sup. Ct. Sullivan County 1989) (expunging prisoner's disciplinary record where at each hearing the prisoner was charged with aggressive behavior similar to behavior for which he was receiving psychiatric treatment; mental illness was not taken into account; there was no consideration of whether he was competent to participate in the hearing; his psychiatric history was well-documented; he had been committed to the forensic psychiatric hospital seventeen times; and the hearing officer did not inquire, based on his nonattendance at hearings, into whether or not he was competent); Trujillo v. LeFevre, 130 Misc. 2d 1016, 1017, 498 N.Y.S.2d 696, 698 (Sup. Ct. Clinton County 1986) ("any determination by the mental health unit that the petitioner's lack of mental health was a causal factor in his misbehavior should apply equally to all charges.").

228. *See, e.g.,* Anderson v. Goord, 87-cv-141 (N.D.N.Y. 2003) (challenging the adequacy of mental health treatment for prisoners in disciplinary housing units at Attica and Auburn Correctional Facilities).

229. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6 (b)(1) (2007).

230. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6 (c)(3) (2007).

231. N.Y. Comp. Codes R. & Regs. tit. 7, § 310 (2007).

232. N.Y. Comp. Codes R. & Regs. tit. 7, § 310.3. (2007).

233. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6 (f) (2007).

234. Disability Advocates, Inc. v. N.Y. Office of Mental Health, No. 1:02-cv-04002 (S.D.N.Y. 2007) (providing changes under private settlement agreement to the disciplinary process for prisoners in New York). For a brief summary of settlement provisions, visit the case profile on The Civil Rights Litigation Clearinghouse, University of Michigan School of Law website, *available at* http://www.clearinghouse.net/detail.php?id=5560 (last visited: Feb. 15, 2010).

235. *See*, *e.g.*, Campbell v. McGruder, 580 F.2d 521, 527 (D.C. Cir. 1978) (pretrial detainees are presumed innocent and therefore may not be punished).

236. *See* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (holding that conditions of confinement should be evaluated for whether they inflict punishment on prisoners without due process).

Fourteenth Amendment governs whether conditions of confinement violate prisoners' rights.[237] The Court established in *Bell* that jail conditions should not be assessed under the Eighth Amendment, which bans cruel and unusual punishment,[238] because pretrial detainees cannot be punished *at all*.[239] Instead, claims are assessed under the Due Process Clause of the Fourteenth Amendment. For more information about filing a constitutional claim under the Due Process Clause of the Fourteenth Amendment, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

Note that the Supreme Court has also made it clear that losing your liberty by confinement before trial does *not* violate the Constitution.[240] It is only when your loss of liberty goes beyond what necessarily comes with detention that prisoners may raise claims that their rights have been violated.[241] The *Bell* rule shapes most of the law surrounding your rights as a pretrial detainee to adequate mental health care and to avoid unwanted treatment.

1. Your Right as a Pretrial Detainee to Psychiatric Medical Care

In *City of Revere v. Massachusetts General Hospital*, the Supreme Court applied to the medical care context the *Bell v. Wolfish* rule that pretrial detainees are entitled to be free of punishment under the Due Process Clause. In that case, the Court found the Due Process Clause requires the government to provide medical care to pretrial detainees in its custody, and those detainees must receive protections "*at least as great as* the Eighth Amendment protections available to a convicted prisoner" (emphasis added).[242] Even though pretrial detainees' claims that they have been denied adequate medical care are assessed under the Due Process Clause rather than under the Eighth Amendment,[243] many circuits have imported *Estelle v. Gamble*'s[244] "deliberate indifference" test, which is based on the Eighth Amendment, to evaluate detainees'

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237. Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt.").

238. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (emphasis added)).

239. Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979).

240. Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979) ("Due process requires that a pretrial detainee not be punished.").

241. Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447, 468 (1979) ("A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.").

242. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983).

243. *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447, 466 n.16 (1979) ("[The] State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.") (citing Ingraham v. Wright, 430 U.S. 651, 671-672, n.40 (1977)).

244. Estelle v. Gamble, 429 U.S. 97, 107, 97 S. Ct. 285, 293, 50 L. Ed. 2d 251, 262 (1976) (finding that "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice..."). For more information on the deliberate indifference standard, which requires showing more than negligence, please see Part B(2) of this Chapter.

claims.[245] Some courts have found delaying treatment for pretrial detainees violates due process because it punishes detainees *and* shows deliberate indifference to the serious medical needs of the detainees.[246]

The deliberate indifference test is subjective, not objective.[247] This means for an official to be found "deliberately indifferent," the official must have been aware there was a substantial risk of serious harm but failed to respond reasonably to the risk.[248] The official's conduct must go beyond mere negligence.[249]

The bottom line is that you, as a pretrial detainee, have *at least* the same rights that a convicted prisoner has to adequate and timely medical and psychiatric care. Your right comes from the Fourteenth Amendment, and may come from state statutes.[250] So, before filing your complaint, you should find out what the law is in your state.

(a) Your Right to Protection From Self-Harm and to Screening for Mental Illness

One application of the right to mental health care is the right to protection from self-harm and suicide. As a general rule, courts have found that jail staff and administrators have a duty to pretrial detainees to protect[251] and/or provide them with adequate psychiatric care.[252] Courts will only find jail officials liable for

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245. *See, e.g.*, Elliott v. Cheshire County, 940 F.2d 7, 10-12 (1st Cir. 1991) (holding that jail officials violated detainees' rights when they exhibited deliberate indifference to medical needs); Hill v. Nicodemus, 979 F.2d 987, 990-91 (4th Cir. 1992) (finding deliberate indifference is the proper standard under which to assess detainees' rights to medical and mental health care); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1186-87 (5th Cir. 1986) (finding pretrial detainees are entitled to at least the level of medical care required under the deliberate indifference test); Heflin v. Stewart County, 958 F.2d 709, 714 (6th Cir. 1992) (holding that pretrial detainees must show jail acted with deliberate indifference to serious medical needs), *overruled on other grounds by* Monzon v. Parmer County, 2007 U.S. Dist. LEXIS 43798 (N.D. Tex. June 15, 2007) (*unpublished*); Hall v. Ryan, 957 F.2d 402, 404–05 (7th Cir. 1992) (finding that pretrial detainees are at least entitled to protection from jailers' deliberate indifference); Bell v. Stigers, 937 F.2d 1340, 1342-43 (8th Cir. 1991) (holding that under either the 8th or 14th Amendments, deliberate indifference is the appropriate standard for assessing pretrial detainees' claims); Redman v. County of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991) (en banc) (finding deliberate indifference is the appropriate test for pretrial detainees' claims, but distinguishing other levels of culpability in the prison context); Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994) (holding deliberate indifference test applies to pretrial detainees); Cottrell v. Caldwell, 85 F.3d 1480, 1490–91 (11th Cir. 1996) (rejecting a pretrial detainee's mistreatment claim because of a failure to show subjective deliberate indifference).

246. Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) ("We therefore hold that deliberate indifference is the level of culpability that pretrial detainees must establish for a violation of their personal security interests under the Fourteenth Amendment. We also hold that conduct that is so wanton or reckless with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur ... will also suffice to establish liability ..."); Terry *ex rel.* Terry v. Hill, 232 F. Supp. 2d 934, 943–44 (E.D. Ark. 2002) (holding it violates due process and the Eighth Amendment to subject pretrial detainees to an average wait of over eight months for admission to a hospital for mental health care); Swan v. Daniels, 923 F. Supp. 626, 631 (D. Del. 1995) (finding the court could apply either the Eighth or 14th Amendment to assess prisoner's claims, since both amendments provide equivalent protection).

247. *See, e.g.*, Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) ("[A] finding of deliberate indifference requires ... that defendant's knowledge of a large risk can be inferred."); Hare v. City of Corinth, 74 F.3d 633, 636 (5th Cir. 1996) (*en banc*) ("We hold that the episodic act or omission of a state jail official does not violate a pretrial detainee's due process right to medical care or protection from suicide unless the official acted or failed to act with subjective deliberate indifference to the detainee's rights."); Sanderfer v. Nichols, 62 F.3d 151, 154–55 (6th Cir. 1995); *Conn v. City of Reno*, No. 07-15572, 2010 U.S. App. LEXIS 729, at *3 (9th Cir. 2010) (*unpublished*)(overturning district court's grant of summary judgment in case where police officers detained plaintiff, witnessed her attempt at suicide, and failed to report her suicide, and where plaintiff successfully attempted suicide after a second arrest the following day).

248. Sanderfer v. Nichols, 62 F.3d 151, 154–55 (6th Cir. 1995) (adopting and applying the Farmer v. Brennan subjective deliberate indifference test to a pretrial detainee's claim).

249. Sanderfer v. Nichols, 62 F.3d 151, 154–55 (6th Cir. 1995) (adopting and applying the Farmer v. Brennan subjective deliberate indifference test to a pretrial detainee's claim).

250. *See*, *e.g.*, Ark. Code Ann. § 5-2-305 (2006) (establishing a state hospital's duty to provide care for detainees with mental illness committed for evaluation or treatment).

251. Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (en banc) (holding that the state has a duty to provide mental health care to suicidal pretrial detainees where to deny it would suggest deliberate indifference); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) ("It is clearly established … that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish."); Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992) (holding that a pretrial detainee who had committed suicide was entitled to medical care, and its denial could be assessed under the deliberate indifference standard); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) (holding that jail officials had a duty not to be deliberately indifferent to an inmate's psychiatric needs).

252. Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (en banc) (holding that the state has a duty to

failing to prevent a suicide or an attempt, if they knew or should have known that an inmate was suicidal.[253] The standard that courts typically apply to determine if the State failed to protect inmates from themselves or failed to provide mental health care is not negligence but rather deliberate indifference,[254] as outlined in Parts E(1)(a) and B(2) of this Chapter. Moreover, in a case of self-harm, finding "deliberate indifference requires a strong likelihood, rather than a mere possibility, that self-infliction of harm will occur."[255]

Similarly, courts have not established a clear rule requiring screening for mental health problems or suicidal tendencies upon arrival at a jail. Some courts have held incoming prisoners must be screened so that they can be provided with mental health care.[256] Other courts have found there is no duty to screen.[257]

(b) Your Right to Continuation of Drug Treatment

Though the general rule is that courts need not compel jails or prisons to provide specific types of treatment like methadone maintenance,[258] you *do* have a protected liberty interest in treatments that you are already receiving at the time you begin your incarceration. Since pretrial detainees retain as many of the rights they would otherwise have were they not detained, any unnecessary deprivation of liberty—like withdrawing methadone—violates their due process rights.[259] Additionally, withdrawal pain can be considered punishment, which is not allowed prior to trial or plea.[260] The only limit on this right is if the government can claim that it has a legitimate interest, like jail security or ensuring your presence at trial,[261] that would override your liberty interest. In addition to due process, if you are detained rather than released and are being denied methadone, you may be able to claim that you are not being treated the same as pretrial defendants who *are* out on pretrial release.[262]

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provide mental health care to suicidal pretrial detainees where to deny it would suggest deliberate indifference); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991) ("It is clearly established … that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish."); Hill v. Nicodemus, 979 F.2d 987 (4th Cir. 1992) (holding that a pretrial detainee who had committed suicide was entitled to medical care, and its denial could be assessed under the deliberate indifference standard); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir.) (holding that jail officials had a duty not to be deliberately indifferent to an inmate's psychiatric needs).

253. Elliott v. Cheshire County, 940 F.2d 7, 10–11 (1st Cir. 1991).

254. Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (adopting a test of deliberate indifference for episodic acts of inadequate medical care or failure to protect).

255. Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991).

256. Campbell v. McGruder, 580 F.2d 521, 548–50 (D.C. Cir. 1978) (creating an affirmative duty to screen pretrial detainees displaying unusual behavior for mental illness, and requiring treatment for their medical needs); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 677 (S.D. Tex. 1975) (ordering that jail establish an intake screening process to detect alcohol and drug abuse, and mental illness).

257. Belcher v. Oliver, 898 F.2d 32, 34–35 (4th Cir. 1990) (holding detainee's right to be free from punishment did not include right to be screened for mental illness or suicide risk); Gagne v. City of Galveston, 805 F.2d 558, 559 (5th Cir. 1986) (holding arresting officer had no duty to screen for suicidal tendencies); Danese v. Asman, 875 F.2d 1239, 1244 (6th Cir. 1989) ("It is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help."); Estate of Cartwright v. City of Concord, 856 F.2d 1437, 1439 (9th Cir. 1988) (upholding a finding that did not impose liability for failure to screen for mental illness).

258. *See* Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978) ("There is no constitutional right to methadone."); Hines v. Anderson, 439 F. Supp. 12, 17 (D. Minn. 1977) (finding no requirement that prison administer methadone as part of a drug maintenance program).

259. Norris v. Frame, 585 F.2d 1183, 1185 (3d Cir. 1978) (finding that the facts in this case did not warrant depriving pretrial detainee's rights by refusing to continue his methadone treatment); Cudnik v. Kreiger, 392 F. Supp. 305, 311–12 (N.D. Ohio 1974) (holding that it violates due process to deny prisoner the right to continue methadone treatment); s*ee generally* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) (applying the Due Process Clause to assess pretrial detainees' conditions of confinement claims).

260. *See* Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978) ("A detainee ... may not be 'punished' at all."); Cudnik v. Kreiger, 392 F. Supp. 305, 311 (N.D. Ohio 1974) ("[A] pretrial detainee should not be subjected to ... punishment or loss.")

261. Norris v. Frame, 585 F.2d 1183, 1189 (3d Cir. 1978) (providing that the state can only override a prisoner's liberty interest in limited circumstances: those inherent to confinement, necessary to guarantee jail security, or needed to ensure defendant's presence at trial); Cudnik v. Kreiger, 392 F. Supp. 305, 311 (N.D. Ohio 1974) (finding pretrial detainees should lose only those liberties incident to confinement).

262. Cudnik v. Kreiger, 392 F. Supp. 305, 312 (N.D. Ohio 1974) (holding that those detained pretrial should not suffer greater deprivations—other than confinement—than those released pending trial).

2. Unwanted Treatment as a Pretrial Detainee

Just as you have the right to refuse medication while you are in prison,[263] you have the right to refuse treatment if you are a detainee awaiting trial.[264] However, your right to refuse medication is not absolute. Even though you have more rights as a detainee than as a convicted prisoner, the nature of the government interest in giving you medication is unique in this context. Specifically, the government may give you medication before trial in order to make you competent to stand trial.[265] However, the government may do this *only* if several conditions are met.[266] Similarly, there are several procedural checks in place to make sure that medicating you is absolutely necessary.[267] If you are a detainee in federal custody, for example, you are entitled to an administrative hearing for which you had prior notice and are provided representation, and at which you may appear, present evidence, cross-examine witnesses, and hear the testimony of your treating mental health professional.[268] You also may appeal a decision that you do not like.[269] The reason that there are so many checks is that you have a strong interest in defining your own treatment as well as conducting your criminal defense,[270] and so courts will be careful to make sure that your interests are appropriately balanced against the government's interests.[271]

(a) The *Sell* Test: Conditions the Government Must Meet Before Medicating You

In *Sell v. United States*,[272] the Supreme Court established the test for when it may be appropriate for the government to forcibly medicate you prior to trial for serious but non-violent crimes, and when it violates your rights to do so. There, the Court required the government to comply with *all* of the following conditions before medicating the pretrial detainee:

(i) Important Government Interests Are at Stake.[273]

The Court has held that determining a defendant's guilt or innocence for a "serious crime" is an important government interest.[274] However, there is no clear rule defining what "serious" means, though courts may measure it based on the sentence to which the charged crime exposes you.[275] One court, for instance, declined to fix a clear line defining what crimes are serious, but found that one exposing a

263. Washington v. Harper, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 198 (1990) (finding prisoner had a protected liberty interest under the Due Process Clause in avoiding unwanted medication).

264. Riggins v. Nevada, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 490 (1992) (holding lower court erred by not acknowledging criminal defendant's liberty interest in avoiding unwanted antipsychotic drugs); *see generally* Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) (holding that pretrial detainees enjoy at least as much protection as convicted prisoners).

265. Sell v. United States, 539 U.S. 166, 169, 123 S. Ct. 2174, 2178, 156 L. Ed. 2d 197, 205 (2003) (concluding that the government may administer antipsychotic drugs to pretrial detainees in limited circumstances). In prison, in contrast, the government interest is often defined in terms of avoiding harm to self or others. *See* Washington v. Harper, 494 U.S. 210, 222, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 198 (1990).

266. Sell v. United States, 539 U.S. 166, 180–81, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211–12 (2003) (establishing a multi-part test for when a detainee may be medicated to restore competence to stand trial).

267. United States v. Brandon, 158 F.3d 947, 955 (6th Cir. 1998) (requiring judicial hearing on whether to medicate defendant before trial).

268. 28 C.F.R. § 549.43(a) (2007).

269. 28 C.F.R. § 549.43(a)(6) (2007).

270. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 137, 112 S. Ct. 1810, 1816, 118 L. Ed. 2d 479, 491 (1992) (concluding that side effects from antipsychotic medication likely unfairly impaired prisoner's defense at trial); United States v. Brandon, 158 F.3d 947, 955 (6th Cir. 1998) (holding that courts should consider whether medication will affect the defendant's physical appearance at trial or as the defendant's ability to aid in the preparation of his own defense).

271. *See* United States v. Rivera-Guerrero, 377 F.3d 1064, 1071 (9th Cir. 2004) (finding that, due to the nature of the rights at stake, only federal district courts, not federal magistrates, may authorize the involuntary administration of medication).

272. Sell v. United States, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

273. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211 (2003).

274. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 211 (2003).

275. *See* United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (looking to the maximum statutory sentence to determine whether a crime is "serious"); United States v. Dallas, 461 F. Supp. 2d 1093, 1097 (D. Neb. 2006) ("The seriousness of the crime is measured by its maximum statutory penalty.").

defendant to a maximum of 10 years of imprisonment was serious.[276] Therefore, the government had an interest in trying the detainee in that case.[277]

(ii) No Special Circumstances Exist that Lessen the Government's Interest in Prosecution.[278]

If special circumstances exist, the government's interest in trying you will be less important. But, the *Sell* Court noted that, if the detainee is deemed dangerous to himself or others, the State may medicate him on those grounds instead, and need not reach the question of whether medication is necessary to enable him to stand trial.[279] In such a case, special circumstances might not lessen the government's interest, which would involve safety rather than ensuring a detainee could stand trial. You should note that the burden on the government is lower if it desires to medicate you for dangerousness reasons rather than to stand trial.[280]

(iii) Involuntary Medication "Significantly Further[s]" Government Interests, Making Defendant's Competence to Stand Trial Substantially Likely.[281]

Several courts have tried to define what "substantially likely" means. One court found that a 50% likelihood that the pretrial detainee would regain competency was not enough to justify giving him medication over his objection.[282] Another court held that a 70% success rate among other detainees was enough.[283] Yet another court has stated that an 80% chance was enough.[284] Though it is not clear exactly what counts as "substantially likely," the greater the percentage chance you will be restored to health—to which a psychiatrist will testify at your involuntary medication hearing—the smaller the chance you have of successfully claiming that the government should fail the *Sell* test on this basis. However, because the government must meet all of *Sell*'s conditions, you still might be able to claim that you should not be medicated for other reasons. Furthermore, some courts have been skeptical of the practice of using statistical evidence of how likely a defendant is to regain competence,[285] and so you might be able to argue that the statistics themselves are flawed.

Courts are also concerned that side effects, even if not medically harmful, may alter the detainee in ways that are likely to affect his ability to assist in his defense.[286] Whether this will happen is another factor that courts should consider when deciding whether to allow you to be medicated before trial.

(iv) Involuntary Medication is Necessary to Further Government Interests, and Less Intrusive Means Are Unlikely to Achieve the Same Result.[287]

The Supreme Court requires the government to explore alternatives before resorting to the very invasive practice of giving you medication over your objection.[288] These means might include non-drug therapies, or a court order to the detainee backed by the court's power to punish him for contempt if he does not comply.[289]

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276. United States v. Evans, 404 F.3d 227, 238 (4th Cir. 2005).

277. United States v. Evans, 404 F.3d 227, 238 (4th Cir. 2005).

278. Sell v. United States, 539 U.S. 166, 180, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003) (finding that special circumstances, like the fact that the detainee is likely to be civilly confined for a length of time, might lessen the need to prosecute criminally and therefore lessen the need to medicate to stand trial).

279. Sell v. United States, 539 U.S. 166, 182–83, 123 S. Ct. 2174, 2185–86, 156 L. Ed. 2d 197, 213–14 (2003) (finding that if the government can instead seek civil commitment, where the detainee may be medicated because of risk to self or others, it should do that prior to seeking to medicate to stand trial); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1159 n.2 (S.D. Cal. 2006) (finding that courts should conduct a Washington v. Harper dangerousness assessment prior to a trial competence one); United States v. White, 431 F.3d 431, 434–35 (5th Cir. 2005) (holding government should have sought a dangerousness assessment first).

280. *See* United States v. Rodman, 446 F. Supp. 2d 487, 496 (D.S.C. 2006).

281. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003) (noting that the use of drugs must be "in the patient's best medical interest in light of his medical condition" and must take into account the chance of side effects).

282. United States v. Rivera-Morales, 365 F. Supp. 2d 1139, 1141 (S.D. Cal. 2005).

283. United States v. Gomes, 387 F.3d 157, 161 (2d Cir. 2004).

284. United States v. Bradley, 417 F.3d 1107, 1115 (10th Cir. 2005).

285. United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1162 (S.D. Cal. 2006) (doubting the "predictive value and applicability of the government's statistic regarding the likelihood of success").

286. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

287. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

(v) Medication is Medically Appropriate (in the Detainee's Best Interest).[290]

If the State is trying to medicate you, the drugs must be in your best interest. If the side effects are too dangerous, for example, a court may deny the government's request to medicate you.[291] And, courts have held that the government must provide evidence as to how the drugs are likely to affect *you* specifically, rather than people generally.[292]

(b) Other Procedural Requirements

The *Sell* case involves what is called your "substantive due process" right to avoid unwanted intrusions into your personal liberty, and assesses your interests against the government's interests. You also have the right to certain *procedures* before your rights are taken away. For example, you are entitled to a hearing before you are forcibly medicated. If the government seeks to medicate you for dangerousness, it must give you at minimum an administrative hearing.[293] If, however, it is trying to restore your competence to stand trial, you are entitled to a full judicial hearing in a court.[294] In both cases, you have the right to protections like notice, representation, and the right to present evidence. The precise procedural requirements vary by state.

Another safeguard that courts have established is the burden of proof that the government must meet when trying to forcibly administer medication to pretrial detainees. Though not all federal circuits have ruled on this question, the general rule is that the government must show medication is necessary by "clear and convincing evidence."[295] Although clear and convincing is not as difficult a standard to meet as "beyond a reasonable doubt," which is the standard in criminal cases, it is still very hard to meet. Furthermore, the government may not use conclusory evidence—or evidence that presumes the point it is trying to make—to prove its case.[296] Though these protections do not offer you an absolute right to avoid treatment, they make it more difficult for the State to take away your rights.

F. Where to Go for Help

In most states, there are organizations called Protection and Advocacy ("P&A") agencies that protect and advocate for the rights of people with mental illnesses, and investigate reports of abuse and neglect in facilities that care for or treat individuals with mental illnesses. These facilities—which may be public or private—include hospitals, nursing homes, homeless shelters, jails, and prisons. P&As may advocate for prisoners and investigate issues that come up during transportation or admission to such treatment facilities, during residency in them, or within ninety days after discharge from them.[297]

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288. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

289. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

290. Sell v. United States, 539 U.S. 166, 181, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197, 212 (2003).

291. *See* United States v. Evans, 404 F.3d 227, 242 (4th Cir. 2005) (requiring government to state what the likely side effects will be, and whether the benefits of treatment will outweigh them); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1163 (S.D. Cal. 2006) (finding antipsychotic drugs can have severe side effects, and the government had not met its burden of showing that the benefits of giving them to the detainee outweighed the risks).

292. *See* United States v. Evans, 404 F.3d 227, 241 (4th Cir. 2005) (finding fault with government's failure to provide evidence about this particular detainee).

293. *See* United States v. White, 431 F.3d 431, 435 (5th Cir. 2005) (finding that the federal government set up a regulatory scheme that entitled pretrial detainee to an administrative hearing on the issue of forcible medication).

294. United State v. Brandon, 158 F.3d 947, 955–56 (6th Cir. 1998) (finding that judicial, rather than administrative, hearing is necessary because those with legal training make determinations at a judicial hearing).

295. United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004) (requiring the government to make its case for involuntary medication with clear and convincing proof); United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005) (finding that because important interests are involved, the government must prove its case by clear and convincing evidence); United States v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1160 n.3 (S.D. Cal. 2006) ("follow[ing] the weight of the case law in adopting the 'clear and convincing' burden of proof.").

296. *See* United States v. Evans, 404 F.3d 227, 240 (4th Cir. 2005) (government failed to explain how it reached its conclusions about alleged necessity to medicate pretrial detainee).

297. This general definition of protection agencies was taken from U.S. Dept. of Health & Human Servs. Nat'l Mental Health Info. Ctr., *Center for Mental Health Services: Protection and Advocacy*, http://www.mentalhealth.samhsa.gov/cmhs/p&a (last visited Feb. 14, 2010).

G. Conclusion

This Chapter explains your rights as a prisoner with mental illness. It covers the basic information you will need to understand how the law applies to prisoners with mental illness, your right to receive treatment, and your limited right to refuse unwanted treatment and transfers. For a list of organizations that might be able to help you with legal issues related to your mental illness, please write to the *JLM*.

APPENDIX A

RESOURCES FOR PRISONERS WITH MENTAL ILLNESS

The following is a list of organizations, including P&As, that you might wish to contact for help with legal issues related to your mental illness. This list is not complete, and every state should have at least one P&A that assists people with mental illness. To find out the name and contact information for the P&A in your area, contact the National Disability Rights Network, 900 Second Street NE, Suite 211, Washington, D.C. 20002; Phone: (202) 408-9514, TTY: (202) 408-9521, Fax: (202) 408-9520.

National Organization
The Bazelon Center for Mental Health Law
1101 15th Street NW, Suite 1212
Washington, DC 20005
Phone: (202) 467-5730
Fax: (202) 223-0409
http://www.bazelon.org

California
Disability Rights California
100 Howe Avenue, Suite 185-N
Sacramento, CA 95825
Phone: (916) 488-9955
Toll Free: (800) 776-5746
TTY: (800) 719-5798
http://www.pai-ca.org

Florida
Advocacy Center for
Persons with Disabilities, Inc.
2728 Centerview Drive, Suite 102
Tallahassee, FL 32301
Phone: (850) 488-9071
Toll Free: (800) 342-0823 (in-state)
Fax: (850) 488-8640
TDD: (800) 346-4127
http://www.advocacycenter.org

Massachusetts
Disability Law Center, Inc.
11 Beacon Street, Suite 925
Boston, MA 02108
Phone: (617) 723-8455
Toll Free: (800) 872-9992
TTY: (800) 381-0577
Fax: (617) 723-9125
http://www.dlc-ma.org/index.htm

New York
The Urban Justice Center
123 William Street, 16th Floor
New York, NY, 10038
Phone: (646) 602-5600
Toll Free: (877) 647-5291
Fax: (212) 533-4598
http://www.urbanjustice.org/
Counties served: Bronx, Brooklyn, Manhattan, Queens

Disability Advocates, Inc.
5 Clinton Square, 3rd Floor
Albany, NY 12207
Phone: (518) 432-7861
Toll Free: (800) 993-8982
Fax: (518) 427-6561
http://www.disabilityadvocates.info/
Counties served: Albany, Columbia, Dutchess, Fulton, Greene, Montgomery, Orange, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Westchester

New York State Commission on Quality of Care
and Advocacy for Persons with
Disabilities ("CQCAPD")
401 State Street
Schenectady, NY 12305
Toll Free: (800) 624-4143 (Voice/TTY/Spanish)
Fax: (518) 388-2860
http://www.cqcapd.state.ny.us

Legal Aid Society of Northeastern New York, Inc.
100 Court Street, P.O. Box 989
Plattsburgh, NY 12901
Phone: (518) 563-4022
Toll Free: (800) 722-7380
Fax: (518) 563-4058
http://www.lasnny.org/
Counties served: Franklin, Clinton, Essex, Hamilton

Legal Aid Society of Northeastern New York, Inc.
17 Hodskin Street
Canton, NY 13617
Phone: (315) 386-4586
Toll Free: (800) 822-8283
Fax: (315) 386-2868
http://www.lasnny.org/
Counties served: St. Lawrence, St. Regis Indian Reservation

Legal Aid Society of Northeastern New York, Inc.
112 Spring Street
Saratoga Springs, NY 12866
Phone: (518) 587-5188
Toll free: (800) 870-8343
Fax: (518) 587-0959
http://www.lasnny.org/
Counties served: Saratoga, Warren, Washington

Legal Aid Society of Northeastern New York, Inc.
1 Kimball Street
Amsterdam, NY 12010
Phone: (518) 842-9466
Toll free: (800) 821-8347
Fax: (518) 843-1792
http://www.lasnny.org/
Counties served: Fulton, Montgomery, Schoharie

Legal Aid Society of Northeastern New York, Inc.
55 Colvin Avenue
Albany, NY 12206
Phone: (518) 462-6765
Toll free: (800) 462-2922
Fax: (518) 427-8352
http://www.lasnny.org
Counties Served: Albany, Columbia, Greene, Rensselaer, Schenectady

New York Lawyers for the Public Interest
151 West 30th Street, 11th Floor
New York, NY 10001-4007
Phone: (212) 244-4664
Fax: (212) 244-4570
http://nylpi.org
Counties served: Bronx, Brooklyn, Manhattan, Queens, Richmond

Neighborhood Legal Services, Inc.
237 Main Street, 4th Floor
Buffalo, NY 14203
Phone: (716) 847-0650
TTY: (716) 847-1322
Fax: (716) 847-0227
http://www.nls.org/
Counties served: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Seneca, Steuben, Wayne, Wyoming, Yates

Legal Services of Central New York, Inc.
472 South Salina Street, Suite 300B
Syracuse, NY 13202
Phone: (315) 703-6500
Fax: (315) 475-2706
http://www.lscny.org/
Counties served: Broome, Cayuga, Chemung, Chenango, Cortland, Delaware, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Otsego, Oswego, Schuyler, Tompkins, Tioga

Touro College Clinic Program
Jacob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722
Phone: (631) 761-7080
Fax: (631) 421-2675
Counties served: Nassau, Suffolk

Texas

Advocacy, Inc.
7800 Shoal Creek Blvd., Suite 171-E
Austin, TX 78757-1024
Phone: (512) 454-4816
Toll Free: (800) 252-9108 (Voice/TDD)
Fax: (512) 323-0902
(only in county and city jails)
http://www.advocacyinc.org

APPENDIX B

CONTACT INFORMATION FOR DISABILITY ADVOCATES, INC. V. NEW YORK STATE OFFICE OF MENTAL HEALTH

Disability Advocates, Inc.
5 Clinton Square, 3rd Floor
Albany, NY 12207
Phone: (518) 432-7861
Toll Free: (800) 993-8982
Fax: (518) 427-6561
www.disability-advocates.org

Prisoners' Legal Services of New York
102 Prospect Street
Ithaca, NY 14850
Prisons Served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard

Prisoners' Legal Services of New York
41 State Street, Suite M112
Albany, NY 12207
Prisons Served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne

Prisoners' Legal Services of New York
Statler Towers, Suite 1360
107 Delaware Avenue
Buffalo, NY 14202
Prisons Served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming

Prisoners' Legal Services of New York
121 Bridge Street, Suite 202
Plattsburgh, NY 12901
Prisons Served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate

Prisoners' Rights Project
The Legal Aid Society
199 Water Street, 6th Floor
New York, NY 10038
Phone: (212) 577-3346

A JAILHOUSE LAWYER'S MANUAL

Chapter 30: Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners

Columbia Human Rights Law Review

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Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER 30

SPECIAL INFORMATION FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PRISONERS*

A. Introduction

Lesbian, gay, bisexual, and transgender ("LGBT") prisoners face the same challenges as other prisoners, but due to prejudice about sexual orientation and gender identity, LGBT prisoners often encounter additional difficulties.

Many of the issues unique to LGBT prisoners have not been litigated extensively.[1] And many of the issues that have been litigated may change significantly in light of a relatively new Supreme Court decision.[2] The outcomes of these claims are now less predictable. This unpredictability, combined with the fact that homophobia and transphobia may play a role in many judges' and juries' decision-making process, means that LGBT prisoners face uphill battles when they bring claims in court. For this reason, you should consider contacting an LGBT impact litigation organization to see if its lawyers would be willing to take your case.[3] For a list of such organizations, see Appendix A at the end of this Chapter. This is especially important if you are seeking to apply new theories about sexual orientation or gender identity to your case. Even if such an organization cannot take your case, someone may be able to refer you to an attorney who has experience working with LGBT plaintiffs.

Throughout this Chapter, the term "transgender" is used to indicate a broad spectrum of people whose identity or lived experiences do not conform to those that are typically associated with the sex assigned at birth. This includes non-, pre-, and post-operative transgendered people; people who live part or all of the time as a gender other than the one assigned to them at birth; people with intersex conditions; cross-dressers; masculine women; and feminine men. Gender identity is used to describe the gender a person identifies as, regardless of whether that gender is the same as the one they were assigned at birth.

This Chapter attempts to address the most pressing concerns of LGBT prisoners. Part B of this Chapter discusses important Supreme Court cases and how they may affect past and future prison regulations. Part C explains what to do if you are being treated unfairly because of your sexual orientation or gender identity. Part D discusses your remedies if you feel that homophobic or transphobic beliefs led to jury bias in your conviction. Part E addresses your right to control your gender identity while in prison and includes a discussion of your right to gender-related medical care such as hormone treatment. Part F explains your right to confidentiality regarding your sexual orientation or gender identity. Part G addresses assault and harassment by prison officials and other prisoners. Part H discusses protective custody and housing placements for transgender prisoners. Part I discusses visitation rights. Finally, Part J discusses your right to receive LGBT literature.

As you read this Chapter, you should always keep in mind that Title 42 of the United States Code, Section 1983 (known as "Section 1983"), is a federal statute that permits you to sue a person who, while acting on behalf of the state, violates either one of your federal statutory rights or one of your constitutional rights, such as your right to be free from cruel and unusual punishment under the Eighth Amendment or your right to equal protection under the Fourteenth Amendment. If you are a state prisoner and your rights

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1. Unfortunately, some legal decisions of significance to LGBT prisoners are unreported—that is, they do not appear in the Federal Reporter or Federal Supplement volumes available in prison law libraries. In the *JLM*, these cases have citations like "U.S. App. LEXIS 12345 (*unpublished*)." Make sure you read Chapter 2 of the *JLM* for important information about unpublished cases. At the very least, even if you cannot cite an unpublished case in your claim, the case may help you predict the outcome of a similar lawsuit.

2. See the next section for a lengthy discussion of Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508 (2003).

3. Impact litigation organizations litigate cases where the law is unresolved with the hope of creating favorable law for future cases. A list of such organizations appears in Appendix A at the end of this Chapter.

have been violated by prison officials, you should also check state and local laws. Depending on where you are located, bringing a lawsuit under Section 1983 may be your best option.[4] For a more detailed explanation of Section 1983, see Chapter 16 of the *JLM*. It is also very important to be aware of the constraints placed on prisoner litigation by the Prisoner Litigation Reform Act ("PLRA"). Please read Chapter 14 of the *JLM* for a more detailed explanation of the PLRA before filing any lawsuit.

B. Changes in the Law

This part begins by briefly explaining a relatively recent and very important Supreme Court case, *Lawrence v. Texas*, in which the Court ruled that states cannot pass laws prohibiting homosexual acts. This case will be discussed alongside *Bowers v. Hardwick*,[5] which was overruled by *Lawrence v. Texas,* and *Romer v. Evans*,[6] which may affect claims brought by LGBT prisoners. Finally, this part discusses the general changes to the law that *Lawrence* and *Romer* might bring about. Because many of the cases discussed in this Chapter are based explicitly on the reasoning in *Bowers*, the issues may be open to new interpretation because of *Lawrence* and *Romer*. Please note that while both *Bowers* and *Lawrence* deal specifically with sexual orientation, they may also affect claims brought by transgendered prisoners because prison officials may perceive a transgendered prisoner to be homosexual, regardless of actual sexual orientation.

1. *Lawrence v. Texas* and Due Process Claims

In June 2003, the United States Supreme Court found a Texas law unconstitutional that made homosexual sex between consenting adults a crime.[7] While the practical effect of the decision may have little immediate impact on you or the conditions of confinement that you face, the *Lawrence* decision may ultimately have far reaching consequences. In the ruling, the Court held that the right to privacy, as guaranteed under the Fourteenth Amendment, includes the right to engage in consensual intimate or sexual activity, including same-sex activity.[8]

The vast majority of the cases in this Chapter were decided before *Lawrence*. Because of this, many cases in this Chapter still use the earlier reasoning in another famous Supreme Court case, *Bowers v. Hardwick*.[9] *Bowers*, decided in 1986, was in many ways the exact legal opposite of *Lawrence,* and cases that would have relied upon the ruling in *Bowers* may now be decided differently, since *Lawrence* is now the law.

Because of the far reaching consequences of *Lawrence* and because the decision is still relatively new, it is hard to know how courts will now treat LGBT claims.

(a) *Bowers v. Hardwick*

Bowers v. Hardwick was a Supreme Court case that found the constitutional right to privacy did not extend to homosexual acts between consenting adults.[10] Generally, the Fourteenth Amendment of the Constitution[11] prohibits the government from infringing upon fundamental rights unless there is a sufficient justification for the government's interference. The question of which rights are "fundamental" has been the subject of many court battles. The Supreme Court has held in the past that very private decisions, such as the decision to use birth control or have an abortion, are protected under the Fourteenth Amendment because they involve a fundamental right to privacy.[12] In *Bowers*, the Court held that the right to engage in

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4. To challenge the conduct of an official or employee of the federal government, you must bring a *Bivens* action. You can find an explanation of how to do this in Chapter 16 of the *JLM*.

5. Bowers v. Hardwick, 478 U.S. 186, 186–87, 106 S. Ct. 2841, 2841–42, 92 L. Ed. 2d 140, 140–41 (1986).

6. Romer v. Evans, 517 U.S. 620, 626–27, 116 S. Ct. 1620, 1624–25, 134 L. Ed. 2d 855, 859 (1996).

7. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

8. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518 (2003).

9. Bowers v. Hardwick, 478 U.S. 186, 186–87, 106 S. Ct. 2841, 2841–42, 92 L. Ed. 2d 140, 140–41 (1986).

10. Bowers v. Hardwick, 478 U.S. 186, 186–87, 106 S. Ct. 2841, 2841–42, 92 L. Ed. 2d 140, 140–41 (1986).

11. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1.

12. Griswold v. Connecticut, 381 U.S. 479, 485–86, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–16 (1965) (articulating the importance of marriage as a right of privacy); Roe v. Wade, 410 U.S. 113, 154, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177–78 (1973) (holding that the abortion decision falls within the right of personal privacy, but qualifying that it must be considered against some important state interests).

consensual homosexual acts is not protected under the right to privacy and that states could prohibit homosexual acts merely on the basis of views that consider homosexuality immoral.[13]

(i) The End of *Bowers*

When the Supreme Court decided *Lawrence v. Texas*, it explicitly overruled *Bowers v. Hardwick*.[14] As a result, many of the cases relying on *Bowers* and refusing to question the unequal treatment of LGBT prisoners might now be questionable. Several important issues arise after *Lawrence*. Keep them in mind if you are thinking about bringing suit about your treatment in prison.

First, *Lawrence* says that under the Constitution, all adults, including LGBT individuals, have the right to engage in intimate conduct with another adult in private.[15] This means that private, consensual homosexual sex is no longer a crime. This does not mean that you have the right to engage in sex in prison, but it probably does mean that prison officials cannot treat you differently because you identify as or are perceived to be LGBT.

Second, one Supreme Court Justice wrote in a concurring opinion in *Lawrence* that moral disapproval is an insufficient reason to treat people differently, relying on a prior Supreme Court opinion.[16] While that is not the holding of the *Lawrence* case, its use by a Justice in *Lawrence* indicates that the rule may be useful in court when arguing that your rights have been infringed because of your sexual orientation.

Third, *Lawrence* makes all the cases that relied on *Bowers* open to attack. When you are considering whether or not to bring a claim, pay close attention to whether *Bowers* played a role in any negative cases in your jurisdiction. If you feel that a case relied heavily on *Bowers* and negatively affects your case, contact one of the impact litigation organizations listed in the Appendix A at the end of this Chapter. It may be possible to argue that the negative case no longer applies since *Bowers* was overruled.

(b) The Unknown Effect of *Lawrence*

Because *Lawrence* was decided fairly recently, it is hard to know how far-reaching its effects will be. Because the case holds same-sex conduct is entitled to at least some legal protections, *Lawrence* may have the power to influence a vast number of cases regarding LGBT rights. But courts have been hesitant to read *Lawrence* broadly enough to establish a basis for LGBT rights beyond cases that are factually similar to *Lawrence*. For instance, sometimes courts will use other *precedents*—such as *Romer v. Evans*,[17] which is discussed below and deals with equal protection—to avoid the *Lawrence* question.[18]

At least one case post-*Lawrence* has declined to extend *Lawrence* to the point where it would protect all kinds of homosexual conduct in prison. In *Willson v. Buss*, a prisoner sued the superintendent of his prison for the right to receive magazines with homosexual content.[19] The court noted that *Lawrence* had overruled *Bowers* and that there was a constitutionally-protected right in open society to engage in homosexual relationships. However, the court made a point of saying that the right does not necessarily extend to the prison context, where constitutional rights may be limited by prison officials for necessary reasons.[20]

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13. Bowers v. Hardwick, 478 U.S. 186, 196, 106 S. Ct. 2841, 2846–47, 92 L. Ed. 2d 140, 149 (1986).

14. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

15. Lawrence v. Texas, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed. 2d 508, 518 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

16. Lawrence v. Texas, 539 U.S. 558, 582, 123 S. Ct. 2472, 2486, 156 L. Ed. 2d 508, 528 (2003) (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); *see also* Romer v. Evans, 517 U.S. 620, 634, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 867 (1996) (holding that action based on a bare desire to harm could not constitute a legitimate government interest, and so violated the Equal Protection Clause).

17. Romer v. Evans, 517 U.S. 620, 626–27, 116 S. Ct. 1620, 1624–25, 134 L. Ed. 2d 855, 859 (1996).

18. *See*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 532–33 (5th Cir. 2004) (relying on *Romer* in holding the law clearly established a denial of protection to a prisoner because of his sexuality violated the Equal Protection Clause).

19. Willson v. Buss, 370 F. Supp. 2d 782, 784 (N.D. Ind. 2005).

20. Willson v. Buss, 370 F. Supp. 2d 782, 786 (N.D. Ind. 2005). See Part J of this Chapter for further discussion of your right to receive LGBT literature while in prison.

2. *Romer v. Evans* and the Equal Protection Clause

While the ruling in *Lawrence v. Texas* was based upon the Due Process Clause of the Fourteenth Amendment and the right to privacy, an alternative basis for claims affecting LGBT prisoners is the Equal Protection Clause. The Equal Protection Clause prohibits the government from treating different classes of people differently unless there is a sufficient, legitimate governmental purpose in doing so.[21] The leading case affecting LGBT people bringing equal protection claims is *Romer v. Evans*.[22]

In considering equal protection claims, courts apply different legal standards to different classifications of people. It is more likely that a law will be found unconstitutional under the Equal Protection Clause of the Fourteenth Amendment when a higher standard of legal scrutiny applies. For example, if the government makes a distinction based upon race, it must show that the contested classification based on race is *necessary* to achieve a compelling government interest. This is known as a "strict scrutiny" legal standard. For a distinction based on gender, the contested classification must be substantially related to an important government objective. This standard is called an "intermediate scrutiny" legal standard. Other classifications, such as those based on age, only need to be rationally related to a legitimate government purpose to survive an equal protection challenge. This standard is known as "rational basis" legal review.

In *Romer v. Evans*, the plaintiffs challenged an amendment to a state constitution that invalidated and prohibited local laws that barred discrimination on the basis of sexual orientation. In hearing the case, the Supreme Court had to decide which level of scrutiny, from those described above, to apply to distinctions or classifications based on sexual orientation. While the Court held that classification based on sexual orientation is only entitled to a rational basis review, the lowest legal standard, the Court still invalidated the amendment under this rational basis test. The Court found that the only purpose behind the law was "animus [hatred] toward the class [homosexuals] that it affects," and held that neither animus nor hatred were legitimate government purposes.[23]

Romer v. Evans is significant for two reasons. First, it establishes that distinctions based on sexual orientation will be evaluated under the rational basis review test, not a stricter test. Second, it demonstrates a willingness on the part of the Supreme Court to use the rational basis test to protect the interests of LGBT people. Previously, it had been very hard to win an equal protection challenge under the rational basis test. So, while *Romer v. Evans* was a disappointment to LGBT people in that the Court did not extend a higher level of scrutiny to classifications based on sexual orientation, it is helpful because it shows how rational basis review can be used to successfully challenge policies that discriminate based on sexual orientation. In *Johnson v. Johnson*, for example, the Fifth Circuit relied on *Romer v. Evans* in discussing claims against prison officials.[24] In this case, a homosexual inmate *alleged* that officials failed to protect him from violence and rapes by other prisoners, even after he alerted officials of the assaults. The Court noted that:

> It is clearly established that all prison inmates are entitled to reasonable protection from sexual assault. ... Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification [or protected group]; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims.[25]

3. A Practical Example

To help you figure out how *Lawrence v. Texas* and *Romer v. Evans* can work together to protect LGBT rights in prison, it may be useful to briefly examine a past case about a lesbian prisoner, *Doe v. Sparks*,[26] which was decided before *Lawrence* and *Romer* and to analyze how it might have been decided differently if it had been decided after both *Lawrence* and *Romer*.

In *Doe v. Sparks*, a lesbian prisoner was denied a visitation by her girlfriend.[27] The prison claimed that allowing homosexual visitation could incite anti-gay violence in the prison. The prisoner tried to bring a

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21. For further discussion of the federal Equal Protection Clause, see Part B(2)(g) of Chapter 16.
22. Romer v. Evans, 517 U.S. 620, 626–27, 116 S. Ct. 1620, 1624–25, 134 L. Ed. 2d 855, 859 (1996).
23. Romer v. Evans, 517 U.S. 620, 626–27, 116 S. Ct. 1620, 1624–25, 134 L. Ed. 2d 855, 859 (1996).
24. Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004).
25. Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004).
26. Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990).
27. Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990).

federal equal protection claim, saying that she was being unfairly targeted for being gay, and that the prison's reasons for denying her girlfriend's visit were not rationally related to a legitimate government purpose. The court, in considering the prisoner's claim, acknowledged that "the Equal Protection Clause dictates equal administration of rights and *privileges*, such as visitation, between similarly situated persons."[28]

Still, the court went on to decide that denying homosexuals visitation rights was not a violation of the federal Equal Protection Clause. The court determined that *Bowers v. Hardwick* prevented LGBT people from being treated as a "class" for equal protection purposes. The court also found that any group that is defined by sexual preference could not bring an equal protection claim.[29]

This case may have been decided differently under *Romer v. Evans* and *Lawrence v. Texas*. In *Doe*, the Court relied on *Bowers v. Hardwick* to conclude that since homosexual acts were not protected activities, homosexuals could not bring an equal protection claim based upon their sexual orientation. After *Romer*, a court hearing a case identical to *Doe* would instead analyze the visitation policy as an equal protection claim using the rational basis review test, and might be more likely to inquire more thoroughly into the government purpose served by the policy. In addition, since *Lawrence* overruled *Bowers* and held that homosexual conduct is entitled to some protection, the prisoner would have a better chance today of bringing a claim based upon her right to privacy, although as we saw in *Willson v. Buss*,[30] not all homosexual conduct or activity is protected in the prison context, even after *Lawrence*.

Thus, after *Lawrence*, the prisoner in *Doe* might now have a much stronger claim that the policy discriminated against her due to her homosexuality and interfered with her right to privacy.[31]

C. Unequal Treatment Because of Sexual Orientation or Gender Identity

1. Equal Protection

The Equal Protection Clause prohibits the government from treating different classes of people differently unless there is a sufficiently legitimate purpose for doing so.[32] If you believe that benefits are being withheld from you and that they are not being withheld from heterosexual prisoners, you may bring a Section 1983 claim against the prison or prison officials for violation of your equal protection rights. To do this successfully, you must convince the court that (1) "similarly situated" prisoners are treated differently by the prison; and (2) the difference between their treatment and your treatment is not justified by being somehow rationally related to a legitimate penological (prison-related) interest. In other words, the prison rule or policy that results in your being treated differently must have a common-sense connection to a valid goal or concern of the prison. For a more thorough discussion of equal protection claims, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

When faced with claims by LGBT prisoners that they are being treated differently than heterosexual prisoners, prisons have often tried to justify their actions by claiming that different treatment is necessary to protect LGBT prisoners, who are often more vulnerable to attack than other prisoners. For instance, two cases in the Sixth Circuit involved LGBT prisoners who, having been denied the opportunity to participate in religious services while in prison, brought suit under Section 1983 for a violation of their First Amendment rights. In both cases, the prison argued that because the LGBT prisoner was vulnerable to attack, his participation in the services posed a security risk. The restriction on the prisoner's First

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28. Doe v. Sparks, 733 F. Supp. 227, 231 (W.D. Pa. 1990).

29. Doe v. Sparks, 733 F. Supp. 227, 232 (W.D. Pa. 1990) ("We hold that conduct which is not in itself protected by substantive due process, natural right, or some source of substantive protection cannot be the basis of an equal protection challenge by the class which engages in the conduct."). However, it should be noted that the court did hold that under Pennsylvania state law, homosexuals could not be discriminated against and thus struck down the visitation policy. Doe v. Sparks, 733 F. Supp. 227, 232–34 (W.D. Pa. 1990).

30. Willson v. Buss, 370 F. Supp. 2d 782, 786 (N.D. Ind. 2005) (finding that the right to homosexual relationships does not extend to all contexts, specifically the receipt of homosexual magazines by prisoners).

31. For further discussion on how *Doe* might be decided today, *see* Derrick Farrell, *Crime and Punishment Law Chapter: Correctional Facilities: Prisoners' Visitation Rights, The Effect of* Overton v. Bazetta *and* Lawrence v. Texas, 5 Geo. J. Gender & L. 167, at 173–74 (2004); Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women's Rights L. Rep. 357, at 384–404 (2009).

32. U.S. Const. amend. XIV.

Amendment rights, the prison argued, served the valid penological interest of prison security and so was justified.[33]

Several LGBT prisoners have, with some success, sued prison officials, claiming they were terminated from their prison jobs because they are LGBT. For instance, in *Holmes v. Artuz*, a federal court in New York noted that a gay prisoner who alleged he was removed from his food service prison job may have stated a claim under Section 1983 for violation of his equal protection rights.[34] The court did not decide whether the equal protection guarantee of the Constitution had been violated because the plaintiff, appearing without counsel, had not presented enough information on which to base that decision.[35] However, the court was clearly sympathetic to the prisoner's claim, and the opinion contains strong language indicating that the state would have to show, rather than merely assert, that its decision was rationally related to the state's interest in maintaining security.[36]

2. Sex Discrimination

Although your chances of prevailing on an equal protection claim may have increased substantially after *Lawrence v. Texas* and *Romer v. Evans*, you might also have a chance of prevailing if you state your grievance in terms of *sex* discrimination as opposed to *sexual orientation* discrimination.[37] Title VII of the

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33. Brown v. Johnson, 743 F.2d 408, 412–13 (6th Cir. 1984) (holding a prison's total ban on group worship services by a church for gay people was reasonably related to the state interest in maintaining internal security in the prison); *but see* Phelps v. Dunn, 965 F.2d 93, 100 (6th Cir. 1992) (holding that a genuine issue of material fact existed as to whether a gay prisoner alleging he was denied permission to attend religious services was in fact so denied, and whether he posed a security risk because he was gay); *see also* Harper v. Wallingford, 877 F.2d 728, 733 (9th Cir. 1989) (affirming summary judgment for defendant prison because allowing plaintiff prisoner to receive mailings from North American Man/Boy Love Association would make him a likely victim of inmate violence); Star v. Gramley, 815 F. Supp. 276, 278–79 (C.D. Ill. 1993) (granting summary judgment to prison that refused to allow a prisoner in a men's facility to wear dresses and skirts because it could pose a security threat by promoting or provoking sexual activity or assault).

34. Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *3 (S.D.N.Y. Oct. 26, 1995) (*unpublished*); *but see* Counce v. Kemna, No. 02-6065-CV-SJ-HFS-P, 2005 U.S. Dist. LEXIS 4021, at *9–10 (W.D. Mo. Mar. 8, 2005) (*unpublished*) (granting defendant prison officials qualified immunity in case where plaintiff alleged job discrimination based on his sexual orientation).

35. The plaintiff was granted leave to replead (plead again). Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *6 (S.D.N.Y. Oct. 26, 1995) (*unpublished*).

36. The *Holmes* court reasoned as follows:

> Defendants argue that "the decision to reassign plaintiff from his job in food service is rationally related to a legitimate state interest in preserving order in the correction facility mess hall (sic)." However, defendants proffer no explanation of what this "rational relationship" might be. A person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security concerns. It is not sufficient to assert, as defendants do in their motion papers, that the prison's exclusionary policy is designed to prevent "potential disciplinary and security problems which could arise from heterosexual inmates' reaction to and interaction with homosexual and/or transsexual inmates who serve and prepare food" in the mess hall. Defendants as yet have offered no evidence that these alleged disciplinary and security problems are real threats to prison life, or that the exclusionary policy is a rational response to such threats if they do exist.

Holmes v. Artuz, No. 95 Civ. 2309 (SS), 1995 U.S. Dist. LEXIS 15926, at *4 (S.D.N.Y. Oct. 26, 1995) (*unpublished*) (citations omitted)*; see also* Johnson v. Knable, *decision reported at* 862 F.2d 314 (4th Cir. 1988), *opinion reported in full at* No. 88-7729, 1988 WL 119136, at *1 (4th Cir. Oct. 31, 1988) (*unpublished*) (vacating lower court's summary judgment dismissal of an equal protection claim brought by a gay prisoner after he was allegedly denied a job in the prison's education department because he was gay, and remanding for further proceedings, noting that "[i]f [the plaintiff] was denied a prison work assignment simply because of his sexual orientation, his equal protection rights may have been violated"); Kelley v. Vaughn, 760 F. Supp. 161, 163–64 (W.D. Mo. 1991) (denying defendant's motion to dismiss on the ground that a gay prisoner, bringing an action against the correctional center's food service manager to challenge his removal from his job as bakery worker, might have a valid equal protection claim); Howard v. Cherish, 575 F. Supp. 34, 36 (S.D.N.Y. 1983) (stating, although it was not the case in the facts before the court, that a gay prisoner who claimed he was punished because he was gay would have a claim under § 1983 if he had shown evidence in his claim that he was discriminated against solely because of his sexual preferences); *but see* Fuller v. Rich, 925 F. Supp. 459, 463 (N.D. Tex. 1995) (finding that mistaken rumors that a gay prisoner was HIV-positive were enough to raise a legitimate safety concern that justified firing him from food handling job).

37. There is only one known case that has used a sex discrimination theory in the prisoner context. *See* Schwenk v. Hartford, 204 F.3d 1187, 1200–02 (9th Cir. 2000) (discussing claim that attack by prison guard was at least in part due to sex discrimination, as guard was not interested in prisoner sexually until his discovery of her "true" sex). It is difficult to predict, then, how courts would respond, and you should be mindful of the consequences under the Prison Litigation Reform Act of filing claims deemed frivolous by the court. See Chapter 14 of the *JLM*, "The Prison Litigation

Civil Rights Act of 1964 creates a federal cause of action for "discrimination because of ... sex,"[38] and has been held to prohibit sex discrimination against both men and women.[39] Sex discrimination is discrimination that occurs based on whether you are a man or a woman and does not directly cover sexual orientation or sexual preference discrimination. But, LGBT persons are sometimes able to use a theory of "sex-stereotyping" to argue they have suffered from sex discrimination. This is useful because courts subject laws and policies that treat people differently according to their sex to "intermediate scrutiny." Intermediate scrutiny is a higher level of scrutiny than "rational basis scrutiny," which is the test applied to claims of discrimination for sexual orientation. Intermediate scrutiny requires the prisoner to show a *substantial* relationship between a prison rule and a legitimate goal of the prison to justify a sex-based classification.[40]

Sex-stereotyping claims cover claims of discrimination against people for not conforming to the expected behavior of their sex. The Supreme Court recognized this cause of action in *Price Waterhouse v. Hopkins*, finding sex discrimination when an accounting firm told an employee she had to "walk, talk, and dress more femininely, style her hair, and wear make-up and jewelry" to get a promotion.[41] This case is particularly useful for transgender prisoners who suffer from discrimination in prison. For many years, courts have been unsympathetic to transgender plaintiffs, particularly in prisons. But, several cases have held that *Price Waterhouse* protects transgender people and overrules previous decisions, like *Ulane v. Eastern Airlines, Inc.*,[42] which denied transgender people protection under Title VII and similar sex discrimination laws.[43]

Sex-stereotyping can also be used by lesbian, gay, and bisexual people in making discrimination claims. For example, if you are a gay man and you believe you were fired from your prison job because you are gay, you could argue that you are a *man* who desires male sexual partners and therefore you were fired, where a female prisoner who desired male sexual partners (and who is thus similarly situated to you) would not have been fired.[44] By framing the argument in this way, you can perhaps get the court to be more rigorous in its review of the prison officials' actions.

Reform Act."

38. 42 U.S.C. § 2000e-2(a)(1) (2000). Numerous state statutes also prohibit sex discrimination; some apply the same standard as Title VII, while others define discrimination more broadly.

39. *See*, *e.g.*, Oncale v. Sundowner Offshore Servs. 523 U.S. 75, 78, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201, 206 (1998); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682, 103 S. Ct. 2622, 2630, 77 L. Ed. 2d 89, 101 (1983).

40. See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

41. Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 109 S. Ct. 1175, 1782, 104 L. Ed. 2d 268, 278 (1989).

42. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084-1085 (7th Cir. 1984) (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *see also* Holloway v. Arthur Andersen, 566 F.2d 659, 661 (9th Cir. 1977) (affirming trial court decision "that Title VII does not embrace transsexual discrimination").

43. *See* Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding *Price Waterhouse*'s logic overruled "the initial judicial approach" in cases like *Holloway*); Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) ("It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on 'sex' (referring to an individual's anatomical and biological characteristics), but not on 'gender' (referring to socially-constructed norms associated with a person's sex) ... However, [this] approach ... has been eviscerated by *Price Waterhouse*."); Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) ("Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."); Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *3 (W.D. Pa. Feb. 17, 2006) (*unpublished*) ("Plaintiff claims that he was fired because he began to present as a female. He claims that he was the victim of discrimination and a hostile work environment created by defendant due to plaintiff's appearance and gender-related behavior. These allegations, if true, state a claim under Title VII."); Kastl v. Maricopa County Cmty. College Dist., No. 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825, at *7 (D. Ariz. June 3, 2004) (*unpublished*) (finding plaintiff's allegation that she was required to use the men's restroom stated a claim under Title VII where plaintiff was a biological female born with male genitalia); Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757, at *12 (W.D.N.Y. Sept. 26, 2003) (*unpublished*) ("This Court is not bound by the *Ulane* decisions. More importantly, the *Ulane* decisions predate the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), which undermined the reasoning of the *Ulane* decisions."); *but see* Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634, at *10–12 (D. Utah June 24, 2005) ("The *Price Waterhouse* prohibition against sex stereotyping should not be applied to transsexuals … [because] there is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.").

44. *See* Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214–15 (1st Cir. 2000) (holding that it was *possible* that a bank that refused a loan application made by a man wearing a dress until he went home and changed into "male

3. State Laws

Many state laws (and constitutions) provide greater protection to LGBT people than the federal Constitution does, as interpreted by the courts. Examples are the Minnesota State Constitution[45] and California's Unruh Civil Rights Act.[46] You should research your state's laws to find out if you could have a stronger statutory claim under those laws than the constitutional claims (discussed in the above two subsections) you could make. If you are in a state with LGBT-friendly statutes, you can bring a claim under a state statute as a "pendent claim" (supplemental to your Section 1983 claim) in federal court, or you can bring the state claim alone in state court. Also, sometimes state laws have been used by courts to determine what constitutes a violation of the federal Equal Protection Clause.[47]

D. Jury Bias

The Sixth Amendment of the United States Constitution guarantees defendants the right to trial by a *fair and impartial* jury in all criminal prosecutions.[48] If you suspect that homophobic or transphobic attitudes among the jurors who delivered the guilty verdict against you prevented them from making an impartial decision about your conviction, you may have grounds to challenge your conviction.[49]

Your right to a fair and impartial jury is supposed to be protected by a process called "voir dire." Voir dire happens before the trial begins. During voir dire, prospective jurors are asked questions so that the judge and the lawyers can learn more about them. Usually the judge asks the questions, although in some jurisdictions the lawyers also ask questions, and in many jurisdictions the lawyers are allowed to submit questions to the judge. Generally, the lawyers from each side are permitted to "strike," or exclude, jurors based on their answers to the questions. The lawyers have an unlimited opportunity to exclude jurors "for cause," which means they can exclude those whom they believe to be biased. The judge, too, has an obligation to exclude any prospective juror she believes to be biased.[50]

You might have a claim that your right to trial by an impartial jury was violated if:

(1) The court failed or refused to question jurors during voir dire about their attitudes towards gay or transgender people, *and* your sexual orientation or gender identity was raised at trial;[51]
(2) The court selected a juror even though that juror had indicated that, due to his homophobia or transphobia, he would have trouble being impartial[52]; or

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attire" had engaged in sex discrimination because it likely would not have refused a loan application to a woman wearing a dress); Baehr v. Lewin, 852 P.2d 44, 82, 74 Haw. 530, 580 (Haw. 1993) (holding that a state statute restricting the marital relation to one man and one woman should be subjected to strict scrutiny under the equal protection clause of the state constitution because it made a sex-based classification).

45. Minn. Const. art. I, § 2.

46. Cal. Civ. Code § 51 (2007).

47. *See* Doe v. Sparks, 733 F. Supp. 227, 232 (W.D. Pa. 1990) (finding that even though federal law allowed discrimination based on sexual activity, Pennsylvania State law did not, and Pennsylvania law could be used to evaluate the decision to bar a lesbian partner from visitation).

48. *See* Irvin v. Dowd, 366 U.S. 717, 721–22, 81 S. Ct. 1639, 1641–42, 6 L. Ed. 2d 751, 755–56 (1961).

49. There is evidence that lesbians are more likely to be convicted than heterosexual women, perhaps indicating that jurors' homophobia regularly plays an inappropriate role in their decision processes. Lesbians also serve longer sentences than heterosexual women. Ruthann Robson, Sappho Goes to Law School 36 (1998).

50. In New York, a prosecuting attorney or a judge may not assume that a gay juror will be biased in favor of other homosexuals involved in the trial. So, simply the fact that both a defendant and a juror are gay should not be "cause" for dismissing the juror. *See* People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case merely because of their homosexuality, is tantamount to a denial of equal protection under the United States Constitution.").

51. In conducting voir dire, the trial court judge is required to permit at least some questioning with respect to any material issue that may actually or potentially arise at trial. Aldridge v. United States, 283 U.S. 308, 311–13, 51 S. Ct. 470, 472, 75 L. Ed. 1054, 1056–57 (1931) (finding voir dire unfair where trial judge "failed to ask any question which could be deemed to cover the subject," in order to uncover a "disqualifying state of mind," in this instance, racial prejudice). The standard of review of jury *voir dire* is that the trial court's discretion must be exercised consistently with "the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310, 51 S. Ct. 470, 471, 75 L. Ed. 1054, 1056 (1931). Nevertheless, the trial court is given wide latitude to determine how best to conduct the voir dire, and failure to ask specific questions is reversed only for abuse of this discretion. Rosales-Lopez v. United States, 451 U.S. 182, 190–91, 101 S. Ct. 1629, 1635–36, 68 L. Ed. 2d 22, 29–30 (1981).

52. *See* State v. Johnson, 706 So. 2d 468, 477–78 (La. Ct. App. 1998) (finding that it was proper to release one

(3) The prosecutor conducting the voir dire excluded all the gay or transgender people from the pool of prospective jurors because they were gay or transgender.[53]

A handful of prisoners have challenged their *sentences* or convictions for alleged anti-gay jury bias, with limited success. For example, in *Owens v. Hanks*, a Seventh Circuit case, a gay prisoner whose sexual orientation was raised in testimony during his murder trial petitioned for a writ of habeas corpus, contending, among other things, that he was denied an impartial jury because the court chose several jurors who had expressed their bias against gay people during jury selection.[54] The court found that these expressions of juror bias did not make his trial unfair because there was testimony at trial that *witnesses* for both the prosecution and the defense were gay, and so any prejudice on the part of the jurors regarding sexuality affected both parties.[55] If both parties are not affected, such a claim might be more likely to succeed.

On the other hand, a New Jersey court *reversed* the conviction of a defendant on appeal, finding that the trial court had deprived him of his fundamental right to be present during an individual voir dire from which spectators were excluded. At the voir dire, questions were asked about prospective jurors' attitudes toward homosexuality. The defendant had expressly requested to be present.[56] The court held that "[s]ince ... the evidence suggested that defendant was bisexual because he was a frequent patron of gay bars, it was important that defendant be present so that he could have formed his own impressions of the jurors' demeanor and visceral reactions when they responded to the questions about homosexuality."[57]

Though the case law is sparse, some cases indicate you might be granted a retrial if homosexuals were purposefully excluded from the jury. In *People v. Viggiani*, a New York state case, the court decided jurors could not be excluded from a jury "for cause" merely because they had a same-sex orientation and so did a participant in the trial.[58] The California Court of Appeals ruled in *People v. Garcia* that the prosecution could not use its peremptory challenges to exclude all lesbians from a jury. It found that homosexuals

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juror for anti-gay bias but improper to release a second juror, who claimed that if he knew defendant was gay he would "almost automatically" convict, because the second was merely parroting the released juror in an attempt to get out of jury duty and was therefore not actually biased).

53. Some courts have ruled that jurors cannot be removed "for cause" from a jury just for being gay. *See*, *e.g.*, People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that [citizens] who may be otherwise qualified, would be unable to sit as impartial jurors in this case, merely because of their homosexuality is tantamount to a denial of equal protection under the United States Constitution."). Other courts have ruled that homosexuals may constitute a "class" of individuals that may not be entirely excluded from a jury. *See*, *e.g.*, People v. Garcia, 92 Cal. Rptr. 2d 339, 343–44, 77 Cal. App. 4th 1269, 1275–77 (Cal. Ct. App. 2000) (holding that "exclusion of lesbians and gay men [from the jury pool] on the basis of group bias violates the California Constitution").

54. For example, one impaneled juror stated at voir dire that "she would unwittingly be influenced by a witness' homosexuality because she believe[d] it [was] morally wrong." Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). Another stated that she did not approve of homosexuality and "would be less likely to believe a homosexual." Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *3 (7th Cir. June 25, 1996) (*unpublished*). Please note, however, that *Owens v. Hanks* is an unpublished opinion and therefore may not be an acceptable case to cite in some jurisdictions.

55. Owens v. Hanks, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *5–6 (7th Cir. June 25, 1996) (*unpublished*); *see also* Lingar v. Bowersox, 176 F.3d 453, 457–59 (8th Cir. 1999) (finding the admission of testimony that defendant was gay during the penalty phase of his trial for murder was harmless and did not contribute to the jury's finding, because it was brief and because the State did not refer to it during closing argument); United States v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (finding refusal by trial court to ask questions of prospective jurors during voir dire to determine if they harbored bias against gay people did not amount to an abuse of discretion and that the proposed evidence was irrelevant, where trial judge had believed such questions would "unnecessarily call attention to [the defendant's] effeminate mannerisms"); State v. Lambert, 528 A.2d 890, 892 (Me. 1987) (finding no abuse of discretion where "questions concerning a personal involvement with sexual abuse, presumably including sexual abuse by a homosexual, were asked of the potential jurors in [a] confidential questionnaire," and "additional questions asked [to jurors en masse] did not contain a potential for such undue embarrassment to a potential juror as to require individual voir dire").

56. State v. Dishon, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269 (N.J. Super. Ct. App. Div. 1997).

57. State v. Dishon, 687 A.2d 1074, 1082, 297 N.J. Super. 254, 269–70 (N.J. Super. Ct. App. Div. 1997).

58. *See* People v. Viggiani, 105 Misc. 2d 210, 214, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. N.Y. County 1980) ("To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case merely because of their homosexuality, is tantamount to a denial of equal protection under the United States Constitution.").

constitute a "cognizable class" and that completely barring them from a jury violated the California constitution.[59]

Although it cannot be predicted with any certainty, the claim that LGBT individuals form a class that cannot be barred from jury service is probably stronger after *Lawrence v. Texas.* Before *Lawrence*, some courts ruled that homosexuals could be barred from jury service because they were presumptively criminals. Not only are homosexuals no longer presumptively criminal in any state, but *Lawrence v. Texas* and *Romer v. Evans* also call into question any government action that is backed by stereotypical beliefs about the inferiority of a class of people.

If you believe homophobic or transphobic bias played a role in the selection of your jury, you may be able to convince a court to vacate or reverse the judgment against you, or to set aside your sentence.

E. Your Right to Control Your Gender Presentation While in Prison

Transgender prisoners often have difficulty expressing their gender while in prison. These difficulties range from denial of access to gender-related medical care to denial of access to personal effects like clothes and cosmetics.

1. Access to Gender-Related Medical Care

Many transgender prisoners seek access to gender-related medical care while in prison. The most common requests are for hormone treatments and gender reassignment surgery. For general information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*.

(a) Access to Gender Reassignment Surgery

Courts generally do not require a prison to pay for or conduct any surgery, either genital or non-genital, related to a prisoner's gender identity or transition.[60] Some states have even gone so far as to legislate a prohibition on prisoner sex-reassignment surgery.[61] But, if you experience health complications as a result of a prior gender-related surgery, you *are* entitled to the medical care necessary to treat those complications.

(b) Access to Hormonal Treatment

The federal Bureau of Prisons' medical policy is to "maintain a transsexual [sic] inmate at the level of change existing upon admission."[62] Nevertheless, many federal and state prisons have refused to provide hormone treatment to transgender prisoners, even though the cost of hormone treatment does not necessarily exceed the costs of other routine medical treatments administered to the general prison population.[63] In addition, prisons may deny hormone treatments if you do not have a doctor's prescription to show that you were previously taking hormones.

If you were undergoing hormone therapy at the time you were incarcerated, and prison officials deny you access to the treatment while you are in prison, you can sue those officials for violation of your constitutional right to medical care. As you will see in the following subsections, the issue of whether a transgender person is entitled to hormone therapy while in prison has been litigated extensively. In most cases, courts have

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59. People v. Garcia, 92 Cal. Rptr. 2d 339, 343–44, 77 Cal. App. 4th 1269, 1275–77 (Cal. Ct. App. 2000).

60. Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 543 (2000); *see also* Lewis v. Berg, No. 9:00-CV-1433, 2005 U.S. Dist. LEXIS 39571, at *22, *30 (N.D.N.Y. Mar. 10, 2005) (*unpublished*) (finding it reasonable for prison grievance committee to deny prisoner's request for gender reassignment and cosmetic surgery and refer her back to medical personnel for other appropriate treatment).

61. *See* Inmate Sex Change Prevention Act, Wis. Stat. § 302.386(5m) (2007).

62. The Bureau's policy reads as follows:

> It is the policy of the [Bureau of Prisons] to maintain a transsexual inmate at the level of change existing upon admission. Should the Clinical Director determine that either progressive or regressive treatment changes are indicated, the Medical Director must approve these prior to implementation. The use of hormones to maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration (with appropriate documentation from community physicians/hospitals) and with the Medical Director's approval.

Farmer v. Moritsugu, 163 F.3d 610, 611–12 (D.C. Cir. 1998) (citing U.S. Dept. of Justice, Fed. Bureau of Prisons, Program Statement 6000.04, Health Services Manual, ch. 15, § 4 (1994)).

63. Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 546 (2000).

found for the prison officials, but recently several courts have required prisons to provide transgender prisoners with hormonal treatment as long as they were undergoing such treatment before entering prison.[64]

(i) Serious Medical Need and Deliberate Indifference

The Supreme Court established in *Estelle v. Gamble* that "deliberate indifference" to a prisoner's "serious medical needs" violates that prisoner's Eighth Amendment right to be free from cruel and unusual punishment.[65]

Circuit courts have consistently considered "transsexualism," also known in this context as "gender dysphoria" or "gender identity disorder,"[66] a "serious medical need" for the purpose of the *Estelle* standard.[67] Many federal courts have held that transgender prisoners are therefore constitutionally entitled to *some* type of medical treatment for their condition. Nevertheless, most of these courts have held transgender prisoners do not have a constitutional right to any *particular* type of treatment, so long as they receive some kind of treatment, such as psychological counseling.[68] Under these rulings, prison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to implement a prisoner's requested course of treatment.[69] Accordingly, most courts that have considered the question have

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64. *See* Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 800–01 (W.D. Mich. 1990) (granting transgender prisoner's request for a preliminary injunction requiring prison officials to provide her with estrogen therapy where she had taken estrogen for the 16 years prior to incarceration); Gammett v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 U.S. Dist. LEXIS 55564 (D. Idaho July 27, 2007) (*unpublished*) (granting prisoner's request for a preliminary injunction to provide estrogen therapy but only after self-castration required the provision of some type of hormone). Because many prisons refuse to prescribe hormones to prisoners who do not have a previous doctor's prescription, prisoners who had been getting hormones through informal means may have an additional challenge in bringing suit.

65. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976). For general information about your right to adequate medical care while in prison, see Chapter 23 of the *JLM*.

66. Activists disagree as to whether or not characterizing transgender identities as medical conditions is strategically wise. On the one hand, it sometimes provides transgender people in and out of prison with access to gender-related medical treatment; on the other hand, these diagnoses often regulate gender expressions and may limit the ability of transgender people who are unable or choose not to access gender-related medical care to have their gender recognized. *See*, *e.g.*, Dean Spade, *Resisting Medicine, Re/modeling Gende*r, 18 Berkeley Women's L.J. 15 (2003).

67. *See*, *e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (finding that inmate who claimed her constitutional rights were violated because she was denied estrogen treatments had a serious medical need as a transsexual); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988) (finding that "transsexualism is a very complex medical and psychological problem" that constitutes a serious medical need); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (finding a transgender prisoner who is entitled to some type of medical care had a serious medical need); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (holding plaintiff 's transgender healthcare was a serious medical need and prison officials were required to provide treatment, including psychotherapy with a professional experienced in treating gender identity disorder and potentially also including hormone therapy or gender reassignment surgery); *but see* Long v. Nix, 86 F.3d 761, 765 n.3 (8th Cir. 1996) (noting that court's holding in *White* that transgenderism is a "serious medical need" may be in doubt in light of *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).

68. *See*, *e.g.*, Meriwether v. Faulker, 821 F.2d 408, 413 (7th Cir. 1987) (holding that a transgender prisoner is entitled to some type of medical treatment but has no constitutional right to any one particular type of treatment where another form of treatment is made available).

69. *See* De'Lonta v. Angelone, 330 F.3d 630, 635 (4th Cir. 2003) (finding prisoner with gender identify disorder was not entitled to continued hormone therapy, but was entitled to treatment for compulsion to self-mutilate after her hormone treatment was stopped); Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996) (holding a prison official was not deliberately indifferent for choosing a different course of treatment than the tranquilizers recommended by the prisoner's expert, where the prison medical staff tried to evaluate the prisoner's psychological condition and the prisoner failed to cooperate); White v. Farrier, 849 F.2d 322, 327 (8th Cir. 1988) (a different diagnosis by prison medical staff than by prisoner's experts does not itself establish deliberate indifference, since doctors are entitled to exercise their medical judgment; a prisoner is not entitled to hormone treatment if the prison instead decides to provide her with psychotherapy); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (holding a transgender prisoner is entitled to some type of medical treatment but has no constitutional right to any one particular type of treatment); Supre v. Ricketts, 792 F.2d 958, 963 (10th Cir. 1986) (holding that prison officials are not required to administer estrogen to treat transsexuals because it is one of a variety of treatment options and there is no medical consensus that it is the best option; therefore a transsexual denied estrogen treatment may have a claim for medical malpractice, but not for deliberate indifference); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (holding that prison could deny transsexual prisoner hormones or sex reassignment surgery if it considered them too much of a security threat, but was required to provide at least some kind of treatment, such as psychotherapy); Madera v. Corr. Med. Sys., No. 90-1657, 1990 U.S. Dist. LEXIS 11878, at *10 (E.D. Pa. Sept. 5, 1990) (*unpublished*) ("[T]here is no absolute constitutional right

denied transgendered prisoners' requests for hormonal treatment while still upholding their right to medical care.[70]

Several more recent federal court decisions, however, suggest that courts are beginning to carve out a limited exception and recognize circumstances in which the provision of hormonal therapy by prisons should be mandatory. In *Phillips v. Michigan Department of Corrections*, for example, a Michigan federal court granted a preliminary injunction directing prison officials to provide estrogen therapy to a thirty-four-year-old transgender woman. The prisoner had been taking estrogen since she was a teenager and had been experiencing physical transformation and severe depression as a result of being prevented from continuing her estrogen treatment in prison.[71] The *Phillips* court held that denying hormonal treatment in this case caused "irreparable harm" and violated the Eighth Amendment:

> It is one thing to fail to provide an inmate with care that would improve his or her medical state, such as refusing sex reassignment surgery or to operate on a long-endured cyst. Taking measures which actually reverse the effects of years of healing medical treatment ... is measurably worse, making the cruel and unusual determination much easier.[72]

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to hormonal treatments for a transsexual any more than there is for any other specific therapy requested by a prisoner."); Farmer v. Carlson, 685 F. Supp. 1335, 1340 (M.D. Pa. 1988) (finding denial of plaintiff's estrogen medication did not stem from a deliberate indifference to her medical needs but instead resulted from an informed medical opinion, and therefore plaintiff did not have a legal claim of deliberate indifference); Lamb v. Mascher, 633 F. Supp. 351, 353 (D. Kan. 1986) (found for defendants who provided psychological treatment to a transgender prisoner but refused to provide hormones, stating, "the key question in this case is whether defendants have provided plaintiff with some type of treatment, regardless of whether it is what plaintiff desires"). The courts' refusal to recognize a specific right to hormone therapy, and the recognition instead of a broader right to medical care, has on at least one occasion prevented prison officials from avoiding liability by claiming qualified immunity. In a Ninth Circuit case, prison officials sued by a prisoner whose hormonal therapy they had terminated argued that because prisoners suffering from gender dysphoria have no clearly established right to female hormone therapy, the officers were entitled to qualified immunity. The Ninth Circuit rejected the officials' claim, holding that "with respect to prisoner medical claims, the right at issue should be defined as a prisoner's 8th Amendment right 'to officials who are not deliberately indifferent to serious medical needs,'" and not as a right to something more specific. South v. Gomez, *decision reported at* 211 F.3d 1275 (9th Cir. 2000), *opinion reported in full at* No. 99-15976, 2000 U.S. App. LEXIS 3200, at *4 (9th Cir. Feb. 25, 2000) (*unpublished*). See Chapter 16 of the *JLM* for an explanation of qualified immunity and other defenses to § 1983 suits.

70. In Maggert v. Hanks, 131 F.3d 670, 671–72 (7th Cir. 1997), a court recognized what these other courts have not: that, at least sometimes, no treatment other than hormone therapy will be effective for transsexual prisoners. Nevertheless, the *Maggert* court held prisons should not be required to provide hormonal therapy—not because other treatments would work, but because such therapy exceeds the minimal treatment prisons are required to provide. Though a prison is required by the 8th Amendment to provide a prisoner with medical care, it need not provide care as good as the prisoner would receive if he were a free person; prisoners are entitled only to minimum care. Maggert v. Hanks, 131 F.3d 670, 671–72 (7th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)). The *Maggert* court reasoned that because neither public nor private health insurance programs typically pay for sex reassignment, it would be inaccessible to most transgender prisoners even if they were not in prison. "Making the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law. ... [This would lead to] transsexuals committing crimes because it is the only route to obtaining a cure." Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997). *See also* Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (assuming that transsexualism is a serious medical need, the denial of hormone therapy was not deliberate indifference because of the length of the plaintiff's term, the prison's inability to perform sex change operations, the lack of medical necessity for the hormone, and the disruption to all-male prisons).

71. Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792 (W.D. Mich. 1990).

72. Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 800 (W.D. Mich. 1990); *see also* De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003) (holding that termination of a transgender prisoner's hormone treatment could constitute deliberate indifference where such treatment was terminated because of prison policy rather than because of medical judgment); South v. Gomez, *decision reported at* 211 F.3d 1275 (9th Cir. 2000), *opinion reported in full at* No. 99-15976, 2000 U.S. App. LEXIS 3200, at *5–6 (9th Cir. Feb. 25, 2000) (*unpublished*) (distinguishing between failing to provide hormonal therapy in the first instance and abruptly terminating an existing prescription; when a prisoner was already receiving hormones at the time of her transfer to a prison, it was a violation of her 8th Amendment rights for that prison to halt all hormone treatment at once rather than end it gradually); Wolfe v. Horn, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001) (ruling that where a prison doctor discontinued a patient's hormone treatment that she had been receiving for almost a year, there was "at least a fact question as to whether each of the defendants was deliberately indifferent to treating [the plaintiff's] gender identity disorder"). The *Wolfe* court found that, while it may be defensible for a prison to reject demands for hormonal therapy by transgender prisoners who did not take hormones outside of the prison setting,

A recent New York district court case is especially encouraging, as it found a prison denying a transgender prisoner hormone therapy violated the Eighth Amendment. In *Brooks v. Berg*, the plaintiff only began to officially identify himself as a transgender person while in prison and so was not using hormonal therapy when he entered prison. The court therefore did away with other courts' distinction between prisoners already using hormone therapy at the time of entry into prison and those seeking to start hormone therapy after entry into prison.[73]

Despite these encouraging developments in a few federal courts, courts in many other jurisdictions have continued to deny claims by transgender prisoners for hormonal treatment.[74] Prisoners who are unable to demonstrate that they previously received hormone treatment before incarceration face an uphill battle. For example, in *Brown v. Zavaras*, the court held that estrogen treatment specifically was not necessary because the plaintiff had not received such treatment prior to incarceration.[75] Nevertheless, receiving hormone therapy prior to incarceration does not guarantee access to similar treatment while incarcerated.[76] Recent cases indicate that the original determination made by prison medical personnel, rather than prior treatment history, will be given the greatest weight by the courts.[77]

2. Access to Personal Items Associated with Gender Identity

Clothing, cosmetics, jewelry, and personal care products are often significant components of a person's gender presentation. Prisons vary as to whether they permit prisoners to access the clothing of their choice and other personal items.[78] Prisoners have challenged prison policies that deny them access to certain kinds of clothing and products, as well as specific refusals of prison staff to provide them with such property, under Section 1983. In both situations, prisoners allege that the prison policies and refusals violate their constitutional rights. These challenges have been largely unsuccessful, however, because courts show significant deference to prison officials' decisions about how to oversee daily life in prison.

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the case is different when prison officials terminate medical treatment that was previously recommended and administered by a medical professional outside of the prison.

73. Brooks v. Berg, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) (finding an 8th Amendment violation where prisoner was not permitted to begin hormonal therapy while in prison; the court reasoned that the "prison policy … makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration," rather than a distinction based on medical judgment). Defendants also admitted that the New York Department of Correctional Services' policy did not prevent a prisoner who was first diagnosed with gender dysphoria while incarcerated from potentially receiving hormone replacement treatments.

74. *See*, *e.g.*, Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (holding that denial of hormone therapy and sex change operation does not constitute deliberate indifference when the prison's medical director found no medical necessity for such treatment and the prison was unable to perform a sex change operation); Farmer v. Moritsugu, 163 F.3d 610, 615 (D.C. Cir. 1998) (denying prisoner's claim against the medical director of the Bureau of Prisons because he was not in a position to diagnose and treat individual patients); Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997) (holding that prisons are not required to provide hormone therapy because it is unnecessary and expensive, and because gender dysphoria is not a serious enough condition).

75. Brown v. Zavaras, 63 F.3d 967, 970 n.2 (10th Cir. 1995).

76. *See*, *e.g.*, Stevens v. Williams, No. CV-05-1790-ST, 2008 WL 916991, at *12–13 (D. Or. Mar. 27, 2008) (*unpublished*) (finding that prisoner, who had received hormone therapy in the past, had previously and unsuccessfully litigated his denial of continued hormone therapy while in prison and therefore was barred from relitigating this claim in federal court); Scribner v. Surapaneni, No. 1:05-CV-642, 2006 WL 3761976, at *5 (E.D. Tex. Dec. 21, 2006) (*unpublished*) (holding that despite prisoner's prior hormone therapy treatment, including treatment while incarcerated, he was not entitled to continued treatment after treating physician found that sex-reassignment surgery was highly unlikely and that the prisoner's age increased concerns about the negative side effects of continued treatment).

77. *See*, *e.g.*, Praylor v. Tex. Dept. of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (deferring to treating physician's recommendations).

78. *See*, *e.g.*, Tates v. Blanas, CIV S-00-2539, 2003 U.S. Dist. LEXIS 26029, at *31 (E.D. Cal. Mar. 11, 2003) (*unpublished*) (rejecting a categorical rule that denies a prisoner a bra simply because he is a transgender or is housed in a men's ward; the possibility that the bra could be misused as a weapon or noose must be balanced against any medical or psychological harm resulting from denial of a bra); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2, *15–16 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that transgender prisoner was permitted access to "female clothing and amenities" in one prison, but denying relief for second facility's refusal of permission to wear female undergarments because of significant penological interests and lack of demonstration that wearing the female undergarments was a medical necessity).

Claims under the First Amendment generally fail in the face of arguments by prisons that restrictions on dress, jewelry, and makeup are justified by legitimate penological interests.[79] Several courts have noted that such deprivations are simply not of a constitutional nature.[80]

As one court stated:

> "Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measures of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." ... Cosmetic products are not among the minimal civilized measure of life's necessities.[81]

Additionally, courts have held that different grooming regulations for male and female prisoners do not trigger a prisoner's equal protection rights.[82]

F. Your Right to Confidentiality Regarding Your Sexual Orientation or Gender Identity

If you are an LGBT prisoner, you may not have disclosed your sexual orientation or transgender status to fellow prisoners. The disclosure by a prison official of your sexual orientation or gender identity could subject you to harassment or abuse by other officials or fellow prisoners. If a prison official has told others that you are gay, lesbian, transgender, or bisexual, you might have a claim under Section 1983 that the official violated your Eighth Amendment right to be free from cruel and unusual punishment and/or your right to privacy under the Fourteenth Amendment.

1. Disclosure of Sexual Orientation or Gender Identity as an Eighth Amendment Violation

(a) Sexual Orientation

One case specifically addresses a prisoner's Eighth Amendment right to be free from disclosure of his or her sexual orientation. *Thomas v. District of Columbia* involved a corrections officer at the Maximum Security Facility in Lorton, Virginia, who allegedly sexually harassed a prisoner and spread rumors that the prisoner was gay and a "snitch."[83] As a result of these rumors, the prisoner claimed he suffered emotional

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79. *See*, *e.g.*, Star v. Gramley, 815 F. Supp. 276, 278–79 (C.D. Ill. 1993) (holding that restrictions on clothing prisoners can wear are reasonably related to a legitimate penological interest and hence do not violate the 1st Amendment; allowing prison to prevent a prisoner from wearing women's makeup and apparel on the ground that the prisoner would be more vulnerable to attack if he dressed that way); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (denying request by transgender prisoner for cosmetics and female clothing, and holding that "prison authorities must have the discretion to decide what clothing will be tolerated in a male prison"); Ahkeen v. Parker, No. 02A01-9812-CV-00349, 2000 Tenn. App. LEXIS 14, at *25 (Tenn. Ct. App. Jan. 10, 2000) (*unpublished*) (upholding prison policy denying men the right to wear earrings, which was challenged on equal protection grounds, because by discouraging transsexual dressing the policy discouraged sexual assaults); s*ee also* Claybrooks v. Tennessee Dept. of Corr., No. 98-6271, 1999 U.S. App. LEXIS 15174, at * 3 (6th Cir. July 6, 1999) (*unpublished*) (affirming lower court's dismissal of transgender prisoner's § 1983 claim for denial of female clothing, not on constitutional grounds, but on the grounds that the Tennessee Department of Corrections is immune from suit in federal court under the 11th Amendment because it is a state agency and the state has not waived immunity).

80. Remember that in order to bring a successful § 1983 claim, you must allege a violation of a federal constitutional or statutory right. *See* Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (failing to be "convinced that a denial of female clothing and cosmetics is a constitutional violation"); Ahkeen v. Parker, No. 02A01-9812-CV-00349, 2000 Tenn. App. LEXIS 14, at *22 (Tenn. Ct. App. Jan. 10, 2000) (*unpublished*) (holding that confiscation of the prisoner's earrings by prison officials did not violate the prisoner's privacy rights, as "loss of freedom of choice and privacy are inherent incidents of confinement" (quoting Hudson v. Palmer, 468 U.S. 517, 528, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393, 404 (1984))); Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7–8 (6th Cir. Jan. 28, 1997) (*unpublished*) (holding that denial of access to hair and skin products that transgender prisoner claimed were necessary for her to maintain a feminine appearance did not state a constitutional claim).

81. Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7–8 (6th Cir. Jan. 28, 1997) (*unpublished*) (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992)).

82. *See*, *e.g.*, Hill v. Estelle, 537 F.2d 214, 215–16 (5th Cir. 1976) (holding that difference in application of state prison regulations, in failing to enforce hair length regulations against female prisoners, impinged on no fundamental right, created no suspect classification, and did not constitute violation of equal protection); Poe v. Werner, 386 F. Supp. 1014, 1019 (M.D. Pa. 1974) (holding that state prison hair length regulation does not violate the Equal Protection Clause, even though it does restrict female hair length or style).

83. Thomas v. District of Columbia, 887 F. Supp. 1, 3 (D.D.C. 1995). *See also* Montero v. Crusie, 153 F. Supp. 2d

distress and feared for his safety when confronted and threatened with bodily harm by other prisoners. The prisoner sued the corrections officer under Section 1983, claiming the officer had violated his Eighth Amendment rights, and the officer moved to dismiss the complaint.[84]

The U.S. District Court for the District of Columbia found that the prisoner had stated a valid Eighth Amendment claim against the officer.[85] The court held that the officer's "alleged conduct, the physical harm with which [the prisoner] was threatened, and the psychic injuries that are alleged to have resulted from such unnecessary, cruel, and outrageous conduct, are sufficiently harmful to make out an Eighth Amendment excessive force claim."[86]

The rumors about the prisoner's homosexuality were just one part of the abuse the officer allegedly visited on the prisoner, and it is impossible to know whether in the absence of the other allegations the court would have reached the same conclusion. However, there is language in *Thomas* that, when read in the context of other Section 1983 cases, could be useful to prisoners bringing suits against prison officials who have revealed their sexual orientation or gender identity to other prisoners.

(b) Gender Identity

If you are a transgender prisoner, you might have a stronger desire for privacy when bathing and changing clothes than traditionally gendered prisoners. If this is not provided, you may bring a claim against the prison for violating your privacy and/or Eighth Amendment rights. The court will balance your interests against the prison's interest in security and will usually find in favor of the prison.[87]

2. Disclosure of Sexual Orientation or Gender Identity as Fourteenth Amendment Violation

The Supreme Court has held that the Fourteenth Amendment to the U.S. Constitution guarantees the right to privacy regarding disclosure of certain personal information.[88] These holdings come out of a Supreme Court tradition of finding a general right to privacy in the Constitution that protects certain intimate matters.[89] Further, many other courts have also found that a constitutional right of privacy protects against disclosure of some kinds of personal information.[90] If a prison official discloses private

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368, 376–77 (S.D.N.Y. 2001) (denying summary judgment for correctional officers who spread rumor that prisoner was gay and tried to incite fight between him and other prisoners).

84. Thomas v. District of Columbia, 887 F. Supp. 1, 3 (D.D.C. 1995).

85. Thomas v. District of Columbia, 887 F. Supp. 1, 5 (D.D.C. 1995) (denying the defendant's motion to dismiss and allowing the case to go to trial).

86. Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D.D.C. 1995).

87. *See* Hudson v. Palmer, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3200–01, 82 L. Ed. 2d 393, 403–04 (1984) (holding that a prisoner's expectation of privacy always yields to what must be considered the paramount interest in institutional security). *See*, *e.g.*, Pollock v. Brigano, 130 Ohio App. 3d 505, 511–12, 720 N.E.2d 571, 576 (Ohio App. 1998) (relying on *Hudson v. Palmer* to hold that "privacy concerns" of transgender prisoner who was forced to shower, change clothes, and use the toilet in front of other prisoners "[did not] rise above the paramount need for institutional security for the other prisoners and the staff" of the prison and that the claims of "lack of privacy do not constitute cruel and unusual punishment under the 8th Amendment because prison policy" had penological justification).

88. *See*, *e.g.*, Whalen v. Roe, 429 U.S. 589, 599–600, 97 S. Ct. 869, 876–77, 51 L. Ed. 2d 64, 73–74 (1977) (holding that the "individual interest in avoiding disclosure of personal matters" is one of the interests protected by a constitutional zone of privacy, but ultimately finding that a New York statute requiring that the state be provided with a copy of prescriptions for certain drugs did not violate the constitution because it included appropriate confidentiality protections and furthered a legitimate state interest); New York v. Ferber, 458 U.S. 747, 760, 102 S. Ct. 3348, 3356, L. Ed. 2d 1113, 1125 (1982) (approving *Whalen v. Roe* and its holding that privacy embraces the individual interest in avoiding disclosure of private matters, holding that a New York statute prohibiting distribution of certain types of materials did not fall under 1st Amendment protection).

89. *See, e.g.,* Griswold v. Connecticut 381 U.S. 479, 485–86, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515–16 (1965) (holding that prohibiting the use of contraceptives violates the Constitution because the marital relationship is one that lies within the zone of privacy created by several constitutional guarantees); Roe v. Wade 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177 (1973) (holding that the constitutional right to privacy includes a woman's decision whether or not to have an abortion).

90. *See, e.g.*, Bloch v. Ribar, 156 F.3d 673, 683–84 (6th Cir. 1998) (holding that there is a right to privacy of information and a constitutional right to avoiding unwarranted disclosure of certain types of private information that concern a fundamental liberty interest); Eastwood v. Dept.. of Corr., 846 F.2d 627, 631 (10th Cir. 1988) (finding the right to privacy is violated "when an individual is forced to disclose information regarding personal sexual matters," which in this case involved forced disclosure of plaintiff's sexual history to an employer when she complained of sexual assault);

information about you, you could be subject to harassment or abuse by other officials or fellow prisoners. If this has happened to you, you might be able to bring a claim under Section 1983 against the official who made the disclosure for violating your constitutional right to privacy. While many cases have focused on disclosure of medical information, you might be able to bring a similar claim for unwarranted disclosure of other personal information.

(a) Privacy Regarding Gender Identity

The Second Circuit has found that a person's transgender status is among those constitutionally protected personal matters, and that a prison official may not violate a prisoner's right to privacy through disclosure of gender identity when that disclosure is not "reasonably related to legitimate penological interests."[91] In other words, the prison official must have a legitimate reason, related to the prison system's goals, for giving away such private information.

Because it is hard to imagine a situation in which a prison could claim a legitimate interest in "outing" a transgendered prisoner, you might succeed if you bring a Section 1983 claim arguing that a prison official who told others that you were transgendered violated your right to privacy. In *Powell v. Schriver*, a transgendered prisoner argued that a corrections officer had violated her constitutional right to privacy when the officer told another corrections officer in the presence of other prison staff and prisoners that she had undergone gender reassignment surgery. The Second Circuit held the corrections officer's "gratuitous disclosure" of the prisoner's "confidential medical information as humor or gossip ... [was] *not* reasonably related to a legitimate penological interest" and therefore violated her right to privacy.[92] Because the sharing of personal information had no real legitimate reason, it was a violation of the prisoner's constitutional right to privacy. Keep in mind, however, that *Powell* focused on the prisoner's transgender status as a medical condition, and not on the sexual orientation of the prisoner.[93]

(b) Privacy Regarding Sexual Orientation

Importantly, at least one court has also held that sexual orientation is one of those "personal matters" protected by the Fourteenth Amendment.[94] There is also at least one case containing such a privacy claim

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Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983), *cert. denied*, 469 U.S. 979, 105 S. Ct. 380, 83 L. Ed. 2d 315 (1984)

("The interests [plaintiff] raises in the privacy of her sexual activities are within the zone protected by the constitution."). The cases involving prisoners' rights to privacy largely involve disclosure of medical information. *See, e.g.*, Powell v. Schriver, 175 F.3d 107, 110–13 (2d Cir. 1999) (finding the disclosure of a prisoner's confidential medical information regarding transsexual status as humor or gossip is not reasonably related to a legitimate penological interest and therefore violates prisoner's constitutional right to privacy); Nolley v. County of Erie, 776 F. Supp. 715, 728–36 (W.D.N.Y. 1991) (finding that red stickers disclosing plaintiff's HIV status to non-medical staff and automatic segregation of HIV-positive prisoners violated constitutional and statutory rights to privacy); Doe v. Coughlin, 697 F. Supp. 1234, 1238–41 (N.D.N.Y. 1988) (holding that the identification of prisoners with HIV and/or AIDS violated their right to privacy and that "the prisoners subject to this program must be afforded at least some protection against the non-consensual disclosure of their diagnosis").

91. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999). *See also* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (holding that a regulation that violates inmates' constitutional rights is only valid if it is "reasonably related to legitimate penological interests").

92. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) (emphasis added). Despite this finding, the *Powell* court ultimately found for the corrections officer because that officer was protected by qualified immunity. Qualified immunity shields government officials from liability for damages on account of their performance of discretionary official functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Powell v. Shriver, 175 F.3d 107, 113 (2d Cir. 1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)). The *Powell* court found that the right of a prisoner to maintain the privacy of her "transsexualism" was not clearly established at the time the defendant in *Powell* made the disclosure, so he could not be held liable. Since the *Powell* case was decided, however, a court within the Second Circuit would likely find that the right to privacy about one's gender identity is "clearly established."

93. Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999).

94. *See* Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) (holding that the disclosure—or even threat of disclosure—of a person's sexual orientation by a state actor constitutes a violation of the person's constitutional right to privacy because sexual orientation is an "intimate aspect of [one's] personality entitled to privacy protection" and "it is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity").

brought by a prisoner specifically related to sexual orientation,[95] though it is important to recognize that the novelty of your claim makes it somewhat unlikely to succeed. Keep in mind, however, that in *Lawrence v. Texas*,[96] the Supreme Court held that homosexual activity was within the zone of privacy protected by the Constitution. After *Lawrence*, a privacy claim might be much stronger.

3. Potential Obstacles to Suit

The Prison Litigation Reform Act ("PLRA") prohibits actions for emotional distress without related physical injury (that rises above a *de minimis*, or minimal, level). Therefore, a prison official's violation of your right to confidentiality would have to create a risk of serious harm to be actionable under the U.S. Constitution. For more information, review *JLM*, Chapter 14 on the PLRA.

If this rule prevents you from bringing suit under the U.S. Constitution, you may still have a state law remedy available to you. Many states recognize the *tort* of invasion of privacy. If the state in which you are incarcerated recognizes this tort, and has *waived* Eleventh Amendment sovereign immunity, you can sue for disclosure of your sexual orientation or gender identity under state law.[97]

G. Assault and Harassment

1. Assault[98]

LGBT prisoners are often more vulnerable than other prisoners to assault (including sexual assault) at the hands of both fellow prisoners and guards, and to illegal searches by prison guards. If you have experienced such assault, you may be able to bring a Section 1983 claim for violation of your Eighth Amendment rights against prison officials either for assaulting you or for failing to protect you from assault.

You should read Chapter 14, "The Prison Litigation Reform Act," Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," and Chapter 24, "Your Right to Be Free From Assault" of the *JLM* if you are considering bringing a suit against prison officials for assault.

(a) Assault by Prison Employees

The Eighth Amendment protects you from punishment that is cruel or unusual.[99] Courts have been reluctant to find constitutional violations when prison officials use force to maintain or restore security within the prison.[100] However, if the force has no identifiable purpose and is simply meant to harm the prisoner, an official may be found to have used excessive force.

To show that an assault by a prison official violates the Eighth Amendment, you must prove that: (1) the prison official acted "maliciously and sadistically"; and (2) the injury you suffered was sufficiently severe (this means the injury is not *de minimis*).[101] This standard was explained by the Supreme Court in *Hudson v. McMillian*, and is known as "the *Hudson* standard."

To determine whether an official acted maliciously and sadistically, courts will consider factors such as:

(1) The extent of the injury suffered;[102]

(2) The need for the official to have used force under the circumstances;

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95. *See* Johnson v. Riggs, No. 03-C-219, 2005 U.S. Dist. LEXIS 44428, at *36–39 (E.D. Wis. Sept. 15, 2005) (recognizing *Sterling*'s right to privacy in one's sexual orientation in the prison context and denying any sort of legitimate penological purpose in disclosing this information without prisoner's consent, but finding for the defendant on grounds of qualified immunity).

96. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508, 525–26 (2003) (holding that the "petitioners are entitled to respect for their private lives" and the state "cannot demean their existence or control their destiny by making their private sexual conduct a crime," relying on the right to liberty under the due process clause and noting that there is an area of personal liberty that the government may not enter).

97. For more information on state tort actions, see Chapter 17 of the *JLM*.

98. See Chapter 24 of the *JLM* for information on assault in prisons generally.

99. U.S. Const. amend. VIII.

100. *See* Hudson v. McMillian, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–99, 117 L. Ed. 2d 156, 166 (1992).

101. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

102. While the injury does not have to be "significant" to prevail on an 8th Amendment claim, the extent of the injury "may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.'" Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261–62 (1986)).

(3) The relationship between the need to use force and the amount of force that was actually used;
(4) The size of the threat as a prison official would reasonably perceive it; and
(5) Efforts made by prison guards to lessen the severity of a serious use of force.[103]

Under the *Hudson* standard, you do not need to show you suffered *serious* injury, but you must show that you suffered some physical injury. The extent of your injury is one of the factors a court will consider in determining whether the use of force violated the Eighth Amendment's ban on cruel and unusual punishment. Also, the PLRA prohibits actions for emotional distress without some accompanying physical injury.[104]

(b) Assault by Other Prisoners

If you have been attacked or feel at risk of attack by fellow prisoners, you may bring suit under Section 1983 to claim that prison officials who failed to protect you violated your Eighth Amendment right to be free from cruel and unusual punishment.[105]

To show that a prison official violated the Eighth Amendment by failing to protect you from assault by other prisoners, you must prove that: (1) the prison official exhibited "deliberate indifference" to your health or safety by disregarding an excessive risk to it; and (2) the injury you suffered was severe.[106]

Deliberate indifference is a standard that is harder to meet than *negligence*, but not as difficult as the standard of "malicious and sadistic intent."[107] Generally, if prison officials were negligent, it means that they should have known of a danger or failed to take the precautions a reasonable person would have taken. If prison officials were acting with malicious and sadistic intent, it would mean that they acted with the intention of causing you harm. Deliberate indifference is between those two standards; generally, it means that the prison officials were aware of a substantial risk to your safety but ignored it.

The leading case for Section 1983 claims involving assault and deliberate indifference is *Farmer v. Brennan*, in which a transgender prisoner brought a Section 1983 suit based on prison officials' failure to protect her from other prisoners because of her feminine appearance.[108] The Supreme Court defined "deliberate indifference" as the failure of prison officials to act when they know of a "substantial risk of serious harm."[109] The Court went on to say that an "inference from circumstantial evidence" could be used to demonstrate that prison officials had knowledge of a risk.[110] "Circumstantial evidence" is evidence that tends to show something as being true. This means that a prisoner can present evidence showing that it is likely that the prison officials knew of the risk, even if there is no "direct evidence" (such as statements from the officials or documented complaints from the prisoner) that shows this risk.

One important thing to keep in mind is that the "inference from circumstantial evidence" does not mean that an official can be held responsible for something he *should have known* but did not know. Rather, it means the circumstantial evidence should demonstrate that the official *actually knew* of something he denies knowing.

Under *Farmer v. Brennan*, you do not have to wait until you have actually been attacked to bring a viable Section 1983 claim of deliberate indifference. If prison officials did not protect you from a mere *risk* of harm, they may still have deprived you of your rights under the Eighth Amendment. Your status as gay, lesbian, bisexual, or transgendered may make it easier for you to prove that you are at risk of harm. If prison officials know your status, then they know you are at a higher risk for harm. For example, in *Greene*

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103. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992).

104. The Prison Litigation Reform Act (PLRA) also requires that you exhaust administrative options before bringing an action under § 1983. See Chapter 14 of the *JLM* for more information on the PLRA and its requirements.

105. *See* Farmer v. Brennan, 511 U.S. 825, 826, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 837 (1994) (holding unanimously that prison officials can be liable for damages if they are deliberately indifferent in failing to protect prisoners from harm caused by other prisoners).

106. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that a prison official cannot be liable under the 8th Amendment for denying a prisoner humane confinement conditions unless the official knows of and disregards an excessive risk to prisoner's health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must draw that inference).

107. Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824 (1994).

108. Farmer v. Brennan, 511 U.S. 825, 831, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 821 (1994).

109. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

110. Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994).

v. Bowles, the Sixth Circuit recognized an Eighth Amendment deliberate indifference claim where the warden admitted knowing that the plaintiff was placed in protective custody because she was transsexual and that a "predatory inmate" was being housed in the same unit.[111] The court held a vulnerable (e.g. gay or transsexual) prisoner could prove prison officials knew of a substantial risk to his safety by showing the officials knew of the prisoner's vulnerable status, and of the general risk to his safety from other prisoners, even if they did not know of any specific danger.[112] Although it may be easier to prove you are at risk if you are such a vulnerable prisoner, you should still report any threats against you so that officials know about any specific problems, because there must be a *substantial* risk to actually prove deliberate indifference.[113]

In your complaint, you should ask for a temporary injunction while your case is pending. An injunction is an order from a court making the prison officials take or not take a certain action. In your case, you may seek an injunction to be immediately transferred into protective custody while your claim is pending. Note, however, that for the court to grant temporary injunctive relief you will have to show that you are likely to prevail, or win, in your case. You should also be aware that, under the PLRA, any temporary injunction that a court grants you is likely to expire before your case is resolved.

Because the PLRA also bars prisoners from suing for emotional or mental distress without an accompanying physical injury, and punishes prisoners who file multiple lawsuits that courts deem "frivolous" or that fail to state a claim, you should be certain that your claim is one a court will recognize as valid. Be sure to review Chapter 14 of the *JLM* on the PLRA and Chapter 16 of the *JLM* on Section 1983 suits.

(c) Sexual Assault

Sexual assault includes rape and unwanted physical contact of a sexual nature, such as fondling someone else's breasts and/or genitals. Generally, bringing a Section 1983 suit for sexual assault in prison requires the same elements of proof explained above for physical assaults.[114] That is, if a prison official sexually assaults you, you must show that the prison official acted maliciously, and that you suffered harm. If another prisoner assaulted you, you need to show that prison officials acted with deliberate indifference and that you suffered harm.[115]

In addition, Title 18 of the United States Code, Section 2243, criminalizes sexual intercourse or any type of sexual contact between persons with "custodial, supervisory or disciplinary" authority and prisoners in federal correctional facilities.[116] Moreover, Section 2241 makes it a felony to use or threaten force to engage in sexual intercourse in a federal prison.[117] Many states also have laws criminalizing sexual contact between prison officials and prisoners. See Chapter 24 of the *JLM* for more information about assaults.

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111. Greene v. Bowles 361 F.3d 290, 294 (6th Cir. 2004). Note that the plaintiff in *Greene* was actually attacked and severely beaten by the other prisoner.

112. Greene v. Bowles, 361 F.3d 290, 294 (6th Cir. 2004) ("[A] prison official cannot 'escape liability ... by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.'" (quoting Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994))). The court also noted that deliberate indifference can be shown alternatively by proving that prison officials knew that a predatory prisoner presented a substantial risk to a large class of prisoners without segregation or other protective measures.

113. *See* Purvis v. Ponte, 929 F.2d 822, 825–26 (1st Cir. 1991) (*per curiam*) (stating the 8th Amendment was not violated when prisoner alleged general fear of "gay bashing" and suspicions that homophobic cellmates threatened his physical safety, since he did not show likelihood that violence would occur and officials had tried six different cellmates).

114. *See* Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (holding that there are 8th Amendment limitations to imprisonment and that sexual abuse is unconstitutional); Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) (stating that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards" (citing Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986))).

115. *See*, *e.g.*, Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004) (finding a deliberate indifference claim where prison officials continued to house a gay prisoner in the general population where he was gang raped and sold as a sexual slave for over 18 months); Taylor v. Mich. Dept. of Corr., 69 F.3d 76, 84 (6th Cir. 1995) (holding that a warden who knows of a risk of physical and sexual assault posed to a vulnerable prisoner and fails to take reasonable steps to protect against such abuse may be found to have acted with deliberate indifference).

116. 18 U.S.C. § 2243 (2006).

117. 18 U.S.C. § 2241 (2006).

2. Harassment

(a) Sexual Harassment

Sexual harassment is common in prisons, and LGBT prisoners are often even more vulnerable to such harassment than are other prisoners.[118] Federal courts have recognized that sexual harassment of prisoners by prison staff can constitute a constitutional *tort*, violating prisoners' Eighth Amendment right to be free from cruel and unusual punishment.[119] A constitutional tort is an action for damages that you can bring against a government or individual defendants if they violate your constitutional rights. A prisoner can state an Eighth Amendment claim for sexual harassment only if the alleged harassment is so harmful that it could be considered a departure from "the evolving standards of decency that mark the progress of a maturing society," and only if the defendant acted with intent to harm the prisoner.[120] As explained below, prisoners generally do not succeed in claims against prison staff for sexual harassment involving words alone. However, prisoners have succeeded in claims against prison staff for sexual harassment that *did* involve repeated physical touching or assault or that threatened the prisoner's safety.[121]

The 1996 passage of the PLRA made it much harder for a prisoner to succeed in a sexual harassment claim against prison staff. While the PLRA does not explicitly state that prisoners cannot sue for sexual harassment, it does say they cannot recover damages "for mental or emotional injury ... without a prior showing of physical injury."[122] Many courts have interpreted this to mean that you cannot receive money damages for sexual harassment unless you were physically hurt by the harasser.[123] But other sorts of relief,

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118. "In a questionnaire ... administered to eighty self-identified homosexual inmates, fifty-three percent reported that they had been frequently victimized via 'sexual innuendo, sexual harassment, verbal and physical threats.'" James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim. L. Rev. 1, 17 (1999) (quoting Wayne S. Wooden and Jay Parker, *Men Behind Bars* 134 (1982)). The Wooden & Parker study also found white prisoners were more likely to be sexually harassed than Latino or African-American ones.

119. *See* Daskalea v. District of Columbia, 227 F.3d 433, 441–50 (D.C. Cir. 2000) (finding the District of Columbia deliberately indifferent to a pattern of particularly heinous and widespread sexual harassment and abuse of female prisoners, including forced stripteases); Schwenk v. Hartford, 204 F.3d 1187, 1196–97 (9th Cir. 2000) (holding that a pre-operative male-to-female transsexual inmate's 8th Amendment rights were violated by a guard's attempted rape, which constituted sexual assault offensive to human dignity); Boddie v. Schnieder, 105 F.3d 857, 860–61 (2d Cir. 1997) (noting that sexual abuse by corrections officers could be an 8th Amendment violation, but ultimately holding that the particular allegations of verbal harassment and bodily contact made by prisoner were not sufficiently serious to be a violation); Freitas v. Ault, 109 F.3d 1335, 1338 (8th Cir. 1997) (recognizing sexual harassment as a constitutional claim where plaintiff alleges that the harassment objectively caused physical or psychological pain and that the officer acted with a sufficiently culpable state of mind); Johnson v. Phelan, 69 F.3d 144, 147 (7th Cir. 1995) (noting that "a prisoner has a remedy for deliberate harassment, on account of sex, by guards of either sex"); Minifield v. Butikofer, 298 F. Supp. 2d 900, 904 (N.D. Cal. 2004) (dismissing plaintiff's sexual harassment claim because, although the Ninth Circuit has recognized that sexual harassment may constitute a claim for an 8th Amendment violation, the court has specifically differentiated between sexual harassment that involves verbal abuse and that which involves allegations of physical assault, finding only physical assault to violate the Constitution). *See also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 Am. Crim L. Rev. 1, 19–23 (1999) (looking at cases both involving physical contact and no physical contact).

120. Thomas v. District of Columbia, 887 F. Supp. 1, 3–4 (D.D.C. 1995) (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992)).

121. Watson v. Jones, 980 F.2d 1165, 1165–66 (8th Cir. 1992) (finding a valid 8th Amendment claim where correctional officer sexually harassed two prisoners on an almost daily basis for two months by conducting deliberate examination of their genitalia and anuses); Webb v. Foreman, No. 93 Civ. 8579 (JGK), 1996 U.S. Dist. LEXIS 15227, at *9–10 (S.D.N.Y. Oct. 16, 1996) (*unpublished*) (holding that when a guard conducts a strip search that includes grabbing the prisoner's genitals, the conduct may be a valid 8th Amendment claim); Thomas v. District of Columbia, 887 F. Supp. 1, 4–5 (D.D.C. 1995) (finding a valid 8th Amendment claim where correctional officer harassed prisoner and spread rumors that he was gay, thereby endangering him).

122. 42 U.S.C. § 1997e(e) (2006).

123. Cobb v. Kelly, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (*unpublished*) (finding PLRA's physical injury requirement not met when plaintiff's case manager fondled his genitals); Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, at *5–6 (M.D. Pa. Feb. 8, 2006) (*unpublished*) (finding PLRA's physical injury requirement not met when correctional officer held and fondled prisoner's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–66 (W.D. Va. 2000) (finding PLRA's physical injury requirement not met when corrections officers viewed prisoner naked and encouraged him to masturbate); *but see* Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1270 (N.D. Fla. 2002) (finding prisoner who was forced to perform oral sex on fellow prisoner suffered physical injury sufficient to satisfy PLRA's physical injury requirement).

like injunctions (where you ask the court to order someone to stop or start some action other than the payment of money damages), may be available to you.[124] For this reason it is important to learn about the PLRA, particularly its physical injury requirement, before you file a suit.[125]

(b) Verbal Harassment

Prisoners who try to sue based on verbal harassment face two obstacles: (1) an interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment exempting verbal harassment; and (2) the PLRA's physical injury requirement. Courts often find that words alone, no matter how abusive, do not violate the Eighth Amendment.[126] So, claims by prisoners against prison staff for harassment consisting only of words generally do not succeed.[127]

Additionally, even where prisoners have alleged valid Eighth Amendment violations, courts have often determined that the PLRA bars the suits if there is not a physical injury.[128] For instance, harassment by prison staff *has* been found to violate the Eighth Amendment when it includes threats of attack with a lethal weapon.[129] But where no physical injury results, some courts have determined that these cases are barred by the PLRA's physical injury requirement.[130] Also, some courts have held the PLRA blocks the recovery of money damages in cases where harassing language or threats are accompanied by groping or abusive touching.[131]

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124. Zehner v. Trigg, 133 F.3d 459, 462–63 (7th Cir. 1997) (finding that even where the PLRA bars recovery of monetary damages, injunctive relief remains available).

125. See Chapter 14 of the *JLM*.

126. *See*, *e.g.*, Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995) (holding that a jail deputy who had made comments to a female prisoner about her body and his own sexual prowess, and entered her cell, stood over her bed, and told her she had nice breasts, engaged in "outrageous and unacceptable" conduct, but that the conduct did not violate the 8th Amendment, because it did not include "physical intimidation"); Minifield v. Butikofer, 298 F. Supp. 2d 900, 903 (N.D. Cal. 2004) ("Allegations of verbal harassment and abuse fail to state [an 8th Amendment] claim cognizable under 42 U.S.C. § 1983."); Ellis v. Meade, 887 F. Supp. 324, 328–29 (D. Me. 1995) (holding that a correctional officer allegedly tapping or spanking a prisoner's buttocks and asking "How's the little guy doing?" did not violate the 8th Amendment because the comment was isolated and carried no threat of violence); Maclean v. Secor, 876 F. Supp. 695, 698–99 (E.D. Pa. 1995) (holding that threats alone do not constitute a constitutional claim even if the threatened prisoner has a particular vulnerability to assault).

127. *See*, *e.g.*, Austin v. Terhune, 367 F.3d 1167, 1171–72 (9th Cir. 2004) (holding that a guard who exposed genitalia to a prisoner from a glass-walled control booth for a 30–40 second "isolated incident" was not sufficiently serious to constitute an 8th Amendment violation, and noting generally that "[a]lthough prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards … the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment"); DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) (finding that a guard's use of sexually explicit and racially derogatory language was not a constitutional violation, stating that "[s]tanding alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest, or deny a prisoner equal protection of the laws"); Barney v. Pulsipher, 143 F.3d 1299, 1310 n.11 (10th Cir. 1998) (holding that verbal harassment and intimidation alone, without allegations of sexual assault, was insufficient to state an 8th Amendment cause of action); Blueford v. Prunty, 108 F.3d 251, 254–55 (9th Cir. 1997) (holding that prison guard engaging in "vulgar same-sex trash talk" with prisoners was entitled to qualified immunity because a prisoner's right to be free from such behavior was not clearly established at the time the behavior took place). In some cases, allegations of touching may still fail to rise to the level of a constitutional violation. *See*, *e.g.*, Boddie v. Schnieder, 105 F.3d 857, 859–61 (2d Cir. 1997) (finding that a prisoner's claim that female officer touched his genitals and pushed her breasts and genitals against his body did not rise to a violation of the prisoner's constitutional rights). See, however, Chapter 24 of the *JLM*, which cites cases holding that prisoners may recover for psychological injury inflicted by prison staff.

128. See Chapter 14 of the *JLM* for more information on the PLRA.

129. *See*, *e.g.*, Northington v. Jackson, 973 F.2d 1518, 1523–25 (10th Cir. 1992) (finding some forms of verbal harassment can inflict cruel and unusual punishment when they involve threatened use of lethal weapons); Burton v. Livingstone, 791 F.2d 97, 99–100 (8th Cir. 1986); Douglas v. Marino, 684 F. Supp. 395, 397–98 (D.N.J. 1988).

130. *See*, *e.g.*, Walker v. Akers, No. 98-C-3199, 1999 U.S. Dist. LEXIS 14995, at *15–17 (N.D. Ill. Sept. 22, 1999) (*unpublished*) (holding that the PLRA's physical injury requirement bars the recovery of monetary damages where corrections officer threatened prisoner and held electric stun gun to his head).

131. *See*, *e.g.*, Cobb v. Kelly, No. 4:07CV108-P-A, 2007 WL 2159315, at *1 (N.D. Miss. July 26, 2007) (*unpublished*) (finding PLRA's physical injury requirement not met when plaintiff's case manager fondled his genitals); Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, at *5–6 (M.D. Pa. Feb. 8, 2006) (*unpublished*) (finding PLRA's physical injury requirement not met when correctional officer held and fondled prisoner's penis); Ashann-Ra v. Virginia, 112 F. Supp. 2d 563, 565–66 (W.D. Va. 2000) (finding PLRA's physical injury requirement was not met when female corrections officers viewed male prisoner naked and encouraged him to masturbate).

H. Housing and Protective Custody

1. Housing Issues for Transgendered Prisoners[132]

Like most other institutions, prisons are structured around the assumptions that all people are easily classified as either male or female, gender is assigned at birth, and a person's gender remains constant throughout life. These assumptions present extraordinary hardship for transgendered, intersex, and other gender-variant prisoners, as the overwhelming majority of prisons recognize only two genders and segregate male from female prisoners.

Prison authorities rarely recognize the gender identity of transgendered prisoners. Transgendered prisoners are generally housed either according to the gender they were assigned at birth or by their genitalia.[133] Because few transgender people are able to access genital gender reassignment surgery, large numbers of transgender prisoners are housed in facilities for a gender with which they do not identify.

To date, the gendered housing policies of prisons placing transsexual prisoners in housing for genders with which they do not identify have not been successfully challenged in court.[134] The Supreme Court has explicitly held that prisoners do not have a constitutional right to choose their place of confinement.[135] Moreover, courts generally look to prison officials' choices about how to manage their institutions,[136] and classification within prisons has not been found to violate a liberty interest.[137]

Courts have been especially hostile towards the requests of transgender prisoners for transfer to gender-appropriate facilities.[138] Thus, it is unlikely that you will be able to successfully challenge your housing

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132. All known transgendered prisoners who have filed lawsuits contesting their conditions of imprisonment that have resulted in reported opinions have been male-to-female (MTF) transgendered people. This of course does not mean that female-to-male (FTM) transgender prisoners do not face challenges while incarcerated. If you are a FTM prisoner who wishes to sue officials of the prison in which you are housed, the lack of precedent for such cases should not stop you from doing so. But, it might be advisable to contact an impact litigation organization specializing in transgender rights for help in preparing your claim. *See* Appendix A of this Chapter for information on these organizations.

133. *See*, *e.g.*, Farmer v. Brennan, 511 U.S. 825, 829–30, 114 S. Ct. 1970, 1975, 128 L. Ed. 2d 811, 820 (1994) (noting that a preoperative male-to-female transgender prisoner was housed in male housing despite receiving hormone treatments and dressing femininely); Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) (noting plaintiff's incarceration with the male population despite undergoing estrogen therapy and receiving silicone breast implants). *But see* Crosby v. Reynolds, 763 F. Supp. 666, 669–70 (D. Me. 1991) (upholding placement of pre-operative transgender person undergoing hormone treatment, at her request and on the recommendation of the jail's contract physician, within the female population, even in the face of a challenge by the prisoner's female cellmate, who alleged it was a violation of her right to privacy); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *1–2 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (noting that prisoner who "had not as yet completed the transformation" from male to female, while incarcerated in a federal prison, "lived within a female housing unit as a female").

134. *See*, *e.g.*, Meriwether v. Faulkner, 821 F.2d 408, 415 (7th Cir. 1987) (denying transgender prisoner's equal protection claim for not being classified as a woman and housed with female prisoners on ground that a prison administrative decision may give rise to an equal protection claim only if the plaintiff can establish "state officials had purposefully and intentionally discriminated against" her); Lucrecia v. Samples, No. C-93-3651-VRW, 1995 U.S. Dist. LEXIS 15607, at *14–15 (N.D. Cal. Oct. 16, 1995) (*unpublished*) (holding a transgender prisoner's legal challenge alleging that her incarceration in a male cell violated due process must fail because no liberty interest was infringed and "housing decisions are within the discretion of prison officials"); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) ("Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose."). See Chapter 22 of the *JLM* for more information on challenging administrative decisions.

135. Meachum v. Fano, 427 U.S. 215, 216, 96 S. Ct. 2532, 2534, 49 L. Ed. 2d 451, 454 (1976) (reversing lower court decision ruling in favor of plaintiff prisoners who sought injunctive and declaratory relief for being transferred to prisons with less desirable conditions following a fire at their previous facility).

136. *See*, *e.g.*, Sandin v. Conner, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); Grayson v. Rison, 945 F.2d 1064, 1067 (9th Cir. 1991) ("When prison officials have legitimate administrative authority, such as the discretion to move inmates from prison to prison or from cell to cell, the Due Process Clause imposes few restrictions on the use of that authority."); McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975) ("The federal courts are extremely reluctant to limit the freedom of prison officials to classify prisoners as they in their broad discretion determine appropriate").

137. For example, prisoners who have challenged their classification on other bases, such as security or gang classifications, have also been unsuccessful. See Chapter 31 of the *JLM* for a detailed discussion of legal challenges to security classification decisions and the definition of liberty interests in the prison context.

138. As one federal court noted in response to a male-to-female transgender prisoner's request for transfer to a

classification in court. If being housed with the general population is difficult or harmful for you, however, you can request to be placed in segregation or protective custody.

2. Segregation and Protective Custody

Many state prisons segregate LGBT prisoners from the general prison population, either because the prisoner asks for this or the prison officials decide to do this. In the past, the separation of LGBT-identified prisoners from heterosexual prisoners was used to punish LGBT people or was sometimes based on the false assumption that because a prisoner was not heterosexual, he would be more likely to sexually assault other prisoners in the general population.

Today, segregation of LGBT prisoners in state or municipal institutions is often done to protect LGBT prisoners, who might be more vulnerable to attack from other prisoners. While protecting LGBT prisoners may be good, the conditions of protective custody often are not.[139] By law, the warden in a *federal* prison may not segregate an LGBT prisoner solely for his or her own protection.[140] This really means that, absent other circumstances or threats, a warden may not segregate someone *only* for being LGBT.

Segregation means different things in different prisons. Some prisons house a high enough number of LGBT prisoners that they have a wing for people identifying themselves as LGBT; other prisons can offer only single rooms, or certain cells within a larger segregation unit, for the occasional LGBT prisoner.[141]

(a) Getting Into Protective Custody

If you have been placed in general population and have experienced ill treatment there (attack or threat of attack), you may request to be transferred into protective custody through administrative channels.[142]

If your request is not granted when brought through administrative channels, including all administrative appeals processes, you may bring a Section 1983 claim against prison officials for violating your Eighth Amendment right to be free from cruel and unusual punishment. As explained in Part G of this Chapter, a prison official may be held *liable* under Section 1983 for violating the Eighth Amendment if he acted with "deliberate indifference" to your health or safety—that is, if he knew you faced a substantial risk of serious harm but disregarded that risk by not taking reasonable action to stop it.[143] In general, the more serious the threats or attacks against you and the more evidence you can produce that the prison officials knew about the risk but did nothing, the better your chances of winning in court.

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women's prison, "[a] male prisoner cannot be housed in a women's prison. Even though a transfer may relieve plaintiff's anxieties, clearly a violation of the women's rights would be at issue." Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986).

139. Furthermore, at least one federal court has found the practice of placing LGBT prisoners in isolation wards to violate the Due Process Clause of the Constitution. *See* R.G. v. Koller, 415 F. Supp. 2d 1129, 1154–55 (D. Haw. 2006).

140. "The Warden may not refer an inmate for placement in a control unit ... on the basis that the inmate is a protection case, e.g., a homosexual, an informant, etc., unless the inmate meets other criteria as described in paragraph (b) of this section." 28 C.F.R. § 541.41(c)(2) (2007).

141. The New York City prison system, for example, provides separate housing for gay inmates. Darren Rosenblum, *"Trapped" in Sing Sing: Transgender Prisoners Caught in the Gender Binarism,* 6 Mich. J. Gender & L. 499, 524 (2000). The Los Angeles County Jail includes a "homosexual ward" separate from the general prison population where (as of 1990) 350 gay prisoners were housed. Patricia Klein Lerner, *Jailer Learns Gay Culture to Foil Straight Inmates*, L.A. Times, Dec. 27, 1990, at B1. *See also* Falls v. Nesbitt, 966 F.2d 375, 376 (8th Cir. 1992) (describing a "special section of the prison reserved for those prisoners who are slight of build, physically weaker than the typical inmate, preyed upon, or, in many cases, homosexuals"); McCray v. Bennett, 467 F. Supp. 187, 190 (M.D. Ala. 1978) (describing segregation unit housing for, among others, "[k]nown homosexuals," inmates who have histories of institutional violence, and those who are being punished for violating prison rules); Inmates of Milwaukee Cnty. Jail v. Peterson, 353 F. Supp. 1157, 1160–61 (E.D. Wis. 1973) (describing cell block housing for, among others, homosexuals and narcotic addicts undergoing treatment or detoxification).

142. See Chapter 31 of the *JLM,* "Security Classification and Gang Validation," for more information on requesting protective custody.

143. *See* Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that "a prison official cannot be found liable under the 8th Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"). See Chapter 16 of the *JLM* for more information about § 1983 and the deliberate indifference standard.

Few Section 1983 suits about the failure to house a prisoner in protective custody have been brought by LGBT prisoners,[144] but several courts have recognized the vulnerability in prison of people who do not fit with traditional gender norms.[145] Before *Farmer v. Brennan*, the few such claims that were filed had very limited success.[146] The *Farmer* Court's extensive discussion of the meaning of "deliberate indifference," however, may make it easier to win on such claims.[147] Also strengthening the deliberate indifference argument of LGBT prisoners is the fact that *courts* have acknowledged the heightened vulnerability of prisoners known to be LGBT or who might be thought to be LGBT in giving lighter sentences,[148] and *prison officials* have argued that LGBT prisoners are particularly vulnerable in order to justify denying them benefits or services.[149] These cases may make it more difficult for a prison official to prove he did not have the required knowledge that LGBT prisoners are at risk. If you plan to bring a Section 1983 claim for violation of your Eighth Amendment rights, be sure to also read Chapter 16 of the *JLM*.

(b) Getting Out of Protective Custody

Although segregation from the general prison population may afford LGBT prisoners protection from harassment and assault, the conditions of segregated cells are often worse than those in general population. Also, segregation may make you ineligible for work detail and may deny you access to libraries and other facilities, visitation, proper medical treatment,[150] and other privileges available in general population.[151]

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144. *But see* Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (allowing an 8th Amendment claim by a transgender prisoner to go forward where she was placed in the general population and subsequently sexually assaulted, even though the prisoner did not express safety concerns beforehand).

145. *See*, *e.g.*, Taylor v. Michigan Dept. of Corr., 69 F.3d 76, 82–84 (6th Cir. 1995) (noting that "small, youthful prisoners are especially vulnerable to sexual pressure"); Young v. Quinlan, 960 F.2d 351, 362 (3d Cir. 1992) (noting that "fellow inmates subjected [plaintiff] to sexual assault on several documented occasions, most likely because of [plaintiff]'s youthful appearance and slight stature"); United States v. Gonzalez, 945 F.2d 525, 526–27 (2d Cir. 1991) (noting that "even if [plaintiff] is not gay or bisexual, his physical appearance, insofar as it departs from traditional notions of an acceptable masculine demeanor, may make him ... susceptible to homophobic attacks ...."). See also Chapter 24 of the *JLM* and Part G(1) of this Chapter.

146. *See*, *e.g.*, Purvis v. Ponte, 929 F.2d 822, 825–27 (1st Cir. 1991) (holding that the 8th Amendment rights of a prisoner were not violated even after he stated a general fear of "gay bashing" and a suspicion that homophobic cellmates threatened his physical safety, since prisoner presented no evidence of strong likelihood that violence would occur and officials had tried six different cellmates); Falls v. Nesbitt, 966 F.2d 375, 380 (8th Cir. 1992) (holding that guard who failed to protect gay prisoner from a cellmate who ultimately stabbed him was not deliberately indifferent). *But see* Young v. Quinlan, 960 F.2d 351, 362–63 (3d Cir. 1992) (holding that the rights of a prisoner described as small, young, and effeminate may have been violated when he was subjected to sexual assaults by other prisoners after officials in the federal prison where he was housed ignored his requests for protection), *superseded by statute on other grounds*.

147. *But see* Poole v. Yeazel, No. 94-3199, 1995 U.S. App. LEXIS 16195, at *3–4 (7th Cir. June 29, 1995) (*unpublished*) (holding that a guard who knew prisoner had been "labeled a homosexual" did not exhibit deliberate indifference when he failed to protect him from attack, rather "at best the defendants negligently failed to recognize a potential for assault," a failure that does not rise to the level of a constitutional deprivation).

148. The U.S. Sentencing Guidelines are advisory guidelines that assist judges' decisions in sentencing for federal crimes. Before 2005, federal courts had to follow the U.S. Sentencing Guidelines, but federal courts permitted what were called "downward departures" or reduced sentences when sentencing defendants known to be gay or who might be perceived to be gay, in order to protect these defendants from prison abuse. *See* United States v. Gonzalez, 945 F.2d 525, 525–26 (2d Cir. 1991) (finding downward departure of convicted homosexual's sentence was authorized, under the U.S. Sentencing Guidelines as interpreted in United States v. Lara, 905 F.2d 599 (2d Cir. 1990), to ensure his safety in prison due to his feminine features which would make him vulnerable to attack by other prisoners); *see also* United States v. Wilke, 156 F.3d 749, 754–55 (7th Cir. 1998) (departing from sentencing guidelines because of prisoner's sexual orientation and demeanor). Note that the Federal Sentencing Commission has discouraged, but not prohibited, the use of physical appearance alone in determining a prisoner's potential for victimization and thus reduction in sentence. *See* Koon v. United States, 518 U.S. 81, 107, 116 S. Ct. 2035, 2050–51, 135 L. Ed. 2d 392, 418 (1996) (recognizing that use of physical appearance was discouraged by the Commission).

149. See Part B(3) of this Chapter.

150. If you are in protective custody and believe you are being denied proper medical treatment, read Chapter 23 of the *JLM* on medical treatment.

151. *See*, *e.g.*, Hansard v. Barrett, 980 F.2d 1059, 1065 (6th Cir. 1992) (finding evidence insufficient to establish that gay inmates were denied equal opportunity to discretionary reductions in sentences, in violation of equal protection, after being moved to administrative segregation). However, the Hall of Justice Jail for gay prisoners in Los Angeles is "better in many respects than in the main jail," in that "[t]elevisions and telephones are on every row. The atmosphere is more relaxed and it is less crowded. The Hall of Justice Jail has 60 fewer prisoners than the 1,800 for which it was designed. The County Jail, designed for 5,276 inmates, has 6,482." Patricia Klein Lerner, *Jailer Learns Gay Culture to*

If you have been placed in segregation and wish to be housed among the general population, you may request transfer through administrative channels.[152] If unsuccessful, you may file a complaint under Section 1983 and claim that the physical conditions of your segregation violate your Eighth Amendment rights or that the decision to place you in segregation is a violation of your equal protection rights. A Section 1983 claim seeking transfer out of protective custody is far less likely to succeed than an administrative claim requesting transfer *into* protective custody. Courts have held involuntary segregation—even for non-punitive reasons—does not infringe a liberty interest except in narrow circumstances.[153]

For example, in one Seventh Circuit case, the court noted that, while it sympathized with the prisoner's desire not to be segregated, it had to take into account that there might not be feasible alternatives to the prisoner's prolonged segregation.[154] Nevertheless, the court did not dismiss the plaintiff's claim as a matter of law and *remanded* the case to the district court to determine the actual conditions of the prisoner's confinement and the existence of any feasible alternatives.[155]

(c) Challenging the Conditions of Protective Custody

If you cannot or do not want to secure a transfer out of protective custody, but the conditions under which you are living in such custody are bad, you may bring a claim under Section 1983 for:

(1) Violation of your Eighth Amendment right against cruel and unusual punishment (if, for example, the cell is unsanitary, or you are not being provided with food and water often enough);[156] or
(2) Violation of your equal protection rights (if conditions in protective custody are much worse than those in the cells where the general population is housed and the difference is not justified by a legitimate interest, such as security).[157]

I. Visitation Rights: Special Issues for LGBT Prisoners

Most state prisons and all federal prisons have policies that, subject to restrictions, allow prisoners to visit with their family members. Unfortunately, because many of these policies define "family" narrowly, LGBT prisoners whose partners wish to visit them in prison may face special difficulties. Prisoners do not have an absolute right to visitation.[158] Even though prisons may place limitations on visitation or exclude visitation all together, those limitations can only be put in place if the prison has a legitimate penological objective for them. The rehabilitation of prisoners and the security of the prison are justifications that will be accepted by a court if they are proven.[159] A prison official cannot merely assert that limitations on your

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Foil Straight Inmates, L.A. Times, Dec. 27, 1990, at B1.

152. See Chapter 31 of the *JLM*, "Security Classification and Gang Validation."

153. *See*, *e.g.*, Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that "'absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life of a prisoner, will never be a ground for a constitutional claim' because it 'simply does not constitute a deprivation of a constitutionally cognizable liberty interest'" (quoting Pichardo v. Kinker, 73 F.3d 612, 612–13 (5th Cir. 1996)); Collins v. Sullivan, 392 F. Supp. 621, 626 n.12 (M.D. Ala. 1975) (holding that placing an allegedly gay prisoner in a one-man cell for medical reasons was legitimate). See also Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings."

154. Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987) ("Given her transsexual identity ... it is unlikely that prison officials would be able to protect her from the violence, sexual assault and harassment about which she complains.").

155. Meriwether v. Faulkner, 821 F.2d 408, 417–18 (7th Cir. 1987).

156. *See* Wilson v. Seiter, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 282 (1991) (holding that challenges to physical living conditions of prisons are governed by the deliberate indifference standard). For an explanation of the deliberate indifference standard, see Part G(1)(b) of this Chapter.

157. *See*, *e.g.*, Williams v. Lane, 851 F.2d 867, 881–82 (7th Cir. 1988) (holding state provisions for programming and living conditions for protective custody prisoners violated the Equal Protection Clause because they were unequal in comparison with general population prisoners, and not justified by security concerns). *But see* Griffin v. Coughlin, 743 F. Supp. 1006, 1009–16 (N.D.N.Y. 1990) (holding that differences in treatment of protective custody prisoners at Clinton Correctional Facility with those in other protective custody units in New York State and with those in special programs did not violate equal protection rights of protective custody prisoners). For more information about what you need to prove to prevail on a § 1983 equal protection claim in prison, see Chapter 16 of the *JLM* and Part C(1) of this Chapter.

158. Block v. Rutherford, 468 U.S. 576, 585–89, 104 S. Ct. 3227, 3232–34, 82 L. Ed. 2d 438, 446–49 (1984) (finding the denial of visitation appropriate when the denial furthered legitimate governmental purposes and was not for the purpose of punishment).

159. Bell v. Wolfish, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447, 473 (1979) ("Even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be

visitation privileges serve security or rehabilitation interests; the officials must instead show that the visitation policies actually further the objectives they claim and that prisoners are given adequate "procedural safeguards."[160] This means that if a prison forbids you to visit with your partner on the grounds that homosexuality poses a security risk to the institution, you can challenge the policy on the grounds that this objective is not actually advanced by the denial of visitation. Although the visitation policies vary from state to state, and state policies vary from the policies in federal prison, the justifications prison officials use are similar everywhere. The rest of this part will help explain why prisons have denied LGBT prisoners the right to visitation and whether or not those policies can be challenged.

1. Federal Prison Visiting Guidelines

If you are in a federal prison and you want to have regular visitors, you must submit a list of proposed visitors to prison staff members.[161] When prison officials are deciding whether to allow the people on your list to visit you, they will divide your visitors into three categories: (1) members of the immediate family; (2) other relatives; and (3) friends and associates.

Members of your immediate family include your spouse and children. In order to exclude a member of your immediate family, prison officials would have to show "strong circumstances" which justify excluding them.[162] To exclude a relative who is not a member of your immediate family (including aunts, uncles, and cousins), the prison must have a specific reason.[163] To exclude friends and associates, a prison official only needs to show that they "could reasonably create a threat to security."[164]

Unfortunately for LGBT prisoners, federal law prohibits treating a same-sex partner as either a member of the immediate family or as another relative. The federal regulations do not explicitly preclude prisons from counting same-sex partners as immediate family members. Instead, same-sex partners simply do not appear on the list of immediate family members, presumably indicating that they cannot be given the designation of immediate family member.[165] Even in states like Vermont, where domestic partners are recognized as spouses for many state purposes, domestic partners will still not be treated as spouses by federal prisons in those states.[166] In May 2004, Massachusetts began issuing marriage licenses to same-sex couples.[167] In May 2008, California began issuing marriage licenses to same-sex couples as well,[168] and Connecticut followed in November 2008.[169] None of these marriages will count as "marriages" for federal purposes, including in federal prisons, though court challenges are likely to be brought. The Defense of Marriage Act mandates that no state need recognize same-sex unions from other states and also, for federal purposes, defines "spouse" as "a person of the opposite sex who is a husband or a wife." [170] Because of this law, anyone who is not related to you—including your partner or your girlfriend/boyfriend—will be classified in the third category as a friend or associate.

Classification in the third category means that prison officials only need to reasonably fear that your visitor will harm security or your rehabilitation in order to exclude them. In the past, prison officials have generally given two reasons for strict visitation policies for LGBT prisoners. The first reason was

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evaluated in the light of the central objective of prison administration, safeguarding institutional security.").

160. *See* Rudolph v. Locke, 594 F.2d 1076, 1077 (5th Cir. 1979) (stating that courts must determine if given justifications actually further stated purposes); Hamilton v. Saxbe, 428 F. Supp. 1101, 1112 (N.D. Ga. 1976) (stating that officials may not arbitrarily deny a prisoner's visitation request but must provide a meaningful written response).

161. 28 C.F.R. § 540.44 (2007).

162. 28 C.F.R. § 540.44(a) (2007).

163. 28 C.F.R. § 540.44(b) (2007).

164. 28 C.F.R. § 540.44(c) (2007).

165. 28 C.F.R. § 540.44 (2007).

166. Baker v. State, 744 A.2d 864, 170 Vt. 194 (Vt. 1999).

167. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 949–50, 440 Mass. 309 (Mass. 2003). *See also* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004, at A1.

168. *In re Marriage Cases*, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (Cal. 2008). *See also* Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. Times, Jun. 17, 2008, at A19. However, same-sex marriages were later banned in California by the passage of Proposition 8 during the 2008 elections, and the fate of those same-sex marriages performed prior to the ban remains uncertain. *See* Jesse McKinley and Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. Times, Nov. 6, 2008, at A1.

169. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 (Conn. 2008). *See also* Lisa W. Foderaro, *Gay Marriage Begins in Connecticut*, N.Y. Times, Nov. 12, 2008, at A1.

170. 1 U.S.C. § 7 (2006).

rehabilitation. Since homosexual sex was illegal in several states and could be outlawed by the federal government, it was possible for prison officials to claim that allowing prisoners visitation with same-sex partners harmed their rehabilitation. After *Lawrence v. Texas*,[171] this reason is inadequate. *Lawrence* held that a state cannot outlaw homosexual sex. Since a state cannot outlaw homosexual sex, it is difficult to imagine how a state could have a rehabilitative interest in preventing homosexual activity.

The other more common justification given for restricting a homosexual prisoner's visitation was security. Prison officials have sometimes tried to claim that allowing a homosexual's partner to visit or allowing homosexuals to show affection during visitation would open the gay prisoner up to possible violence and retribution.[172] While this justification has worked in other contexts (notably the right to receive LGBT literature—see Part J of this Chapter), courts have often been harsh on prison officials who try to restrict visitation policies. In *Doe v. Sparks*,[173] prison officials had a policy that allowed heterosexual boyfriends or girlfriends to visit prisoners but did not allow same-sex partners to visit. The prison officials claimed that the policy against homosexual visitation furthered the purpose of promoting the internal security of the prison. Although this case challenged a state prison policy, the case was decided under constitutional equal protection standards. The court looked closely at the "security" reasons given by the prison. In this case, visitors were not allowed any physical contact, nor was the relationship between the prisoner and the visitor announced in any way. The court said that there was no way for other prisoners to know of the same-sex relationship between the prisoner and the visitor, and therefore any threat to the security of the prison was "so remote as to be arbitrary."[174] The court found that the prison policy was not reasonably related to security concerns and therefore violated the Fourteenth Amendment.

A similar outcome was reached in a case where prison officials denied a gay prisoner the ability to kiss and hug his visiting partner. In *Whitmire v. Arizona*,[175] prison policy allowed prisoners to kiss and hug family members and heterosexual partners briefly at the beginning and end of visits. The prison claimed that allowing a homosexual prisoner to hug and kiss his partner would cause other prisoners to label him as gay and therefore open him up to attack from other prisoners. In this case, the prisoner was openly gay—he both told other prisoners and the court felt that it was implied since he had no problem showing homosexual affection. The court held the prison policy lacked "a common-sense connection" to security since the prisoner was already labeled as gay—or was at least willing to be so labeled.[176] The court thus determined that the prison was potentially in violation of the prisoner's First, Third, Fifth, and Fourteenth Amendment rights.

These cases show that if a federal prison denies you the same visitation privileges as heterosexual prisoners merely because of your sexual orientation, you may have a strong claim.

2. New York Visitation Policies

New York state's visitation policies are very similar to those of the federal government, with some notable differences. A New York prison's visitation policies should allow visits at times designed to "encourage maximum visiting"; contact visits are generally to be allowed and encouraged; and the prison should not limit the number of visits unless the safety and security of the prison is threatened.[177]

Also like federal prisons, New York prisons require that prisoners submit a list of visitors they would like to have visit.[178] These visitors will be admitted unless prison officials can show some legitimate security reason for excluding them.[179] While prison officials generally have a lot of discretion in deciding what constitutes a safety concern, keep in mind that your prison will probably have to follow the same general rules as federal prisons. Merely stating that your same-sex partner would cause a security concern is likely not enough.[180]

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171. Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508 (2003).

172. *See* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (holding that there is no common sense basis for prisons to prevent, for safety reasons, displays of affection between same sex couples when a prisoner is openly gay).

173. Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

174. Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

175. Whitmire v. Arizona, 298 F.3d 1134, 1135 (9th Cir. 2002).

176. Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002).

177. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.2(b)(2) (1995).

178. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.2(a)(1) (1995).

179. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.2(b)(2) (1995).

180. *See* Doe v. Sparks, 733 F. Supp. 227, 234 (W.D. Pa. 1990) (striking down prison policy against visits by homosexual prisoners' partners on grounds that the connection between the policy and the supposed security concerns

New York prisons generally allow physical contact between prisoners and visitors.[181] This contact can involve a small amount of kissing, hugging, and hand-holding (as long as it all takes place in plain view). All of this can occur at the beginning and end of a visit, and brief kisses and embraces should also be allowed during the course of the visit as long as it does not offend other prisoners' sense of decency.[182] The "decency" exception in the New York visitation guidelines might mean that a prison official could try to deny you physical contact with your same-sex partner. If prison officials try to prevent you from engaging in the same physical contact with your partner that heterosexual prisoners are allowed to engage in, you may have a valid claim under both federal and state law.[183]

(a) New York's Family Reunion Program

Currently, New York has a Family Reunion Program that allows close family members a chance for more private visits with prisoners.[184] Unfortunately, the program only applies to close relatives and spouses who are in legal marriages and so does not apply to same-sex partners.[185]

Because of the way the law is written, partners of homosexual prisoners are not eligible for the Family Reunion Program. New York state courts have upheld treating prisoners differently based on whether or not they are married,[186] but these cases generally involve treatment of heterosexual, unmarried prisoners. No challenge to the Family Reunion Program by homosexual partners based on federal or New York law has been reported to date. If you are a homosexual prisoner with a domestic partner who is being denied visitation under the Family Reunion Program, it might be worth contacting one of the impact litigation groups listed at the end of this Chapter about possible federal or state equal protection claims.

(b) New York City's Domestic Partnership Laws

Unlike the rest of New York state and the federal government, New York City's Domestic Partnership Law requires city correctional facilities to give registered domestic partners of prisoners the same visitation rights as those granted to married couples.[187] This not only means that your domestic partner can visit you under the same rules governing married couples but also that domestic partners may visit other family members in the same way that heterosexual spouses may.

Very little case law involving the Domestic Partnership Law exists. This may reflect the fact that prisons are treating domestic partners in the same manner as heterosexual spouses, or it may reflect the relative newness of the Domestic Partnership Law. At the very least, the law has been upheld under challenges from various opposition groups.[188]

J. Right to Receive LGBT Literature[189]

Under *Thornburgh v. Abbott*, prisons may restrict your right to receive publications that may cause a threat to the daily operation of the prison. [190] In other words, you may not be able to receive publications if

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the policy is supposed to address is too remote).

181. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.4(k) (1995).

182. N.Y. Comp. Codes R. & Regs. tit. 7, § 200.4(k)(1)–(4) (1995).

183. *See generally* Whitmire v. Arizona, 298 F.3d 1134, 1135–36 (9th Cir. 2002) (holding that there is no common-sense basis for prisons to prevent, for safety reasons, displays of affection between same sex couples when a prisoner is openly gay and similar displays of affection are permitted for heterosexual couples).

184. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.1 (1995).

185. N.Y. Comp. Codes R. & Regs. tit. 7, § 220.3 (1995). Note, however, that the governor of New York issued an executive order on May 14, 2008, requiring all state agencies to recognize same-sex marriages legally performed in other jurisdictions. *See* Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. Times, May 29, 2008, at A1. Though not all agencies have enacted these changes yet, if you married your same-sex partner in Massachusetts, for instance, but are now in prison in New York, you could be eligible for this program.

186. *See*, *e.g.*, Mary of Oakknoll v. Coughlin, 101 A.D.2d 931, 475 N.Y.S.2d 644 (3d Dept. 1984).

187. Admin. Code of the City of N.Y. § 3-244 (2002).

188. *See*, *e.g.*, Slattery v. City of New York, 179 Misc. 2d 740, 686 N.Y.S.2d 683 (Sup. Ct. N.Y. County 1999) (holding that New York City had the statutory power to enact the Domestic Partnership Law).

189. For general information about your right to communicate with the outside world, including your rights to engage in non-legal correspondence, your right to communicate with your lawyer, your right to receive non-gay publications, your right to have access to news media, and your access to visitation while in prison, see *JLM*, Chapter 19.

190. Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). Note that the *Thornburgh* standard has replaced the previous and more relaxed standard articulated in Procunier v. Martinez, 416 U.S. 396, 94 S.

the prison administration decides that the publication could cause problems with security, order, or discipline. This rule has posed special problems for LGBT prisoners.

1. Sexually Explicit Material with Homosexual Content

(a) Federal Prisons

In *Thornburgh*, the Supreme Court found constitutional a federal prison regulation that gave prison officials discretion to withhold from prisoners—among other types of mail—sexually explicit publications, if they reasonably believed that those publications posed a threat to prison order or security.[191] The *Thornburgh* Court also upheld as constitutional a 1985 Bureau of Prisons program statement that, in providing guidance on the meaning of the term "sexually explicit," specifically listed "homosexual (of the same sex as the institution population) material" as material a warden could decide not to allow prisoners to receive. The Court justified its decision on two grounds: (1) "homosexual" material would, once in the prison, circulate and lead to "disruptive conduct"; and (2) if prisoners observed a fellow prisoner reading such material, they might draw inferences about the prisoner's sexual orientation and "cause disorder by acting accordingly."[192] After *Thornburgh*, then, all sexually explicit material is potentially censorable, but it is even easier and more defensible for a warden to censor homosexual sexually explicit material.

Note that the holding in *Thornburgh* does not necessarily mean that you may never receive publications with explicit homosexual sexual content while in prison. The *Thornburgh* Court merely held that a warden may exercise discretion to restrict your access to such material. The decisions of different wardens will result in different regulations in different prisons.

Further, though federal regulations allow the censorship of heterosexual sexually explicit material and several courts have, since *Thornburgh*, upheld restrictions on such material,[193] if wardens in the prison where you are incarcerated are exercising their discretion selectively (for example, allowing prisoners to receive heterosexual explicit material and not homosexual explicit material), you may be able to bring a claim under Section 1983 to challenge this conduct on equal protection grounds.[194] If a warden in a federal prison is censoring homosexual content and not heterosexual content, keep in mind how some of the cases from earlier in this Chapter might help you make an equal protection challenge. First, it is not clear whether courts will allow prisons to make life more difficult for you simply because other prisoners dislike your sexual orientation.[195] Second, if you are openly gay, lesbian, or bisexual already, the warden will have a

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Ct. 1800, 40 L. Ed. 2d 224 (1974). Therefore, cases decided before 1989 are unlikely to be helpful to you because courts will probably only take into account precedent decided under the currently prevailing *Thornburgh* test.

191. Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989).

192. Thornburgh v. Abbott, 490 U.S. 401, 412–13, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–73 (1989). Other courts have upheld similar state prison policies on the grounds that pornographic material leads to security risks. *See, e.g.*, Frost v. Symington, 197 F.3d 348, 357–58 (9th Cir. 1999) (upholding prison regulation banning sexually explicit materials depicting sexual penetration on grounds that such material could lead to sexual harassment of female guards); Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulations prohibiting prisoners from possessing sexually explicit materials on grounds that regulation was "reasonably related to legitimate penological interests"); Allen v. Wood, 970 F. Supp. 824, 831 (E.D. Wash. 1997) (granting defendant prison's motion for summary judgment on ground that prison regulations prohibiting certain sexually explicit materials satisfied the reasonable relation standard).

193. *See, e.g.*, Frost v. Symington, 197 F.3d 348, 358 (9th Cir. 1999) (holding that a prison's restrictions on a prisoner's possession of images depicting heterosexual penetration did not violate the prisoner's 1st Amendment rights); Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding regulation prohibiting prisoners from possessing sexually explicit materials on grounds that regulation was "reasonably related to legitimate penological interests"); Amatel v. Reno, 156 F.3d 192, 202 (D.C. Cir. 1998) (holding that regulation banning use of Bureau of Prisons funds to distribute sexually explicit material to prisoners was reasonable means of advancing penological interests); Snelling v. Riveland, 983 F. Supp. 930, 936 (E.D. Wash. 1997) (rejecting prisoner's claim that prison policy banning receipt of written or graphic sexually explicit material violated his 1st Amendment rights), *aff'd*, 165 F.3d 917 (9th Cir. 1998).

194. The state could counter such a claim by showing that it has a rational basis for its regulation; for example, that explicit material depicting men engaged in sexual acts with each other is more likely to lead to "disorder" in an all-male prison than is material depicting heterosexual acts because the acts depicted in the heterosexual material cannot be performed in prison the same way that the acts in the homosexual material can.

195. *See* Watkins v. U.S. Army, 875 F.2d 699, 729–30 (9th Cir. 1989) (showing that, under *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984), the court is unwilling to allow the Army to use the private prejudice of heterosexuals as grounds for discriminating against homosexuals, even for their protection).

difficult time justifying a decision based on the idea that other prisoners who observe you reading homosexual magazines would make life more difficult for you.[196]

Finally, in 1999, the Bureau of Prisons issued a new Program Statement to replace the one addressed by the *Thornburgh* Court. The new Program Statement does not include "homosexual" in the list of types of sexually explicit material the warden may reject, as the 1985 Program Statement did. A court could still allow censorship of sexually explicit homosexual material if the prison could demonstrate legitimate penological justifications for restricting the material. However, it would not be as easy for the court as it was when "homosexual material" was enumerated in the Program Statement. A prisoner challenging a warden's decision to restrict his access to sexually explicit homosexual publications, then, might have a stronger case under the new Program Statement than under its predecessor.

(b) State Prisons

Regulations governing many state prisons also contain provisions that permit censorship of sexually explicit homosexual material, and state courts have similarly found state prisons' regulations prohibiting explicit homosexual literature to be constitutional.[197] For example, the New Hampshire Department of Corrections Policy and Procedure Directive governing prisoner mail service in New Hampshire State Prisons bans "[o]bscene material, including publications containing explicit descriptions, advertisements, or pictorial representations of homosexual acts, bestiality, bondage, sadomasochism, or sex involving children."[198]

2. Non-Sexually Explicit LGBT Publications

(a) Federal Prisons

The 2003 Program Statement on incoming publications, elaborating on the Federal Bureau of Prisons regulations, provides that "[s]exually explicit material does not include material of a news or information type. Publications concerning research or opinions on sexual, health, or reproductive issues, or covering the activities of gay rights organizations or gay religious groups, for example, should be admitted unless a threat to legitimate institution interests."[199] This language seems to indicate that you should be allowed to receive a wide variety of LGBT publications with political, religious, social, and fictional content while you are in prison. Because prejudice against LGBT people often creates the view that everything about sexual orientation is sexual, and anything related to homosexuality is about sex, even if it explicitly is not, prison wardens may attempt to keep you from receiving issues of magazines such as *The Advocate* or *Out* on the grounds that they are sexually explicit. Under the 2003 Program Statement quoted above, such conduct in federal prisons is impermissible and open to challenge.[200]

(b) State Prisons

The right of prisoners to receive non-sexually explicit LGBT publications in state prisons is less clear and possibly less strong than in the federal context.[201] Most states do not have statements similar to the

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196. *See* Whitmire v. Arizona, 298 F.3d 1134, 1136 (9th Cir. 2002) (finding prison officials could not justify a discriminatory policy based on protecting prisoner from rumors of his homosexuality where prisoner was already "out" in prison).

197. *See* Willson v Buss, 370 F. Supp. 2d 782, 790–91 (N.D. Ind. 2005) (upholding prison supervisor's denial of plaintiff's sexually explicit homosexual literature, claiming a legitimate penological interest in prison security).

198. Lepine v. Brodeur, No. CV 97-72-M, 1999 WL 814277, at *5 (D.N.H. Sept. 30, 1999) (*unpublished*) (finding prison regulations forbidding prisoners from receiving pornographic publications depicting homosexual intercourse constitutional).

199. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5266.10, Incoming Publications 4 (2003).

200. It is worth mentioning that publishers also have 1st Amendment rights regarding subscribers' ability to receive publications in prison. This can become important in the prison context because, unlike prisoners, publishers are not subject to the Prison Litigation Reform Act and its exhaustion procedures and fee caps, and so would be able to sue the prison more freely.

201. *See*, *e.g.*, Harper v. Wallingford, 877 F.2d 728, 730 (9th Cir. 1989) (holding that prisoner's 1st Amendment rights were not violated when a non-sexually explicit membership application and organization bulletin for the North American Man/Boy Love Association was withheld from him, primarily because the materials posed a threat to the prisoner's safety, since if the prisoner was seen reading the material by other prisoners and presumed to be gay, he might be "subject to violent attacks from inmates"); Espinoza v. Wilson, 814 F.2d 1093, 1099 (6th Cir. 1987) (finding that censorship was justified because homosexual activity had presented security problems at prison in the past and

federal one, and the discretion given to prison officials in *Thornburgh v. Abbott* may result in many different decisions and regulations even within the same state.[202]

K. Conclusion

Being lesbian, gay, bisexual, or transgender can make the experience of incarceration especially hard, and the lack of case law involving prisoners who are LGBT may make you hesitant to bring a claim due to uncertainty about how a court will rule on it. Contact the legal organizations in the Appendix for help with your case and send information about the challenges you face in prison to the non-legal advocacy groups listed there. You are in a better position than anyone else to educate LGBT activists about the challenges LGBT prisoners face so that they can better advocate for laws and policies that will improve your situation.

homosexual publications posed a danger to institutional security); Willson v. Buss, 370 F. Supp. 2d 782, 787–90 (N.D. Ind. 2005) (finding prisoner did not have right to receive two gay advocacy magazines, although lacking in sexually explicit material, and that the prison regulation banning "blatant homosexual materials" was constitutional).

202. Thornburgh v. Abbott, 490 U.S. 401, 417 n.15, 190 S. Ct. 1874, 1883 n.15, 104 L. Ed. 2d 459, 475 n.15 (1989) (noting that "[t]he exercise of discretion called for by these regulations may produce seeming 'inconsistencies' ... [but that given the] likely variability within and between institutions over time ... greater consistency might be attainable only at the cost of a more broadly restrictive rule").

APPENDIX A

LGBT RESOURCES

American Civil Liberties Union Lesbian, Gay, Bisexual, Transgender & AIDS Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627

Gay & Lesbian Advocates & Defenders (GLAD)
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-1350
GLAD is a public interest legal organization working to defend and expand the rights of gay men, lesbians, bisexuals, transgender individuals and people with HIV. GLAD responds to over 3,000 requests for information and assistance each year and litigates impact cases.

Gay Men's Health Crisis
119 West 24th Street, 7th Floor
New York, NY 10011
Hotline: 1-800-AIDS-NYC (1-800-243-7692)
Legal Services and Advocacy: (212) 367-1040.

Immigration Equality
40 Exchange Place, 17th Floor
New York, NY 10005
(212) 714-2904
Immigration Equality is a coalition of immigrants, lawyers and other activists providing education, outreach, legal services, information and referrals, to combat discrimination in immigration law.

Lambda Legal Defense & Education Fund
National Headquarters
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585

Western Regional Office
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
(213) 382-7600

Midwest Regional Office
11 East Adams, Suite 1008
Chicago, IL 60603
(312) 663-4413

Southern Regional Office
730 Peachtree Street, NE, Suite 1070
Atlanta, GA 30308
(404) 897-1880

South Central Regional Office
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
(214) 219-8585
Lambda is a national organization committed to achieving full civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work.

National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257
NCLR is a progressive, feminist, multicultural legal center devoted to advancing the rights and safety of lesbians and their families through direct litigation and advocacy.

National Gay and Lesbian Task Force
National Headquarters
1325 Massachusetts Ave., NW, Suite 600
Washington, DC 20005
(202) 393-5177

New York Office
80 Maiden Lane, Suite 1504
New York, NY 10038
(212) 604-9830
NGLTF is a national progressive organization working for the civil rights of gay, lesbian, bisexual and transgender people.

Sylvia Rivera Law Project
147 W. 24th St., 5th Floor
New York, NY 10011
(212) 337-8550
Toll Free: 1-866-930-3283
Sylvia Rivera Law Project fights discrimination against gender non-conforming people, particularly intersex and transgender people, and focuses on people of color and poor people.

A JAILHOUSE LAWYER'S MANUAL

Chapter 31: Security Classification and Gang Validation

Columbia Human Rights Law Review

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CHAPTER 31

SECURITY CLASSIFICATION AND GANG VALIDATION*

A. Introduction

Upon entering the prison system, all prisoners are assigned a security classification, which is reevaluated regularly. Your security classification largely determines where you are incarcerated and what sort of treatment you receive while in prison. A lower security classification is better because it means that you have more freedoms and fewer restrictions. You can think of gang validation as a subset of security classification. Gang validation is the process that prison officials use to identify prisoners that they suspect of being members of gangs or "Security Threat Groups" ("STGs"). If you have been validated as a member of a gang, it means that prison officials have classified you as someone who poses a particular security risk and you may be isolated from other prisoners.

Part B of this Chapter discusses general security classification. It starts with a description of the guidelines for prisoner classification in the Federal Bureau of Prisons ("BOP") and in New York State, California, and Florida, and then explains of some of the legal challenges that prisoners have raised to classification decisions in the past. Keep in mind that these challenges have been largely unsuccessful. Part B ends with a description of administrative options for challenging a particular security classification. Part C outlines gang validation and begins with a general discussion of the process, followed by a summary of the ways that prisoners have used the Fourteenth Amendment, the Eighth Amendment, the Fifth Amendment, and equal protection claims to challenge their validation as gang members. Because these legal challenges have been largely unsuccessful, the Chapter concludes with some suggestions for challenging gang validation using administrative options.

B. General Security Classification

1. Introduction

In all states, you will be assigned a security classification shortly after entering the prison system. This Chapter focuses on the classification guidelines operating in the Federal Bureau of Prisons, in New York's Department of Correctional Services ("DOCS"), in California's Department of Corrections and Rehabilitation ("CDCR"), and in Florida's Department of Corrections ("FDOC"). It also focuses on attempts that prisoners have made to challenge their classification under these guidelines in court. Most other state prisons use similar classification systems to evaluate prisoners in terms of both public and private risk. Courts in most jurisdictions, including New York, California, and Florida are reluctant to interfere in what they view as a prison's internal administrative matters. However, you should investigate the details of your own state's procedures.

You should be able to obtain a copy of the classification manual for the system in which you are incarcerated. The classification manual should allow you to verify that the criteria used to evaluate you are accurate. However, in some states, such as New York, the classification manual is primarily a set of guidelines for entering data into a computer program. Without access to that computer program, the classification manual will not be very useful, although you may still find it helpful to examine the classification criteria in greater detail.

2. Federal Bureau of Prisons Classification Guidelines[1]

(a) Security Level Score

In the federal prison system, new prisoners are assigned a security level score by a Community Corrections Manager in the Bureau of Prisons ("BOP"). This score is used by Regional and Central Office Designators to assign new prisoners to an institution with a corresponding level of security, as determined by the security measures in place at the institution.[2]

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* This Chapter was revised by Romie Barriere, based in part on previous versions by Ben Van Houten and Daniel Green. Thanks to John Boston for his valuable feedback.

1. The Federal Bureau of Prisons classification guidelines are documented in U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, *available at* http://www.bop.gov/policy/progstat/5100_008.pdf (last visited March 24, 2010).

2. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security

Approximately seven months after a prisoner arrives at the institution, he will have his first program review following initial classification. At this time, the prisoner will be given a custody classification score. This score refers to how much staff supervision is required for the prisoner within and beyond the confines of the institution. It determines, among other things, the types of work assignments and activities that a prisoner may participate in, and the level of staff supervision required.[3] Note that the custody level score is different from the security level score, which is used to match a prisoner with a specific type of institution based on the institution's security features.

A prisoner's custody classification must be reviewed at least every twelve months and is usually reviewed at the same time as program reviews.[4] Additionally, a prisoner's security level and custody level will usually be reviewed when a new sentence is imposed, when a sentence is reduced, when a disciplinary action occurs, or when there is a "change in external factors" that "might affect the security or custody level."[5]

The calculation of a new prisoner's security level score is based on the prisoner's Pre-Sentence Investigation Report ("PSI"), a copy of the judgment from the prisoner's case, and the Individual Custody and Detention Report provided by the U.S. Marshals Service. Where no PSI has been prepared, a Post-Sentence Investigation Report will be prepared. In some cases, a Magistrate Information Sheet may be used. The BOP has identified several factors that are considered in the determination of the security level score:

(a) The "level of security and supervision the inmate requires";
(b) The "level of security and staff supervision the institution is able to provide";
(c) The prisoner's program needs (including substance abuse, medical/mental health treatment, educational training, group counseling and other programs); and
(d) Various administrative factors, including the level of overcrowding in an institution, its distance from the prisoner's release residence, and any recommendations that the judge may have offered.[6]

In considering these factors, the BOP uses a detailed scoring system including elements based on the severity of the current offense, any past offenses, and other relevant details. Scores in various elements are entered into a database known as SENTRY. This database then calculates a prisoner's security level score; for a detailed breakdown of this calculation, you should refer to the BOP Program Statement.

(b) Other Safety Factors

In addition to the scoring system, the BOP may also check if any of eleven "public safety factors" are present in the prisoner's case. These public safety factors are: (1) validated membership in a "disruptive group" identified in the Central Inmate Monitoring System (males only); (2) current term of confinement in the "Greatest Severity" range according to the Offense Severity Scale (males only); (3) sex offender status; (4) Central Inmate Monitoring assignment of threat to government official; (5) deportable alien status; (6) remaining sentence length (males only); (7) violent behavior (females only); (8) involvement in a serious escape; (9) prison disturbance; (10) juvenile violence; and (11) serious telephone abuse.[7] If any of these factors are present, they will raise a prisoner's security classification despite a score that would, on its own, produce a lower classification.[8] At maximum, three of these factors will be applied to an inmate. If more than three of the factors apply, those that would provide the greatest public safety and security threat are considered.[9] These factors may be waived at the discretion of the Regional Director.

Designation and Custody Classification Manual, ch. 3, at 3 (2006).

3. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006).

4. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006).

5. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 6, at 1 (2006).

6. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 1, at 1–2 (2006).

7. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 7–10 (2006).

8. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 2, at 4 (2006).

9. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 7 (2006).

In addition, the Regional Director may find that any of eleven "management variables" apply, which would result in a prisoner's placement at an institution that is not at the same security level as the prisoner's security level score.[10] Examples of Management Variables include population management, medical or psychiatric history, and greater security concerns.[11] Management variables generally relate to administrative considerations that might result in a prisoner's placement in a specific institution, while Public Safety Factors are considerations that relate to the BOP's concern with the threat a prisoner poses to society.

Custody classification evaluations are calculated in a similar way, using a scoring system based primarily upon a prisoner's criminal history and behavior within the institution. The warden has discretion to assign a prisoner a custody level different from the one indicated by the scoring system. If this is done, an explanation must be noted on the prisoner's custody classification form. Public safety factors and management variables may be used in this determination.

There are different scoring systems for calculating the security levels of male and female prisoners. Persons under the age of eighteen are not subject to this classification system. In addition, certain special cases have special designation procedures, including military prisoners and some medical or mental health cases. Please consult the Program Statement for a full list of descriptions of these special cases.

3. New York's Classification Guidelines

In New York, new prisoners are assigned an initial classification score at a reception facility. Reclassification hearings occur periodically. In New York State, the initial reclassification screening occurs six months after a prisoner is taken into custody; subsequent reclassifications take place every three months after that.[12] The counselor assigning the classification enters numerical factors into a computer program, which then calculates a score. The information used to determine the factor values comes from evidence presented in the Commitment Paper, the Pre-sentence Report ("PSR"), warrants, the Division of Criminal Justice Services ("DCJS") Summary Case History ("Rap Sheet"), sentencing minutes (when available), your interview, and, if you have served a prior DOCS term, any available Department records of that term.[13] Both official and unofficial documents may be relied upon, though evidence from unofficial documents "should be evaluated in relation to official documents and used where appropriate."[14] If a counselor cannot resolve inconsistencies between documents, the counselor is supposed to use the "most cautious alternative."[15]

New York's Security Classification Guidelines identify two types of security risks: (1) public risk, which is the likelihood that a prisoner will escape and be a danger to the public; and (2) institutional risk, which is the likelihood that a prisoner will be dangerous to staff, other prisoners, or himself while incarcerated. The Guidelines use four main factors to determine public risk: (1) history of criminal violence; (2) history of escape and abscondence (hiding to avoid legal proceedings); (3) time until earliest possible release; and (4) family, employment, school, and military history.[16] The Guidelines identify two main factors that determine institutional risk: (1) family, employment, school, and military history; and (2) institutional disciplinary history.[17]

These characteristics are all evaluated by point scores. The point scores are then combined to produce your security classification. More specific descriptions of each of the characteristics can be found in the State

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10. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 1 (2006).

11. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5, at 3–5 (2006).

12. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-85 (1996). To acquire a copy of this manual, you may need to file a request under the Freedom of Information Act. Please refer to Chapter 7 of the *JLM*, "Freedom of Information," for more information on FOIA requests.

13. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-43 (1996).

14. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-43 (1996).

15. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-43 (1996).

16. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-1 (1996).

17. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-1 (1996); *see also* N.Y. Comp. Codes R. & Regs. tit. 7, app. 1-E (2008).

of New York DOCS Classification Manual. The Classification Manual also describes the procedures used for assigning point values and the way in which a score is calculated from these values.[18]

In addition to these main characteristics, you should know that that there are thirty-five additional characteristics that are difficult to assign point values to, or that aren't used very often. These additional characteristics can affect the classification you receive and may qualify you for a higher classification level, even if you a receive point total that might alone produce a lower classification.[19]

You should also be aware that the characteristics for male and female prisoners may have different elements.[20] Male and female prisoners' scores are evaluated against different classification schemes. The elements for minor and adult prisoners may also differ. Finally, there are some cases in which the counselor will feel that the point score does not accurately represent your security risk, and he is permitted to adjust the security classification, although he must provide an explanation for doing so.[21] Most other state prison systems have similar provisions that let a counselor or other official assign you a security classification that differs from the one produced from the scoring system.[22]

4. California's Classification Guidelines

In California, new prisoners are assigned a classification score when they are committed to state prison.[23] This classification determines the type of institution in which the prisoner is placed. In California, there are four levels of prisons. Level 1 houses the least dangerous prisoners, and Level 4 houses the most dangerous. In order to fill out an inmate classification score sheet, a counselor will first review documents, such as probation reports, and then interview the prisoner.[24] A committee will then conduct a hearing to determine your classification.[25] The committee will review the counselor's score sheet and consider various factors during the hearing, including: 1) background information such as your age at first arrest, current prison term, street gang affiliation, mental illness, prior sentences, and prior incarcerations; and 2) your prior behavior while incarcerated.[26] These factors are assigned point scores; your total score will determine your classification. Sometimes, the law requires a mandatory minimum score for certain sentences or crimes, which will replace your score if it is below the mandatory minimum.[27] In other cases, prison officials can adjust your score if necessary for safety or other institutional needs, such as prison overcrowding.[28] A score of 0–18 means placement in a Level 1 institution; a score of 19–27 means placement in a Level 2 institution;

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18. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-1–2 (1996).

19. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-1 (1996).

20. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-3 (1996).

21. State of New York, Department of Correctional Services, Office of Classification and Movement, Classification Manual, II-3–4 (1996).

22. *See, e.g.*, State of California, Department of Corrections & Rehabilitation, Operations Manual §§ 61010.8, 61020.13 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010) (authorizing department officials to depart from the classification scoring system in individual cases); 103 Mass. Code Regs. 420.08(f) (1995) (authorizing override of scored classification level); N.J. Admin. Code § 10A: 9-2.14 (Supp. 2007) (providing for override of the initial classification determined by scoring); Or. Admin R. 291-078-0020(4) (2008) (providing for either decreases or increases in the level of supervision from that determined through the risk assessment score).

23. Cal. Penal Code § 5068 (2008).

24. State of California, Department of Corrections & Rehabilitation, Operations Manual § 61010.9 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010). To acquire a print copy, you may need to file a request under the Freedom of Information Act. Please refer to Chapter 7 of the *JLM*, "Freedom of Information," for more information on FOIA requests.

25. Cal. Code Regs. tit. 15, §§ 3375–76 (2010).

26. Cal. Code Regs. tit. 15, § 3375.3 (2010).

27. Cal. Code Regs. tit. 15, § 3375.3 (2010); *see also* State of California, Department of Corrections & Rehabilitation, Operations Manual § 61010.11.5 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010).

28. State of California, Department of Correction & Rehabilitation, Operations Manual § 61010.8 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010).

a score 28–51 means placement in a Level 3 institution; and a score higher than 51 means placement in a Level 4 institution.[29]

The committee will reclassify you and recalculate your score at least once a year.[30] When possible, the committee should give you notice before any hearing so that you have time to prepare.[31] At the hearing, the committee will consider two things: 1) your favorable behavior since the last review, such as six month periods without any serious disciplinary actions and six month periods with average or above average performance in certain programs; and 2) any unfavorable behavior since the last review, such as serious misbehavior, assault, possession of a deadly weapon, drug distribution, or starting a riot.[32] Favorable behavior will reduce your score and unfavorable behavior will increase your score. Remember, a lower score means a lower classification and placement in a less secure institution.

5. Florida's Classification Guidelines

In Florida, security classification decisions are made by two groups, the Institutional Classification Team ("ICT") and the State Classification Office ("SCO").[33] The ICT includes the warden or assistant warden, the classification supervisor, and a correctional officer chief, and is responsible for recommending security classifications for prisoners.[34] The State Classification Office is responsible for reviewing recommendations made by the ICT.[35] When a new prisoner arrives, the ICT uses the Custody Assessment and Reclassification computer program ("CARS") to prepare an automated custody classification questionnaire using all available sources to determine the appropriate degree of supervision, including information such as your criminal history and sentence.[36] When the questionnaire is completed, a computer generated numerical score is used to place prisoners in one of five security classification levels (maximum, close, medium, minimum, and community), which are called "custody grades" by the Florida Department of Corrections.[37] The most restrictive custody grade is maximum custody status, which usually refers to prisoners who are sentenced to death.[38] The least restrictive custody grade is a community custody status, which makes a prisoner eligible for placement in a community residential facility.[39] Changes can be made to a prisoner's custody grade for various reasons, including changes in charges due to plea bargaining, public interest concerns, family environment, military record, age, and health.[40] Other factors that may affect your custody status include sex offenses, alien status, escape, and gain time credits.[41] The SCO can also start a new custody assessment when they decide it is "necessary for the safety of the public or the needs of the department."[42]

The ICT will meet to review your custody status, assess your adjustment, and determine whether any changes may be necessary. You are required to appear at any review or assessment unless a documented

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29. State of California, Department of Corrections & Rehabilitation, Operations Manual § 61010.11.7 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010).

30. Cal. Code Regs. tit. 15, § 3376(d)(2) (2010); *see also* State of California, Department of Corrections & Rehabilitation, Operations Manual § 61020.14 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010).

31. Cal. Code Regs. tit. 15, § 3375(e) (2010).

32. Cal. Code Regs. tit. 15, § 3375.4 (2010).

33. Fla. Admin. Code Ann. r. 33-601.209 (2009).

34. Fla. Admin. Code Ann. r. 33-601.209(3) (2009).

35. Fla. Admin. Code Ann. r. 33-601.209(2) (2009).

36. Fla. Admin. Code Ann. r. 33-601.210(2)(b) (2009).

37. Fla. Admin. Code Ann. r. 33-601.210(2)(a) (2009).

38. *See* Florida Department of Corrections Website, *Frequently Asked Questions Regarding Custody*, *available at* http://www.dc.state.fl.us/oth/inmates/custody.html#1 (last visited March 24, 2010).

39. *See* Florida Department of Corrections Website, *Frequently Asked Questions Regarding Custody*, *available at* http://www.dc.state.fl.us/oth/inmates/custody.html#1 (last visited March 24, 2010).

40. Fla. Admin. Code Ann. r. 33-601.210(2)(d) 1–9 (2009).

41. Fla. Admin. Code Ann. r. 33-601.210(2)(h) (2009) (listing the exceptions to the rule that inmates convicted of crimes involving sex acts are not ordinarily eligible for community or minimum custody status); Fla. Admin. Code Ann. r. 33-601.210(2)(j) (2009) (specifying certain conditions under which alien inmates shall not be assigned to a custody status any lower than close custody); Fla. Admin. Code Ann. r. 33-601.210(4)(e) (2009) (stating that a prison may alter the regular schedule for assessments and reviews in cases of escape or other unusual occurrences); Fla. Admin. Code Ann. r. 33-601.210(4)(k) (2009) ("Additional gain time is to be considered at the time of any scheduled or unscheduled review.").

42. Fla. Admin. Code Ann. r. 33-601.210 (2)(g) (2009).

permanent medical condition makes you unable to participate. You should receive notice at least forty-eight hours in advance unless you have waived your right to notice.[43] Assessments will occur at least every six months for prisoners with three years or less remaining to serve, and every twelve months for prisoners with more than three years remaining. If you are serving a life sentence with no parole, a life sentence with no established release date, or a death sentence, you will receive an assessment and review every twenty-four months.[44] Custody grades can be increased or decreased throughout your sentence. If your behavior is favorable, your custody grade should decrease as the time remaining on your sentence decreases.

6. Classification of Female Prisoners

While many state correctional agencies use the same classification guidelines for male and female prisons, some states, including Idaho, Massachusetts, New York, and Ohio, as well as the Federal Bureau of Prisons, apply different guidelines or weigh factors differently. For example, as stated in Part B(2) of this Chapter, the Federal Bureau of Prisons considers "violent behavior" as a public safety factor for female prisoners only, while factors specific to male prisoners include the severity of the offense, membership in a disruptive group and the remaining length of the sentence. Because there are greater numbers of men in prison, there are also more prisons built for male prisoners. Consequently, in many states, female prisoners with different classification levels are housed together. Female prisoners may also be over-classified or placed in a higher security level than necessary. The majority of classification systems were designed for male prisoners and fail to predict the needs of female prisoners.[45] In 2000, a group of female prisoners intervened in a class action lawsuit against the Michigan Department of Corrections ("MDOC") and were able to reach a settlement concerning the classification of female prisoners. The MDOC agreed to make changes to the classification system as it was applied to female prisoners and to conduct research regarding the changes.[46] If you are considering bringing a similar lawsuit to challenge the use for females of a classification system designed for males, you should read this case closely and consider contacting an advocacy organization such as the Women's Prison Association or the California Coalition for Women Prisoners.[47]

7. Legal Challenges to Classification Decisions

Generally, legal claims made to improve the conditions of imprisonment are filed under 42 U.S.C. § 1983. Because your security classification determines the conditions of your imprisonment, most prisoners who challenge their security classification file their claims under Section 1983. The U.S. Constitution and other federal statutes provide a broad range of individual rights. Section 1983 is a federal statute that protects you from violations of these rights by allowing you to sue the individuals responsible in federal court.[48] It is important to note that there is generally no federal law on the issue of classification, either substantively or as a matter of due process, because these matters are generally governed by state law. You should look to the law of your own state and individual prison regulations, and when it is possible you should always try to have the regulations enforced in state court. You can look to federal court if a state remedy does not exist, or if the federal remedy would override the state remedy.[49]

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43. Fla. Admin. Code Ann. r. 33-601.210 (4)(c) (2009).

44. Fla. Admin. Code Ann. r. 33-601.210(4)(c) 1–3 (2009) (specifying the schedules for assessments and reviews).

45. *See* Patricia L. Hardyman and Patricia Van Voorhis, U.S. Dept. of Justice and The Nat'l Inst. of Corr., Developing Gender-Specific Classification Systems for Women Offenders p. viii (2004) *available at* http://www.nicic.org/Downloads/PDF/2004/018931.pdf (last visited March 24, 2010).

46. *See Female Prisoners' Portion of Cain Case Settled,* 3 Prisoners and Corr. Forum 6, 6–7 (Spring/Summer 2000), *available at* http://www.michbar.org/prisons/pdfs/spring00.pdf (last visited March 24, 2010) (the Cain settlement agreement included provisions agreeing to: hire an expert to evaluate the type, quantity, or quality of misconducts issued to male and female prisoners; ensure that female prisoners have access to legal assistance; provide an unmonitored telephone to allow prisoners to participate in court ordered hearings; and settle outstanding claims). An unsigned copy of the final settlement agreement in the Cain case is on file in the *JLM* office.

47. Women's Prison Association, *available at* http://www.wpaonline.org/ (last visited March 24, 2010); California Coalition for Women Prisoners, *available at* http://www.womenprisoners.org/ (last visited March 24, 2010). For more information about the settlement, see the earlier class action suit, Cain v. Dept of Corr., 548 N.W.2d 210, 451 Mich. 470 (Mich. 1996).

48. *See*, *e.g.*, Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492, 497 (1961) (applying § 1983 to illegal search of civilian home and detention of citizen by police), *overruled in unrelated part by* Monell v. New York City Dept.. of Social Servs.*,* 436 U.S. 658, 695, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978).

49. *See*, *e.g.*, Monroe v. Pape, 365 U.S. 167, 174, 81 S. Ct. 473, 477, 5 L. Ed. 2d 492, 498 (1961) (explaining that one aim of § 1983 is to provide a federal remedy where the state remedy, though adequate in theory, was not available in

For detailed instructions on how to file a claim under Section 1983, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of the Federal Law." It is also crucial that you read Chapter 14 of the *JLM*, on the Prison Litigation Reform Act ("PLRA"). The PLRA requires you to exhaust administrative remedies before filing suit and imposes substantial penalties if you fail to do so.[50]

One possible legal challenge to classification decisions is a due process challenge. The Due Process Clause of the Fourteenth Amendment protects individuals, including prisoners, from the loss of "life, liberty, or property" at the hands of the government without due process of law.[51] But, the Constitution itself does not provide prisoners the right to be housed at any particular classification level. Therefore a prisoner must rely on state law to create a liberty interest in order to have a valid claim for denial of due process under the Fourteenth Amendment.[52] In 1995, in *Sandin v. Conner*, the Supreme Court created a new standard for determining whether conditions of imprisonment constitute a due process violation.[53] The new standard emphasizes the nature of the deprivation suffered by the prisoner. You should be careful researching this issue, however, as much of the case law on prisoner classification was decided under an old standard. You must make sure that the cases you research use the current *Sandin* standard.

In *Sandin*, the Court held that state-created liberty interests "will be generally limited to freedom from restraint which … imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,"[54] and that the hardship imposed upon the prisoner must be of "real substance."[55] Following *Sandin*, courts have been extremely reluctant to find that a particular security classification constitutes a deprivation of a constitutional liberty interest.[56] Prisoners have not been successful in convincing the court that the officials' decision to classify them in a particular way constituted an "atypical and significant" deprivation of liberty. Prisoners have had more success, however, challenging long-term placement in administrative segregation.[57]

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practice), *overruled in unrelated part by* Monell v. New York City Dept.. of Social Servs., 436 U.S. 658, 695, 98 S. Ct. 2018, 2038, 56 L. Ed. 2d 611, 638 (1978).

50. Most importantly, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). For more information on the exhaustion requirement, see Part E of Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

51. U.S. Const. amend. XIV, § 1. For a more detailed discussion of liberty interests and the degree of due process rights owed to prisoners see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings."

52. Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429 (1995) ("States may under certain circumstances create liberty interests which are protected by the Due Process Clause.").

53. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (finding no liberty interest in prisoner's administrative segregation absent atypical, significant deprivation).

54. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

55. Generally, hardships of "real substance" involve some physical injury or other deprivation related to an inmate's person. Otherwise, the unfair treatment may not be recognized as a constitutional liberty interest. *See*, *e.g.*, Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999) (finding due process claim meritless because prisoner had no protectable interest in custodial classification and did not allege physical injury in claim for damages); Martin v. Scott, 156 F.3d 578, 580 (5th Cir. 1998) (holding that under ordinary circumstances administrative segregation will never be grounds for a constitutional claim because it does not constitute deprivation of a constitutional liberty interest).

56. In recent years, a number of circuit courts have addressed the question of classification rights under *Sandin* and have found a violation of a protected liberty interest in only limited cases. *See*, *e.g.*, Iqbal v. Hasty, 490 F.3d 143, 161 (2d Cir. 2007), *cert. granted*, 76 U.S.L.W. 3654 (U.S. Nov. 17, 2008) (holding that a prisoner has a protected liberty interest "only if the deprivation ... is atypical and significant and the state has created the liberty interest by statute or regulation"); Morales v. Chertoff, No. 06-12752, 2006 U.S. App. LEXIS 31846, at *3–4 (11th Cir. Dec. 27, 2006) (*unpublished*) (finding that the issue of custodial classification does not implicate an atypical or significant deprivation); Portley-El v. Brill, 288 F.3d 1063, 1065 (8th Cir. 2002) (holding that "administrative and disciplinary segregation are not atypical and significant hardships under *Sandin*"); Leamer v. Fauver, 288 F.3d 532, 546 (3d Cir. 2002) (holding that, "[u]nder *Sandin*, the mere fact of placement in administrative segregation is not in itself enough to implicate a liberty interest"); Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999) (finding that, following *Sandin*, "a deprivation in prison implicates a liberty interest protected by the Due Process Clause only when it imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences"); Freitas v. Ault, 109 F.3d 1335, 1337–38 (8th Cir. 1997) (holding that administrative detention and prison transfer do not meet the "atypical and significant hardship" required to implicate a liberty interest).

57. *See* Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001) (finding that an aggregated period of confinement in administrative segregation of 762 days is a "sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*" (quoting Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000))). In New York, at least, when looking at whether placement in administrative segregation constitutes an "atypical and

One reason it is so difficult to succeed on a Fourteenth Amendment claim is that even where a liberty interest is recognized, a prisoner will still lose his case if the prison's policies satisfy due process (remember that the Fourteenth Amendment does not protect you from any deprivation of liberty, but only those undertaken without due process of law). In *Wilkinson v. Austin*, the Supreme Court found that prisoners had a protected liberty interest in avoiding placement in a Supermax facility which imposed "atypical and significant hardships" on the prisoners such as twenty three hours in their cells, non-contact visits, and indefinite placement.[58] While the court recognized the liberty interest for prisoners, they still upheld the prison's procedural policies as satisfying due process.[59] The Court also clarified that the liberty interest protected—an interest in avoiding transfer to a higher level of confinement—is not one created by the Constitution, but rather is a product of state policies and regulations.[60]

Classification that affects parole eligibility may also establish a liberty interest. For example, you may have an argument that you would be eligible for parole, were it not for your incorrect classification. In *Wilkinson*, the court considered the fact that prisoners lost their eligibility for parole while incarcerated at the Supermax facility in addition to the factors listed above and found that together they resulted in atypical and significant hardships.[61]

You may also be able to challenge your classification in state court on the grounds that prison officials gave you an unfair classification based on their evaluation of the information contained in the Commitment Paper, the Pre-Sentence Report ("PSR"), warrants, the DCJS Summary Case History ("Rap Sheet"), sentencing minutes, the interview, or any available Department records of a prior DOCS term. It may be possible to convince the court that some of the information contained in these documents was incorrect, or that a clerical error was made in transferring the information from these documents onto a classification worksheet or into a computer program. If an error like this was made, any security classification derived from them was not only unfair, but also invalid, because it would be based on false information.[62] Be aware that you may face difficulties in obtaining these documents for review, and that you may be unsuccessful in doing so even if you bring the matter to court.[63]

Again, there is generally no federal law in this area, but state law may permit suit based on violations of state law and state-created liberty interests, or prison regulations. Even in state courts, however, it may still be difficult to succeed on your claim. In California, courts have given a great deal of deference to the classification decisions of prison officials, limiting judicial intervention to instances when "actions by prison

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significant" hardship, federal courts will aggregate separate special housing unit ("SHU") and disciplinary segregation sentences where they constitute a sustained period of confinement. Sims v. Artuz, 230 F.3d 14, 23–24 (2d Cir. 2000). This means they will consider time spent in administrative segregation, regardless of whether it was in a different facility, if the confinement is continuous. In *Giano*, for instance, the court combined the prisoner's 92-day confinement at one institution with his 670-day confinement at another. Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001).

58. Wilkinson v. Austin, 545 U.S. 209, 220, 125 S. Ct. 2384, 2393, 162 L. Ed. 2d 174, 188 (2005).

59. Wilkinson v. Austin, 545 U.S. 209, 230, 125 S. Ct. 2384, 2398, 162 L. Ed. 2d 174, 193 (2005).

60. Wilkinson v. Austin, 545 U.S. 209, 222, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 189 (2005).

61. Wilkinson v. Austin, 545 U.S. 209, 224, 125 S. Ct. 2384, 2395, 162 L. Ed. 2d 174, 190 (2005) (finding that each factor on its own may not be enough to constitute "atypical and significant hardship" but taken together they do); *see also* Neal v. Shimoda, 131 F.3d 818, 828–30 (9th Cir. 1997) (holding that classification as a sex offender deprived prisoner of a liberty interest where refusing sex offender treatment made one ineligible for parole).

62. Udzinski v. Coughlin, 592 N.Y.S.2d 801, 802, 188 A.D.2d 716, 717 (3d Dept. 1992) (ordering that petitioner's crime and sentence report, upon which his security classification was based, be corrected because Department of Correctional Services employees inaccurately transcribed information from pre-sentence report into their own documents).

63. In New York, N.Y. C.P.L.R. 390.50 (2010) provides for the confidentiality of pre-sentence reports (meaning that such reports "may not be made available to any person or public or private agency"), except where disclosure is permitted or required by statute. Where there is no relevant statutory provision, a prisoner may obtain a copy of the report "upon a proper factual showing for the need thereof." People v. Shader, 233 A.D.2d 717, 717, 650 N.Y.S.2d 350, 351 (3d Dept. 1996). *See, e.g.,* Kilgore v. People, 274 A.D.2d 636, 636, 710 N.Y.S.2d 690, 391 (3d Dept. 2000) (finding petitioner's bare assertion that he required the pre-sentence report in order to properly prepare for an appearance before the Board of Parole is insufficient to constitute a showing of need for the report); *cf.* Gutkaiss v. People, 49 A.D.3d 979, 979–80, 853 N.Y.S.2d 677, 678 (3d Dept. 2008) (finding that the petitioner had made a proper factual showing entitling him to a copy of the report where "petitioner had notice of an impending hearing before the Board and his presentence report was one of the factors to be considered by the Board in determining his application for release"). Cal. Code Regs. tit. 15, § 3375(j) (1)–(2) (2009) (detailing procedures for discussion of presentencing materials and requiring that prisoner's intending to challenge any of the information collected on their intake form provide necessary documentation to support their challenge).

officials are arbitrary, capricious, irrational, or an abuse of the discretion granted those given the responsibility for operating prisons."[64]

8. Administrative Options

Courts generally don't like to interfere with security classification, and therefore the most realistic approach to getting your classification lowered may be through your prison's internal appeals process. Keep in mind that an unsuccessful federal lawsuit could have consequences for you under the Prison Litigation Reform Act ("PLRA").[65] Additionally, the PLRA requires that you exhaust administrative options before bringing a legal action under Section 1983.[66] Be sure to read Chapter 14 of the *JLM*, "The Prison Litigation Reform Act."

No matter where you are incarcerated, your security classification should be periodically reviewed. You should notify your assigned counselor of any information that you think could impact your security classification, such as a change in your rap sheet. You should also give copies of any relevant documents to your counselor. You will need to research the administrative rules in your prison regarding appeals of security classification. For example, in California you are able to contest classification decisions resulting in adverse effects (such as an increased custody level) during your reclassification hearing, and are then able to appeal your score and hearing results to your prison's Classification Committee.[67]

Finally, if you have exhausted all of the internal administrative options, and you are imprisoned in the state of New York, you can institute an Article 78 court proceeding. Article 78 provides a procedure for challenging administrative decisions in court. Article 78 only applies to the state of New York, but if you are imprisoned elsewhere, you should research whether or not your state has a similar law.[68] For detailed instructions on bringing an Article 78 proceeding, see Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." *There are very strict rules and time limits* to remember when bringing an Article 78 proceeding, so it is important that you read Chapter 22 carefully.

C. Gang Validation

1. Definition and Discussion

Gang validation is the process by which prison officials determine that a prisoner is an associate or a member of a gang or Security Threat Group ("STG"). Once that decision has been made, the prisoner is often "administratively segregated," meaning that he is housed separately from, and receives different treatment than prisoners who have not been validated as gang members or associates. Although the specific procedures vary from state to state, Arizona, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Nebraska, New Jersey, Oregon, Tennessee, Texas, and Wisconsin all segregate suspected gang members from the rest of the prison population.[69] While a state prison system may use a standard written

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64. *In re* Wilson, 202 Cal. App. 3d 661, 667, 249 Cal. Rptr. 36, 40 (Cal. App. 1988) (finding that there was a basis for a prisoner's classification as a sex offender even when the related charges had been dismissed, and therefore officials did not act arbitrarily or capriciously).

65. For example, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

66. The Prison Litigation Reform Act, 42 U.S.C. § 1997e (a) (2006).

67. State of California, Department of Corrections & Rehabilitation, Operations Manual § 62010.4.2.1 (2004), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM Ch 6-Printed Final.pdf (last visited March 24, 2010).

68. *See, e.g.,* Fl. Statutes Ann. §120.68 (2009); Cal. Gov't Code §53069.4 (2009). Similarly to Article 78 of the New York Civil Practice Law and Rules, most state statutes contain strict time limitations on when you can challenge administrative proceedings in court, so be sure to read your own state's rules carefully.

69. *See* Ariz. Dept. of Corr., Dept. Order No. 805, Protective Segregation (2009), *available at* http://www.azcorrections.gov/Jill_800_805.aspx (last visited March 24, 2010); Cal. Admin. Code tit. 15, § 3341.5 (2008); Colo. Dept. of Corr., Admin. Reg. No. 600-07 (2008), *available at* https://exdoc.state.co.us/userfiles/regulations/pdf/0600_07.pdf (last visited March 24, 2010); Conn. Dept. of Corr. Admin., Directive No. 6.14 (2008), *available at* http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0614.pdf (last visited March 24, 2010); Fla. Dept. of Corr., Gang and Security Threat Group Awareness, *available at* http://www.dc.state.fl.us/pub/gangs/index.html (last visited March 24, 2010); Ill. Admin. Code tit. 20, § 505.40 (2008); 103 Mass. Code Regs. 421.09 (2008), *available at* http://www.mass.gov/Eeops/docs/doc/policies/421.pdf (last visited March 24, 2010); Mich. Dept. of Corr., Pol'y Directive No. 04.04.113 (2007), *available at* http://www.michigan.gov/documents/corrections/0404113_216357_7.pdf (last visited

definition of what constitutes a gang member, the process for actually proving that someone is a gang member, and the amount of proof required, may vary by state.[70]

Generally, the only way to be declassified as a gang member is to "debrief." "Debriefing" is a process that may involve informing prison officials of the identities and activities of fellow gang members. Debriefing can place the suspected gang member's well-being at risk, and may subject him to retaliation. This Section discusses the problems that individuals who have tried to challenge their gang validation in court have experienced, and offers some suggestions for challenging gang validation through administrative proceedings rather than in court.

California's system of gang validation is one of the most developed and punitive in the country. California has been segregating suspected gang members since at least 1984, and other states have studied California in developing gang validation procedures of their own.[71] In California, and states with similar procedures, you are validated as a gang member if you are found to meet any three of several criteria.[72] These criteria include, but are not limited to: gang tattoos, correspondence to or from known gang members or correspondence that contains references to gang activity, wearing gang colors, association with known gang members, possession of gang-related literature, possession of a photograph of known gang members, and identification by a fellow prisoner as a gang member. Misconduct is not necessarily required for being labeled a gang member.

Florida uses the term Security Threat Group ("STG") which includes "formal or informal ongoing groups, gangs, organization or associations consisting of three or more members who have a common name or common identifying signs, colors, or symbols. A group whose members/associates engage in a pattern of gang activity or department rule violation."[73] Similar to California, a "criminal gang member" in Florida is a person who meets two or more certain criteria. These criteria include, but are not limited to: self-identification as a criminal gang member, identification as a criminal gang member by a parent or guardian, identification by a documented reliable informant, adopting the style of dress of a criminal gang, adopting the use of a hand sign identified as used by a criminal gang, having a tattoo identified as used by a criminal gang, and associating with one or more know criminal gang member.[74]

New York State uses the label "Security Risk Group" and defines a gang, for the purposes of their rules, as "a group of individuals, having a common identifying name, sign, symbol or colors who have engaged in a pattern of lawlessness" such as violence, destruction of property, threats, intimidation, harm, or drug smuggling. Prisoners are prohibited from wearing, possessing, or distributing gang materials or insignia (identifying marks or symbols of the gang) or participating in gang-related activities or meetings.[75]

Most of the case law on gang validation comes from California, where prisoners have been most active in using the courts to challenge their classification as gang members. For that reason, the following discussion addresses claims regarding gang validation that have been filed in California, both in state and federal court. Federal courts have generally not been receptive to prisoner claims, declining to decide whether prisoners have a constitutionally protected "liberty interest" in being classified a particular way. Instead, courts have found that the due process afforded to prisoners by the California system would be sufficient

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March 24, 2010); Neb. Corr. Servs., Admin. Reg. No. 201.05, *available at* http://www.corrections.state.ne.us/policies/files/201.05.pdf (last visited March 24, 2010); N.J. Admin. Code tit. 10A, § 5-6.3 (2008); Or. Admin. R. 291-069-0270 (2008); Tenn. Dept. of Corr. Admin., Pol'y No. 404.10 (2007), *available at* http://www.tennessee.gov/correction/pdf/404-10.pdf (last visited March 24, 2010); Tex. Dept. of Corr., Offender Orientation Handbook 26 (2004), *available at* http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf (last visited March 24, 2010); Wis. Admin. Code DOC § 308.04(2)(d) (2008), *available at* http://www.legis.state.wi.us/rsb/code/doc/doc308.pdf (last visited March 24, 2010).

70. Claire Johnson et al., Nat'l Criminal Justice Reference Serv., Prosecuting Gangs: A National Assessment (1995), *available at* http://www.ncjrs.gov/txtfiles/pgang.txt (last visited March 24, 2010).

71. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 Cal. L. Rev. 1115, 1129 (1995).

72. Madrid v. Gomez, 889 F. Supp. 1146, 1242 (N.D. Cal. 1995) (quoting the California Department of Corrections Operations Manual § 55070.19.2 which requires at least three "original, independent source items of documentation indicative of actual membership" in a gang).

73. *See* Fla. Dept. of Corr., *Frequently Asked Questions- Gangs and Security Threat Group Awareness, available at* http://www.dc.state.fl.us/pub/gangs/faq.html (last visited March 24, 2010).

74. *See* Fla. Dept. of Corr., *Frequently Asked Questions- Gangs and Security Threat Group Awareness, available at* http://www.dc.state.fl.us/pub/gangs/faq.html (last visited March 24, 2010).

75. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2(B)(6)(iv) (2008).

even if such an interest was found to exist.[76] For this reason, the courts have rejected Fourteenth Amendment claims that classification as a gang member violates a prisoner's right to due process.[77] The courts have also rejected Eighth Amendment claims that the debriefing requirement subjects a prisoner to cruel or unusual punishment,[78] and claims that it violates a prisoner's Fifth Amendment protection from self-incrimination.[79] The courts have generally found that prison officials should be granted broad discretion in such administrative matters, and the California courts have disposed of most gang validation complaints at the summary judgment stage (meaning that the prisoner was not able to reach the full trial stage).

In a recent New York case, a prisoner was unsuccessful in his attempt to challenge his classification as a member of a Security Risk Group ("SRG") based on his being observed greeting another inmate with gang signs. The court in that case found gang validation and classification as a member of a SRG to be "merely an observation tool" that does not result in a loss of liberty.[80]

Before you bring any action, you should consider the possibility that the court where you argue your case will follow the lead of the California courts. You should also consider the implications that dismissal of your case could have for you under the Prison Litigation Reform Act.[81] Finally, before taking any action, it is important that you also read Part B of this Chapter, which is devoted to general security classification and contains additional information that you may find relevant.

2. Fourteenth Amendment Claims

The Due Process Clause of the Fourteenth Amendment protects individuals, including prisoners, from loss of "life, liberty, or property" at the hands of government without due process of law.[82] However, courts in California have found that administrative segregation does not violate the Due Process Clause itself. They have generally determined that it is not necessary to decide whether or not a prisoner has a valid state-created liberty interest in being free from administrative confinement because the due process provided to prisoners by the California system would be sufficient even if this liberty interest were found to exist.[83]

In California, the due process provided in classification and administrative segregation proceedings is considered adequate. The courts have found that California procedures provide the prisoner with some notice of the charges against him. The procedures also provide him with an opportunity to present his views and concerns to the official charged with deciding whether or not to transfer him to administrative segregation. Due process requires that, following a prisoner's administrative segregation, officials must also engage in some sort of periodic review of his confinement.[84] Although prison officials are not required by due

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76. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*) (finding no due process violation because the prisoner plaintiff received notice of his classification and continuing placement in the security housing unit, and his placement there was based on reliable information), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); Galvaldon v. Marshall, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*) (finding no due process violation because the prisoner plaintiff had an opportunity to present his views to the Criminal Activities Coordinator, the prisoner's status was based on sufficient and reliable evidence, and his status was given periodic review).

77. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); Galvaldon v. Marshall, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished*).

78. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *25–26 (N.D. Cal. Mar. 10, 1997) (*unpublished), aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*).

79. Griffin v. Gomez, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *17–19 (N.D. Cal. June 29, 1995) (*unpublished*), *aff'd in part and rev'd in part on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *23–24 (N.D. Cal. Mar. 10, 1997) (*unpublished), aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *15 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

80. Arriaga v. City of New York, No. 06 Civ. 2362 (PKC) (HBP), 2008 U.S. Dist. LEXIS 41433, at *20–21 (S.D.N.Y. May 20, 2008) (*unpublished*).

81. For example, if you do not exhaust your administrative remedies, your case will be dismissed rather than stayed (held pending exhaustion). See Chapter 14 of the *JLM*, "The Prison Litigation Reform Act," for more information on the PLRA.

82. U.S. Const. amend. XIV, § 1. For a more detailed discussion of liberty interests and the degree of due process rights owed to prisoners, see Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Hearings."

83. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); Galvaldon v. Marshall, No. C-95-1674-MHP, 1997 U.S. Dist. LEXIS 21500, at *17–23 (N.D. Cal. Nov. 12, 1997) (*unpublished).*

84. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *11 (N.D. Cal. May 20, 1997) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *13 (N.D. Cal. Mar. 10, 1997)

process to provide the names of their sources of information in validating a suspected gang member, if they fail to do so, the record must contain a prison official's statement that safety considerations prevented the disclosure of the informant's name.[85]

The Ninth Circuit has found that the Due Process Clause does *not* require:

(1) Detailed written notice of charges;
(2) Representation by counsel or counsel-substitute;
(3) An opportunity to present witnesses;
(4) A written description of the reasons for placing the prisoner in administrative segregation; or
(5) The disclosure of the identity of any person providing information leading to the placement of the prisoner in administrative segregation.[86]

Placement in segregation for an indeterminate period based upon gang membership does not require any procedure or protections beyond those required in regular administrative segregation cases.[87] However, a prisoner may not be confined separately for gang affiliation unless the record contains *some factual information* from which prison officials can reasonably conclude that the information supporting segregation is reliable.[88] In California, under statute, information is considered reliable if one of the following five criteria is met:

(1) The confidential informant has previously given information that has proven to be true;
(2) Other confidential sources have independently provided the same information;
(3) Other information provided by the confidential informant is self-incriminating;
(4) Part of the information provided is corroborated (confirmed) through investigation or information by non-confidential sources; or
(5) The confidential informant is the victim.[89]

Finally, a further due process related claim that you might make is that your validation as a gang member has been made in retaliation for some other unrelated legal activity that you have engaged in, such as filing an appeal. To state the *prima facie* case,[90] you have the burden of showing that retaliation for the exercise of protected conduct was the "substantial" or "motivating" factor behind the prison officials' conduct.[91] Additionally, you must show that the retaliatory action did not advance legitimate prison

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(*unpublished)*, *aff'd* , No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); *see also* Hewitt v. Helms, 459 U.S. 460, 477 n.9, 103 S. Ct. 864, 874 n.9, 74 L. Ed. 2d 675, 692 n.9 (1983) (noting that prison administrators must engage in some sort of periodic review of whether the prisoner remains a security threat), *as modified by* Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

85. *See* Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987) (holding that due process requires the affirmative statement of a prison official where safety considerations prevent the disclosure of the informant's name and additional facts to show that the information was reliable); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *16 n.6 (N.D. Cal. Mar. 10, 1997) (*unpublished)* (finding that prison officials must include a statement that the informant's name was not included for safety purposes), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*).

86. Toussaint v. McCarthy, 801 F.2d 1080, 1100–01 (9th Cir. 1986); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *9 (N.D. Cal. Aug. 14, 1997) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *13 (N.D. Cal. Mar. 10, 1997) (*unpublished)*, *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*).

87. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *8–9 (N.D. Cal. May 20, 1997) (*unpublished*) (citing Madrid v. Gomez, 889 F. Supp. 1146, 1275 (N.D. Cal. 1995)).

88. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *9 (N.D. Cal. May 20, 1997) (*unpublished*) (citing Madrid v. Gomez, 889 F. Supp. 1146, 1274 (N.D. Cal. 1995)); *see also* Koch v. Lewis, 96 F. Supp. 2d 949, 965 (D. Ariz. 2000) (noting that there must be some reliable evidence of current gang/STG membership before the state may impose indefinite administrative segregation), *vacated as moot*, Koch v. Schriro, 399 F.3d 1099 (9th Cir. 2005)*; accord***,** Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001) (holding that there must be specific facts to support administrative segregation based on gang membership). *Contra***,** Austin v. Wilkinson, 372 F.3d 346, 356 (6th Cir. 2004) (holding there is no procedural due process requirement of recent gang activity, though there might be a substantive requirement), *aff'd in part, rev'd in part on other grounds*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

89. Cal. Code Regs. tit. 15, § 3321(c) (2010).

90. To state a *prima facie* case is to state sufficient facts to allow the judge or jury to find in your favor if everything you said is true and undisputed.

91. Koch v. Lewis, 96 F. Supp. 2d 949, 956 (D. Ariz. 2000), *vacated as moot*, Koch v. Schriro, 399 F.3d 1099 (9th Cir. 2005). See Chapter 24 of the *JLM*, "Your Right To Be Free from Assault," for more information on your rights against retaliation**.**

management or prisoner treatment goals (referred to as "penological goals"),[92] or was not "narrowly tailored" enough to achieve such goals. Arbitrary targeting of inmates for gang validation is not an action that is narrowly tailored to achieve legitimate penological goals. For example, you might try to argue that gang validations without good cause actually misdirects prison resources away from other proceedings and compromises prison security.[93] Once you have established a *prima facie* case of retaliation and demonstrated that the retaliatory action does not advance a legitimate penological goal, the burden shifts to the prison officials to establish that they would have validated you as a gang member even if you had not engaged in the legally protected conduct.

3. Eighth Amendment Claims

The Eighth Amendment of the Constitution prohibits "the unnecessary and wanton infliction of pain"[94] and punishment that is "grossly out of proportion to the severity of the crime."[95] California courts have rejected the argument that the debriefing process[96] constitutes an Eighth Amendment violation because it could subject a prisoner to retaliation from other gang members, thereby placing his life and well-being at risk. They have generally found this allegation to be speculative, and courts will not allow this argument to go forward without evidence of a particular threat to the prisoner bringing the case, or without evidence that prison officials are not concerned about the prisoner's well-being.[97]

4. Fifth Amendment Claims

The Fifth Amendment of the Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[98] Debriefing generally requires a prisoner to disclose information regarding himself and other gang members and their gang-related activities. Prison administrators have argued, and courts have agreed, that debriefing is necessary to determine whether a prisoner is telling the truth about no longer being a part of the gang. It has also been argued that debriefing helps to determine if a gang member's information is reliable and to gather further information about the gang.[99]

California courts have held that the Fifth Amendment protection against self-incrimination is not violated by the debriefing requirement, because the information acquired in debriefing is not (under California's policy) used in later criminal proceedings.[100] Courts have held that the right against self-incrimination "does not arise in the debriefing processing," and therefore that prison officials are not

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92. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," and Chapter 27 of the *JLM*, "Religious Freedom in Prison," for more information on the "legitimate penological goals" language and the *Turner* standard.

93. *See, e.g.,* Koch v. Lewis, 96 F. Supp. 2d 949, 956 (D. Ariz. 2000) ("instituting STG proceedings without good cause would misdirect prison resources away from proceedings involving a legitimate compromise to prison security"), *vacated as moot*, Koch v. Schriro, 399 F.3d 1099 (9th Cir. 2005). While an argument of wasting prison resources was effective in Koch, many other courts have held that gang validation supports the goal of prison security. *See., e.g.,* Stewart v. Alameida, 418 F.Supp.2d 1154, 1163 (N.D. Cal. 2006) (finding the prison's regulations on gang validation did not violate the prisoner's rights because the regulations were reasonably related to the valid penological interest of security).

94. Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

95. Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 68 (1981) (quoting Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 2866, 53 L. Ed. 2d 982, 989 (1977) (plurality opinion)).

96. For more on debriefing, see Part C(4) of this Chapter.

97. Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *26 (N.D. Cal. Mar. 10, 1997) (*unpublished), aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*).

98. U.S. Const. amend. V.

99. Griffin v. Gomez, No C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *5 (N.D. Cal. June 29, 1995) (*unpublished*), *aff'd in part and rev'd in part on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 (CW), 1997 U.S. Dist. LEXIS 4612, at *22 (N.D. Cal. Mar. 10, 1997) (*unpublished*), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); Medina v. Gomez, No. C-93-1774 (TEH), 1997 U.S. Dist. LEXIS 12208, at *15 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

100. Griffin v. Gomez, No C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *8–11 (N.D. Cal. June 29, 1995) (*unpublished*), *aff'd in part and rev'd in part on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*); Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *23–24 (N.D. Cal. Mar. 10, 1997) (*unpublished*), *aff'd*, No. 97-15538, 1998 U.S. App. LEXIS 8184 (9th Cir. Apr. 20, 1998) (*unpublished*); Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *16 (N.D. Cal. Aug. 14, 1997) (*unpublished*).

required to provide prisoners with immunity.[101] Remember that the right against self-incrimination is a personal protection and may not be invoked to prevent the implication of others, such as other people involved in the gang.

Keep in mind, however, that as a California prisoner, the policies surrounding debriefing provide you with only thin protection. Although the regulations state that debriefing is "not for the purpose of acquiring incriminating evidence against the subject,"[102] they do not explicitly forbid the evidence being used in later legal proceedings. Partly as a result of prisoners challenging the debriefing process, the regulations also provide that if a prisoner "makes a statement that tends to incriminate [himself] in a crime," he must waive his right against self-incrimination "prior to questioning ... about the incriminating matter."[103] However, the prison official or gang investigator conducting the debriefing determines when a statement "tends to incriminate," and the debriefing prisoner has no attorney or representative present at the debriefing. If you are currently appealing your conviction or sentence and considering debriefing, you should talk to your appellate attorney about the possible implications debriefing may have on your appeal.

If you are not in California, it may be worth investigating whether or not the system in which you are incarcerated has a policy regarding the use of information gathered through gang debriefings in future criminal proceedings. If it does not have such a policy, then the debriefing requirement may present a valid Fifth Amendment issue.

5. Equal Protection and Free Exercise of Religion Claims

To prevail on an equal protection claim, a prisoner usually must prove: (1) that the government has intentionally treated similarly situated prisoners differently; and (2) that there is no rational relationship between this dissimilar treatment and any legitimate penal interest.[104] This standard is frequently called "rational basis review." Rational basis review is the lowest level of scrutiny applied by courts. Prisoner challenges to classifications usually fail because officials only need to show that the action is rationally related to a legitimate government interest. If, however, you are alleging that you were treated differently than other, similarly situated prisoners *because of your race*, some courts, including California, will apply "strict scrutiny" to the government's policy. "Strict scrutiny" is a significantly higher standard than "rational basis review," and therefore more difficult for the government to meet (and more favorable to prisoners). To survive "strict scrutiny," the government must prove that the treatment you are challenging both: (1) promotes a compelling state interest; and (2) is narrowly or suitably tailored to that interest.[105]

An example of a policy of different treatment based on race was found in *Johnson v. California*.[106] In *Johnson*, the court applied a strict scrutiny standard of review with regard to the prison's policy of placing new or transferred inmates with cellmates of the same race during the initial sixty-day evaluation period. In *Harbin-Bey v. Rutter*, however, the Sixth Circuit Court of Appeals held that a prison's decision to designate a prisoner as a member of a Security Threat Group without a hearing did not involve different treatment based on race.[107] The court in *Harbin-Bey* held that this policy applied to all inmates and therefore was not a decision based on race.[108] For a more information on Equal Protection claims you should see Chapter 16 of the *JLM, "*Using 42 U.S.C. § 1983 and 28 U.S. § 1331 to Obtain Relief from Violations of Federal Law."

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101. Griffin v. Gomez, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *19 (N.D. Cal. June 29, 1995) (*unpublished*), *aff'd in part and rev'd in part on other grounds*, No. 95-16684, 1998 U.S. App. LEXIS 3152 (9th Cir. Feb. 24, 1998) (*unpublished*).

102. Cal. Code Regs. tit. 15, § 3378.1(b) (2010).

103. Cal. Code Regs. tit. 15, § 3378.2 (2001).

104. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005); *see* Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (establishing the "legitimate penological interests" test).

105. Johnson v. California, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949, 958 (2005); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720, 127 S. Ct. 2746, 2752, 168 L. Ed. 2d 517, 523 (2007) (using the strict scrutiny standard in the context of race-conscious student assignment policies designed to eliminate racial imbalances in school enrollment); Jana-Rock Construction, Inc. v. N.Y. State Dept. of Econ. Dev., 438 F.3d 195, 205 (2d Cir. 2006) (clarifying that extrinsic showing of discriminatory animus or effect is not necessary to trigger strict scrutiny).

106. Johnson v. California, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949, 958 (2005). *But see* Medina v. Gomez, No. C-93-1774 TEH, 1997 U.S. Dist. LEXIS 12208, at *19 (N.D. Cal. Aug. 14, 1997) (*unpublished*) (holding that debriefing (a procedure in which an inmate was held in administrative segregation unless he renounced his gang membership) neither "burdens a fundamental right nor targets a suspect class," and was therefore subject to only rational basis and not strict scrutiny review).

107. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005).

108. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005).

You may be able to argue that the debriefing policy makes it hard to practice your religion. However, these types of claims have failed because the policy does not "substantially burden" free exercise of religion.[109] Using the substantial burden test, a district court in California, in *Rojas v. Cambra*, rejected a challenge where a religious Catholic prisoner argued that the debriefing policy was unconstitutional because it forced him to confess to a person other than a priest. The court held that the policy did not substantially burden the prisoner's religion because the prisoner was not forced to commit any act forbidden by his religion, but instead could refrain from debriefing.[110] For more information on your right to practice your religion see Chapter 27 of the *JLM,* "Religious Freedom in Prison."

6. Administrative Options

Given courts' general hostility toward gang validation claims, the most effective way to challenge classification is probably through administrative procedures within the prison. You should be granted periodic review of your status as an alleged gang member, at which time you should have the opportunity to express your views on your classification. This is your opportunity to ensure that officials are following the proper administrative procedures that the California courts have relied upon in dismissing prisoners' due process claims. For example, as discussed above, all anonymous testimony must be accompanied by an official statement that the identity of your accuser has been withheld for security reasons and that testimony should be as complete as it can possibly be without identifying the source. You should become familiar with the classification procedures so that you can monitor whether they are being followed, deviations from the classification may provide grounds for challenging your classification.

Chapter 15 of the *JLM*, "Inmate Grievance Procedures," contains detailed instructions on how to pursue administrative remedies. The focus of Chapter 15 is on the state of New York's Internal Grievance Program ("IGP"), but you will also find information on locating the guidelines and procedures for filing grievances in other states. You may also find Chapter 18 of the *JLM*, "Your Rights at Prison Disciplinary Proceedings," helpful in challenging your classification. Many states separate their disciplinary and classification systems and there may be separate provisions for appealing your classification. It is important that you read the grievance rules carefully so that you can use the correct administrative remedy. Finally, if you have exhausted all of the administrative options and you are imprisoned in the state of New York, you can file an Article 78 proceeding. Article 78 provides a procedure for challenging administrative decisions in court. For instructions on how to bring an Article 78 proceeding, see Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

D. Conclusion

Your security classification is important because it influences where you are incarcerated and what sort of freedoms you will receive. If you have undergone gang validation and been designated a member of a Security Threat Group it may be possible to challenge this designation, although such challenges are difficult to win. While you may have some room to raise a challenge on equal protection grounds if the prison used a race-based policy to classify you in a certain group, you are probably more likely to be successful challenging your security classification through your prison's administrative procedures.

109. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *23 (N.D. Cal. May 20, 1997) (*unpublished*).

110. Rojas v. Cambra, No. C 96-2990 VRW, 1997 U.S. Dist. LEXIS 7610, at *22–23 (N.D. Cal. May 20, 1997) (*unpublished*).

A JAILHOUSE LAWYER'S MANUAL

Chapter 32: Parole

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CHAPTER 32

PAROLE*

A. Introduction

Parole is a system of discretionary release for prisoners who have not yet served their maximum sentences. Parole also refers to the process of your supervised re-integration into the community while you serve the remainder of your sentence outside of prison. Part B provides an overview of the parole system of New York State. Parts C through I examine New York's parole system in detail. Part C explains the calculation of the minimum incarceration period; Part D discusses the Shock Incarceration Program; Part E discusses the sentence of parole supervision; Part F explains parole release hearings; Part G reviews release on parole; Part H covers parole revocation; and Part I discusses release from parole supervision; Part J looks at the parole system of California; Part K considers the Florida state system; Part L examines the Illinois state system; Part M explores the system in Texas; and Part N explains the Michigan parole system. Prisoners in other states must research their own states' laws on parole, as parole laws tend to be very different from state to state and parole has been eliminated altogether in many states. See Chapters 35 of the *JLM* for information on conditional and early release, and see Chapter 39 for imformation on temporary release programs (available online at http://www.hrlr.org/jlm/toc or write to the *JLM*).

B. New York

In New York, the Division of Parole is part of the Executive Department and is separate from both the Division of Probation and Correctional Alternatives and the Department of Correctional Services.[1] The parole law is found in the N.Y. Executive Law § 259 and in Title 9 of New York State Compilation of Codes, Rules and Regulations, Part 8000.[2] The parole law requires the Division of Parole to adopt written guidelines for use in making parole decisions.[3] The Division of Parole also publishes pamphlets, handbooks, and other materials that explain the parole process.

For further information, check with your institution's parole officer, pre-release center, or law library; they should have the New York State Parole Handbook, "Questions and Answers Concerning Parole Release and Supervision."[4] This pamphlet gives the Division of Parole's answers to questions on issues regarding time served, institutional parole and parole board activities in state correctional facilities, parole supervision, the revocation process, the Sentencing Reform Act of 1995, interstate parole, juvenile offenders, restoration of rights, executive clemency, appeals, and access to parole files. If available, you should also review other Division of Parole publications, especially the *Guidelines Applications Manual*, and look at the laws and regulations themselves.

This Chapter describes the practices and procedures of the Parole Board. Parole has five basic phases:

(1) Determination of your minimum sentence;
(2) Parole release considerations, preparing for your parole hearing, and the hearing itself;
(3) Release on parole and supervision by parole officers;
(4) Constitutional due process protections required in the parole revocation process; and
(5) Release from parole and the restoration of full rights.

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1. In New York, the Work Release and Temporary Release programs are run by the Department of Correctional Services. N.Y. Correct. Law §§ 150, 851 (McKinney 2010). Probation is handled by the Division of Probation and Correctional Alternatives. N.Y. Exec. Law § 240 (McKinney 2002). Conditional Release is now administered by the Division of Probation and Correctional Alternatives and a branch of the Department of Correctional Services called "Local Conditional Release Commission." N.Y. Penal Law § 70.40 (McKinney 2004 & Supp. 2008).

2. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000 (2001). The New York Official Compilation of Codes, Rules, and Regulations is in a green three-ring binder, and it should be in your prison library.

3. N.Y. Exec. Law § 259-c(4) (McKinney 2005 & Supp. 2008). *See* New York State Division of Parole, Release Decision-Making Guidelines Application Manual (1982). Though the Guidelines are written and codified, the Parole Board is not absolutely bound to follow them.

4. New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2007), *available at* http://parole.state.ny.us/Handbook.pdf.

You can appeal a Parole Board decision in two ways. You *must* first try the administrative process within the Division. If that fails and you wish to continue, you may then appeal through an Article 78 proceeding in the New York courts.[5] You should know that the courts have adopted an extremely tough test for judicial review of any Parole Board decision. In order for courts to intervene in Parole Board decisions, you must show "irrationality bordering on impropriety on the part of the parole board."[6] Courts rarely find Parole Board conduct wrong enough to intervene.

C. Minimum Term of Incarceration Under an Indeterminate Sentence and Conditional Release Under a Determinate Sentence

If you were given an indeterminate sentence, the sentencing court should have fixed the minimum term you must serve in a state correctional facility before eligibility for release.[7] A sentence is "indeterminate" if a range of minimum and maximum time is specified, rather than a particular number of days or years. Since 1995, New York has been moving away from indeterminate sentencing and discretionary parole release to a system of determinate ("flat") sentences. Determinate sentences are required for persons sentenced as second violent felony offenders after 1995, or first violent felony offenders after 1998.[8] Determinate sentences are also required for felony drug offenders sentenced after 2004.[9] Persons sentenced to a determinate sentence as violent or second violent felony offenders are eligible for conditional release when they have served six-sevenths of their sentence.[10] Persons serving determinate sentences for felony drug offenses are eligible for merit time/conditional release after serving five-sevenths of their sentence.[11]

But, there are three exceptions. First, you may get early parole if you successfully complete a shock incarceration program[12] (described in Part D of this Chapter). Second, you may appear before the Parole Board prior to the expiration of your minimum sentence if you are eligible for "merit time." Most categories of non-violent felonies qualify for merit time.[13] If you are serving a sentence that qualifies and you have earned merit time, you will appear before the Parole Board for release consideration after you have served five-sixths of your minimum sentence.[14] If you are serving an indeterminate sentence for a felony drug offense committed before 2004, you may earn additional merit time and appear before the Parole Board for release consideration after serving two-thirds of your minimum sentence.[15] Third, certain categories of felony drug offenses are eligible for a sentence of parole supervision[16] (described in Part E of this Chapter).[17]

D. Shock Incarceration Program

Shock incarceration is a program under the jurisdiction of the Department of Correctional Services in which selected eligible prisoners participate in a structured six-month program at a Shock Incarceration facility. Shock incarceration is a highly regimented program that requires daily exercise, a full work day,

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5. For a discussion of Article 78 proceedings, see *JLM*, Chapter 5, Part C(6), and Chapter 22.

6. *In re* Russo v. N.Y. State Bd. of Parole, 50 N.Y.2d 69, 77, 405 N.E.2d 225, 229, 427 N.Y.S.2d 982, 986 (1980). The *Russo* standard has been held to be a review of "whether the Board's decision to deny parole was arbitrary or capricious." Silmon v. Travis, 95 N.Y.2d 470, 477, 741 N.E.2d 501, 505, 718 N.Y.S.2d 704, 708 (2000) (holding it not arbitrary or capricious for the Board to consider remorse and insight in denying parole). *See* Jorge v. Hammock, 84 A.D.2d 362, 364, 446 N.Y.S.2d 585, 587 (3d Dept. 1982) (holding complete disregard of a sentencing judge's recommendation in setting a minimum incarceration period was inappropriate and entitled prisoner to a new hearing).

7. N.Y. Penal Law § 70.00(3) (McKinney 2004 & Supp. 2008). If you were sentenced before September 1, 1980, the Parole Board—instead of the sentencing court—will fix your minimum term. Schwimmer v. Hammock, 59 N.Y.2d 636, 637, 449 N.E.2d 1266, 1267, 463 N.Y.S.2d 188, 189 (1983).

8. N.Y. Penal Law §§ 70.02, 70.04 (McKinney 2004 & Supp. 2008). See Part D(1) of this Chapter for a discussion of this law.

9. N.Y. Penal Law §§ 70.70, 70.71 (Supp. 2008).

10. N.Y. Correct. Law § 803(1)(c) (McKinney 2010) (effective until Sept. 1, 2011).

11. N.Y. Correct. Law § 803(1)(d) (McKinney 2010) (effective until Sept. 1, 2011).

12. N.Y. Correct. Law §§ 865-867 (McKinney 2010); N.Y. Exec. Law 259-i(2)(e) (McKinney 2005 & Supp. 2008).

13. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2010) (effective until Sept. 1, 2011).

14. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2010) (effective until Sept. 1, 2011).

15. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2010) (effective until Sept. 1, 2011).

16. N.Y. Penal Law § 70.70(3)(d) (McKinney 2010) (effective until Sept. 1, 2011).

17. If you complete a shock incarceration program, you are eligible to receive a Certificate of Earned Eligibility under Section 805 of N.Y. Corrections Law. N.Y. Correct. Law §§ 805, 867 (4) (McKinney 2010). See Part F(5) of this Chapter for additional information on Certificates of Earned Eligibility.

daily meetings, and substance abuse counseling. Participants are also expected to earn a high school equivalency diploma through the educational programs offered.[18] Generally, participants who successfully complete the program are issued a Certificate of Earned Eligibility and become eligible for parole release consideration prior to completing the court-imposed minimum sentence.[19] See Part F(5) of this Chapter for additional information on Certificates of Earned Eligibility.

A prisoner may make an application to the shock incarceration screening committee for permission to participate in the shock incarceration program.[20] Eligible prisoners are also screened to insure that their participation in the program is "consistent with the safety of the community, the welfare of the applicant, and the selection criteria for the program."[21] Therefore, even if you meet the criteria for the program, you still may not ultimately be chosen to participate.

E. Sentence of Parole Supervision

If you have a history of substance dependence, and abuse of that substance has led you to commit illegal acts, you may be given a sentence of parole supervision (also known as a "Willard Sentence" after the Willard Drug Treatment Center). You are eligible for a sentence of parole supervision only if you satisfy the following three requirements:

(1) You have a substance dependence history that has significantly contributed to your illegal acts;
(2) A sentence of parole supervision would likely help you become or stay drug-free; and
(3) A sentence of parole supervision would not risk "public safety or public confidence in the integrity of the criminal justice system."[22]

Furthermore, you can only be given a sentence of parole supervision for conviction of certain specified crimes.[23] When the court considers whether to give you a sentence of parole supervision, the prosecutor may either agree with or oppose the sentence, and the court is permitted, but not required, to consider the prosecutor's view.

If you receive a sentence of parole supervision, you will be placed under the supervision of the state Division of Parole and will be sent immediately to a reception center for no more than ten days.[24] Once you

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18. N.Y. Comp. Codes R. & Regs. tit. 7, §1800.6(b) (2008).

19. N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011).

20. N.Y. Correct. Law § 867(1) (McKinney 2010). To be eligible, you must be under the age of 40 and have been at least 16 years old, but less than 40, when you committed the crime for which you are incarcerated. You must be eligible for parole in three years and not have been convicted of a felony with an indeterminate sentence. The commission of certain crimes will also make you ineligible, including but not limited to a violent felony offense, an A-1 felony offense, or rape in the second or third degree. N.Y. Comp. Codes R. & Regs. tit. 7, §1800.4 (2008).

21. N.Y. Comp. Codes R. & Regs. tit. 7, §1800.3(c) (2008).

22. N.Y. Crim. Proc. Law § 410.91(3) (McKinney 2005) (effective until Sept. 1, 2011); People v. Denue, 275 A.D.2d 863, 864, 713 N.Y.S.2d 783, 784 (3d Dept. 2000) (denying petitioner a sentence of parole supervision because he did not show that he had a history of substance dependence that significantly contributed to his criminal conduct or that he was not subject to an undischarged term of imprisonment).

23. The specified crimes are listed in N.Y. Crim. Proc. Law § 410.91(5) (McKinney 2005) (effective until Sept. 1, 2011) and include the following: criminal mischief in the third degree as defined in N.Y. Penal Law § 145.05 (McKinney 1999 & Supp. 2008); criminal mischief in the second degree as defined in N.Y. Penal Law § 145.10 (McKinney 1999); grand larceny in the fourth degree as defined in N.Y. Penal Law §§ 155.30(1)–(10) (McKinney 1999 & Supp. 2008); grand larceny in the third degree as defined in N.Y. Penal Law § 155.35 (McKinney 1999) (except where the property consists of one or more firearms, rifles, or shotguns); unauthorized use of a vehicle in the second degree as defined in N.Y. Penal Law § 165.06 (McKinney 1999); criminal possession of stolen property in the fourth degree as defined in N.Y. Penal Law §§ 165.45(1)–(3), (5)–(6) (McKinney 1999 & Supp. 2008); criminal possession of stolen property in the third degree as defined in N.Y. Penal Law § 165.50 (McKinney 1999) (except where the property consists of one or more firearms, rifles, or shotguns); forgery in the second degree as defined in N.Y. Penal Law § 170.10 (McKinney 1999); criminal possession of a forged instrument in the second degree as defined in N.Y. Penal Law § 170.25 (McKinney 1999); unlawfully using slugs in the first degree as defined in N.Y. Penal Law § 170.60 (McKinney 1999); an attempt to commit any of the aforementioned offenses if such attempt constitutes a felony offense; or any class D or class E controlled substance or marijuana felony offense as defined in N.Y. Penal Law §§ 220.00–220.76, 221.00–221.55 (McKinney 2008). You are only eligible if you are a second felony offender who stands convicted of no other felony offense, have not previously been convicted of either a violent felony offense as defined in N.Y. Penal Law § 70.02, a class A felony offense or a class B felony offense (other than a class B felony offense defined in article 220 of the penal law, which describe a variety of controlled substance offenses), and are not subject to an undischarged term of imprisonment. N.Y. Crim. Proc. Law § 410.91(2) (McKinney 2010) (effective until Sept. 1, 2011).

24. N.Y. Crim. Proc. Law § 410.91(1) (McKinney 2010) (effective until Sept. 1, 2011).

arrive at the reception center, the law requires that you be given a copy of the conditions of your parole, and you will need to acknowledge in writing that you have received a copy of these conditions.[25] Sometime after you leave the reception center, you will be placed in a drug treatment campus for ninety days.[26] While you are at the campus, the Division of Parole will assess your needs and develop a personal drug treatment program. In most cases, this program will include help from local community organizations that work with the Division of Parole.[27] After you have completed the drug treatment program at the campus, you will be given money, clothes, and transportation from the drug treatment campus to the county where your parole supervision and drug treatment plan will continue.[28]

F. Parole Release Hearing and Appeals

1. Your Right to a Parole Release Hearing

The parole release hearing is an interview where the Parole Board determines whether you should be released from prison before you serve your maximum sentence. You are entitled to a parole release hearing at least one month before the end of your minimum period of incarceration.[29] There are some situations in which you may become eligible for parole before you complete your minimum sentence. You may get early parole if you complete a Shock Incarceration program, or if you are eligible for and earn merit time, or if you serve and successfully complete a sentence of parole supervision.[30] (See Parts D and E of this Chapter for a description of the Shock Incarceration Program and the Sentence of Parole Supervision.) You do not have to file for a parole release hearing; one will be scheduled for you automatically. If you believe your scheduled parole release hearing is past due, you can contact the pre-release center or parole officer at your institution.

2. Steps to Take Before the Hearing

The decision to release you on parole is strictly a matter of Parole Board discretion; there is no statutory or constitutional right to parole release.[31] Nevertheless, there are ways you can improve your chances of being released on parole. While you are in prison, the more that you do to prepare for your re-entry into the community, the better your chances become of convincing the Board to release you on parole. As you may know, however, in recent years, the Parole Board has placed heavy emphasis on the seriousness of the crime when making decisions about prisoners who are incarcerated for violent felonies. In addition to the facts and circumstances of the underlying crime, the Parole Board is likely to consider five basic areas:

(1) *Education*—Did you take any classes while in prison? Those classes might include a GED course, vocational training, or college;
(2) *Employment*—Did you try to develop any job skills? These could range from making furniture to kitchen work, as long as it is a skill that relates to life and potential employment outside of prison;
(3) *Issues That Led to Incarceration*—Can you address the problems that led to your conviction? For example, if you are in on a drug use charge, did you participate in any treatment programs?;
(4) *Likelihood of Community Reintegration*—Have you had any contact with your family or community? Even if you cannot show family ties like letters or visits, developing a contact with a halfway house or an ex-offender service group will help; and
(5) *Future Plans and Goals*—You should be prepared to discuss your immediate plans and future goals for your life after release on parole.

In short, your activities while you are incarcerated affect your chances for parole.

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25. N.Y. Crim. Proc. Law § 410.91(6) (McKinney 2010) (effective until Sept. 1, 2011).
26. N.Y. Crim. Proc. Law § 410.91(1) (McKinney 2010) (effective until Sept. 1, 2011).
27. N.Y. Crim. Proc. Law § 410.91(6) (McKinney 2010) (effective until Sept. 1, 2011).
28. N.Y. Crim. Proc. Law § 410.91(7) (McKinney 2010) (effective until Sept. 1, 2011).
29. N.Y. Exec. Law § 259-i(2)(a) (McKinney 2010) (effective until Sept. 1, 2011).
30. N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011).
31. *See*, *e.g.*, Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001) (holding that a prisoner does not have a justifiable expectation of release on parole, and that it is up to the Parole Board to determine prisoner eligibility for parole); Boothe v. Hammock, 605 F.2d 661, 664 (2d Cir. 1979) (holding that New York state's statutory scheme of parole did not create entitlement to parole). However, as discussed in Part F(5) of this Chapter, in 1987 New York adopted the Certificate of Earned Eligibility program, which created a presumption in favor of release on parole in certain situations.

As an eligible parole candidate, you must complete what is known as a parole or release plan prior to your parole release hearing. This plan will be part of your Inmate Status Report.[32] The Guidelines describe "release plans" as "including community resources, employment, education and training and support services."[33] One of the most important parts of your parole plan is your proposed course of employment or education after release. If you are granted parole but have not produced a satisfactory plan, your release date will be pushed back until you have developed one. If you wait longer than six months after the release hearing to develop a satisfactory plan, you will have to go before the Parole Board again for reconsideration of your status.[34] Therefore, if you are finding it difficult to develop a parole plan, you must get some help as soon as possible. Otherwise, you risk delaying or losing your parole release.

For help in preparing your parole plan, contact the pre-release center or parole officer at your institution. The parole statute now requires the Division of Parole to "assist inmates eligible for ... parole ... to secure employment, educational or vocational training."[35] In addition to contacting the pre-release center and/or institutional parole officers, you should use any other contacts you have (like former employers, family, or friends) to get a job while still incarcerated. For information on employment in New York City, you can contact the New York State Division of Parole at (518) 473-9400. The Fortune Society is another good source of support that may lead to possible employment. It also offers one-to-one counseling and tutoring. You can write to the Fortune Society at 53 W. 23rd St., 8th floor, New York, NY 10010; or, call (212) 691-7554.

Your institutional record is also an important part of your Inmate Status Report. It will list your program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and relationships with staff and other prisoners.[36] It is important that this information present a favorable image to the Parole Board. However, while it may be helpful to maintain an exemplary prison record to make a good impression on the Parole Board, it is important to note that good conduct alone does not guarantee parole.[37]

To obtain parole, your record and conduct must show the Parole Board that:

(1) You "will live and remain at liberty without violating the law;"
(2) Your release will not harm society; and
(3) You will not "deprecate" the seriousness of the crime you committed (make the crime seem less serious) and undermine respect for the law.[38]

If you have been issued a Certificate of Earned Eligibility (See Part F(5) of this Chapter), the Parole Board will implement a lesser standard of review in determining your parole.[39] Nevertheless, it is a good idea to build the strongest record of education, program participation, and work that you can, since your activities while in prison directly affect this part of the Inmate Status Report.

If the Parole Board grants parole, some prisoners may be required to find acceptable housing prior to being released. The Parole Board's requirements for approved housing may be very difficult (for example,

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32. N.Y. Exec. Law § 259-i(2)(c)(A)(iii) (McKinney 2010) (effective until Sept. 1, 2011); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3 (2008). New York defines the Inmate Status Report as follows: The Inmate Status Report is prepared by an Institutional Parole Officer and will include information such as: (1) court information on the present offense, the judge's sentence, etc.; (2) your age, place of birth, occupation, marital status, etc; (3) your legal history; (4) your institutional record, including any disciplinary record, your medical history and involvement in educational and recreational programs; (5) your inmate statement, which includes comments and attitude regarding the offense that resulted in your conviction, as well as your comments about your prior record; and (6) your Parole Plan. New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 12, *available at* https://www.parole.state.ny.us/intro_handbook.html.

33. N.Y. Comp. Codes R. & Regs. tit. 9, § 8001.3(b)(3) (2008).

34. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(f) (2008).

35. N.Y. Exec. Law §259-a(6) (McKinney 2010).

36. N.Y. Exec. Law § 259-i(2)(c)(A)(i)(McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3 (a)(1), (b)(1) (2008).

37. N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney 2005 & Supp. 2008).

38. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.1(a) (2008).

39. "[P]arole release shall be granted at the expiration of [prisoners'] minimum terms … unless the [Board of Parole] determine[s] that there is a reasonable probability that the inmate will not live and remain at liberty without violating the law and that the release is not compatible with the welfare of society." N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(c) (2008); *see also* N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011).

prisoners may be banned from living near a school or a school bus stop, may not be allowed to live alone, or may not be allowed to live in a shelter).[40]

If you are serving a sentence for a non-violent felony, other than those involving manslaughter, homicide, or sexual misconduct, you may be eligible for presumptive release on parole if you have no serious disciplinary infractions and have not brought a frivolous court proceeding while incarcerated.[41]

3. The Parole Release Hearing

A two or three member panel of the Parole Board conducts the parole release hearing during monthly visits to each facility.[42] Only one member of the panel will review your parole plan in detail. The other panel members will be present at the interview, but will generally defer to the judgment of the member who read the file. Instead of reading the full report, the other panel members will receive a summary of your parole report. The Parole Board members, the facility parole officer and staff, and a hearing reporter will be present at the release interview. You are not permitted to have an attorney with you at this interview.[43]

During the parole release interview, panel members will ask you questions about:

(1) Your plans if you are released on parole;
(2) Your conduct and activities during your incarceration;
(3) Your criminal record, including past crimes and time served; and
(4) The events surrounding the crime for which you are presently incarcerated.

It is important to note that the panel members will consider whether you understand why the crime happened, whether you feel any remorse for the crime, and what you would do differently in the future. You must answer all questions honestly, but be sure to present your side of the story in answering any difficult questions. Remember, if your parole is denied and you want to appeal, the basis for any appeal *must* appear in the hearing record. So, you must present all your information and reasons for parole at the interview.

Be sure to bring to your release hearing any documents that would make a good impression on the panel members, such as program certificates, diplomas, or letters of recommendation. These should already be in your parole file, but sometimes institutional authorities forget to file them properly.

The Parole Law *requires* the Parole Board to take into consideration *all* of the following factors in determining early release on parole:

(1) Your institutional record;
(2) Your academic achievements;
(3) Your training or work assignments;
(4) Any therapy you have had;
(5) Interpersonal relationships with staff and other prisoners;
(6) Your performance, if any, in a release program;
(7) Any release plans involving community resources, education, and training support services;
(8) Any deportation orders;
(9) Any written or oral statement of the crime victim;[44]
(10) The seriousness of the offense for which you are presently incarcerated;
(11) Recommendations of the sentencing court and district attorney;
(12) The recommendation of your attorney at trial;
(13) The pre-sentence probation report;
(14) Any mitigating and aggravating factors;[45]

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40. *See* People *ex rel.* Travis v. Coombe, 219 A.D.2d 881, 881–82, 632 N.Y.S.2d 340, 341–42 (4th Dept. 1995) (holding that parole grantee was not entitled to immediate release, since "[n]o residence was located that was acceptable to the Division of Parole").

41. N.Y. Correct. Law § 806 (McKinney 2010) (effective until Sept. 1, 2011).

42. N.Y. Exec. Law § 259-b(1) (McKinney 2010); New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 2, *available at* https://www.parole.state.ny.us/intro_handbook.html (noting that the Board of Parole "consists of up to 19 members appointed by the Governor with the advice and consent of the Senate").

43. New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 8, *available at* https://www.parole.state.ny.us/intro_handbook.html.

44. The Parole Board will also consider any statements made on the victim's behalf by a representative.

45. Mitigating factors are circumstances in your crime that make your case more sympathetic or more favorable. Aggravating factors make you or your crime less sympathetic or less favorable.

(15) Activities following arrest and prior to conviction;[46] and
(16) Any prior criminal record.[47]

If the Board fails to consider relevant statutory factors in determining your parole, you may have grounds for appealing the parole decision.[48] But, the Board does not have to give each factor equal weight.[49]

The Board decides whether or not to grant parole either on the day of the hearing or a few days later. Typically, the panel will make a decision immediately after you leave the room. The Parole Board has a large amount of discretion in deciding whether you are eligible for parole. The Parole Board establishes its own guidelines to determine when a prisoner is eligible for parole,[50] and it currently sets a high standard. As the court stated in *Barna v. Travis*, "the New York parole scheme is not one that creates in any prisoner a legitimate expectancy of release."[51] Even though the Parole Board must consider the above factors, the list is only intended as a guide. In recent years the Board has given particular weight to the factors of crime severity and past criminal history for individuals incarcerated for violent felonies.

4. Victim Impact Statement

A victim impact statement is a written statement to the Parole Board by the crime victim or the victim's family, describing the effect of the crime on the victim's life or on his or her family.[52] The victim or the victim's family must submit the statement at least ten business days before your parole hearing.[53] You usually cannot see the victim's (or the victim's family's) statement unless the victim or court authorizes you to do so.[54]

Whether or not there is a victim impact statement in your file, you can ask as many people as possible from your family, your community, and your legal team to write letters to the Parole Board in support of your release. If the letters come to you directly, photocopy them (or ask someone to photocopy them for you) and ask the parole officer at your facility to add them to your file. You should also bring these letters to your pre-parole interview and to the parole hearing itself.

5. Certificate of Earned Eligibility

The "Earned Eligibility Program" was enacted to address the problem of overcrowding in state prisons.[55] Under the program, once you are in custody, you should be assigned a work and treatment program "as soon as practicable."[56] Two months before your minimum term expires, the Department of Correctional Services (DOCS) will review your institutional record to determine whether you have complied with your program. If you have successfully participated in this program, DOCS *may* issue you a "Certificate of Earned Eligibility" (CEE).[57] Prisoners serving an indeterminate sentence with a minimum term over six years are not able to receive a CEE. It is also important to note that even if you successfully complete the program, you may still

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46. It is important to effectively use your pre-conviction time (that is, the time following your arrest but before conviction and sentencing), especially if you are out on bail. Seeking employment—or, if you already have a job, keeping a good record at that job—can sometimes help justify a lower sentence and early release on parole.

47. N.Y. Exec. Law § 259-i(1)(a) (McKinney 2010).

48. *See*, *e.g.*, King v. N.Y. State Div. of Parole, 190 A.D.2d 423, 431, 598 N.Y.S.2d 245, 250 (1st Dept. 1993), *aff'd*, 83 N.Y.2d 788, 632 N.E.2d 1277, 610 N.Y.S.2d 954 (1994) (holding that the Parole Board has a duty "to give fair consideration" to each person who comes before it, and where the record "convincingly demonstrates" that the Board did not fairly consider the proper standards in reaching its decision, courts must intervene).

49. Geames v. Travis, 284 A.D.2d 843, 843, 726 N.Y.S.2d 506, 506 (3d Dept. 2001) (holding the Parole Board does not have to weigh each factor equally; the heavy weight put on crime severity and criminal history here was acceptable).

50. N.Y. Exec. Law § 259-c(4) (McKinney 2005 & Supp. 2008) (effective until Sept. 1, 2011).

51. Barna v. Travis, 239 F.3d 169, 170–71 (2d Cir. 2001) (holding that denial of parole did not violate the Due Process or *Ex Post Facto* clauses, since petitioners did not have "a legitimate expectancy of release that is grounded in the state's statutory scheme").

52. N.Y. Exec. Law § 259-i(2)(c)(A)(v) (McKinney 2010).

53. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.4(b) (2008).

54. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.4(e) (2008).

55. N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011).

56. N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011).

57. N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011). *See* Klos v. Haskell, 835 F. Supp. 710, 723 (W.D.N.Y 1993), *aff'd,* 48 F.3d 81 (2d Cir. 1995) (stating the Commissioner and Deputy Commissioner of the Department of Correctional Services may exercise "their discretion, without restraint, to remove an inmate from participation in the [CEE] program").

be denied a CEE since the decision to issue a CEE is discretionary.[58] Therefore, it is entirely up to DOCS to determine whether or not to grant you a Certificate of Earned Eligibility. A court of law cannot force DOCS to issue you a CEE, even if you have completed your treatment program; however, DOCS cannot arbitrarily deny a CEE. In such instances, a court may review the denial, although it is important to remember that courts often defer to the opinion of DOCS, except in unusual or extreme circumstances.

If you have a CEE and have served your minimum period of incarceration, the standard for parole release is easier to meet.[59] First, the Parole Board may not consider whether your release will "deprecate the seriousness of [the] crime," which is the standard the Board uses for prisoners who do not have a CEE.[60] Second, when you possess a CEE, the Board presumes you will probably live and remain at liberty without violating the law—which means unless the Board affirmatively finds otherwise, you should get parole.

One month prior to the expiration of your minimum period of incarceration (MPI), you will be interviewed by members of the Board for release consideration.[61] The Parole Board does not need to consider your full institutional record, as discussed above. Instead, it will review:

(1) The time-range guidelines;
(2) Your institutional disciplinary record;
(3) Your performance, if any, in a temporary release program;
(4) Your release plans—including community resources, employment, education and training, and support services; and
(5) "Any available information which would indicate an inability to live and remain at liberty without violating the law, and that the release is incompatible with the welfare of society."[62]

It is important to note that having a CEE does not automatically entitle you to parole.[63] Rather, it "create[s] merely an expectation of parole ... that deserves due process protection."[64] As in all cases, if you are denied parole, you have a right to be told why you were denied.[65] If a court determines that the Parole Board did not comply with these requirements, you may be entitled to a new hearing.[66]

6. Denial of Parole Release

If you are denied parole, within two weeks of your first hearing, the Parole Board must provide you with a detailed written explanation stating the reasons you were denied parole. Within two weeks of your first hearing, the Board will also set a date for reconsideration of your parole release, which must be scheduled within twenty-four months of your first hearing.[67] The twenty-four month notice period begins from the date of your last parole hearing. Before the new hearing, you should (1) prepare a new parole plan; and (2) try to strengthen the parts of your record that the Board identified as reasons for denying parole. If you are denied parole more than once, you must continue to follow this procedure. If your parole is *revoked*, there is no time

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58. *See* Frett v. Coughlin, 156 A.D.2d 779, 781, 550 N.Y.S.2d 61, 63 (3d Dept. 1989) ("Successful participation in the program is merely a threshold requirement which activates the Commissioner's discretionary power to issue a CEE. The statute simply does not create a liberty interest in receiving a CEE because, even upon successful participation in the program, the Commissioner may deny the certificate.").

59. N.Y. Correct. Law § 805 (McKinney 2010) (effective until Sept. 1, 2011).

60. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.1(a) (2008).

61. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(c) (2008).

62. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(c)(1)–(5) (2008). *See*, *e.g.*, Pike v. N.Y. State Div. of Parole, 188 A.D.2d 602, 603, 591 N.Y.S.2d 495, 496 (2d Dept. 1992) (holding that despite the CEE, "petitioner's release was incompatible with the welfare of society, and that the petitioner would not remain at liberty without violating the law"); Confoy v. N.Y. State Div. of Parole, 173 A.D.2d 1014, 1015, 569 N.Y.S.2d 846, 847 (3d Dept. 1991) (holding that denial of parole was based on determination that the "[prisoner] would not remain at liberty without violating the law and that his release would be incompatible with the welfare of society").

63. Howard v. N.Y. State Bd. of Parole, 270 A.D.2d 539, 539–40, 704 N.Y.S.2d 326, 327 (3d Dept. 2000) (holding that the fact that the prisoner received a CEE did not preclude parole board from denying him parole release).

64. People *ex rel.* Hunter v. Bara, 144 Misc. 2d 750, 752, 545 N.Y.S.2d 65, 66 (Sup. Ct. Richmond County 1989) (holding that the prisoner only has a liberty interest in the possibility of release on parole).

65. N.Y. Exec. Law § 259-i(2)(a)(i) (McKinney 2005 & Supp. 2008) (effective until Sept. 1, 2011).

66. *See* People *ex rel.* Hunter v. Bara, 144 Misc. 2d 750, 752, 545 N.Y.S.2d 65, 67 (Sup. Ct. Richmond County 1989) ("If the Parole Board fails to comply with the statutory due process protection, the parole candidate is entitled to a new hearing rather than a habeas corpus relief ... It does not give the petitioner a vested right to release.").

67. N.Y. Exec. Law § 259-i(2)(a)(i) (McKinney 2010) (effective until Sept. 1, 2011); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(d) (2008). *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1 (2008) (appeals procedure).

limit for rescheduling a parole release hearing. So, if your parole is revoked and you are returned to prison, the Parole Board may order that you be held for a period longer than twenty-four months before being given another parole hearing.[68] See Part H of this Chapter for more information on parole revocation.

7. Appealing Denial of Parole Release to Appeals Unit

You can appeal a denial of parole. An appeal is an administrative procedure conducted through the Appeals Unit of the Parole Board.[69] You have the right to an attorney when you appeal to the Parole Board. If you cannot afford an attorney, one will be assigned to you.[70] You can appeal a release proceeding on one or more of the following grounds:

(1) The proceeding and/or determination violated lawful procedure, was influenced by an error of law, or was "arbitrary, capricious or otherwise unlawful";
(2) A Board member or members relied on mistaken or irrelevant information in making a decision, and this can be *shown in the record* of the hearing; or
(3) The determination was excessive.[71]

If you believe you have grounds for an appeal, immediately file a "notice of appeal," which should be contained in the notification of denial. Then request an attorney. You must file a notice of appeal within thirty days of receiving the notification of denial; otherwise, you will have waived your right to an appeal.[72]

You should begin to prepare for your appeal by obtaining the parole release hearing minutes from: Division of Parole, Appeals Unit, 97 Central Avenue, Albany, NY 12206.[73]

You will have to pay for the parole release hearing minutes (the record of the proceeding). If you have an attorney and cannot afford to pay for the minutes, your attorney can get them for you. You may also make a written request for "[a]ll other nonconfidential, discoverable documents relating to the appeal."[74] So, if you believe there is important information in your parole records to support your appeal, you may request permission to access it. However, you will not be given unrestricted access. Access to your parole records will be limited in the following ways:

(1) You can only gain access to your case record at certain times—just before a scheduled appearance before the Board or a hearing officer, or prior to making an administrative appeal;[75]
(2) You can only access parts of the case record that the Board or the hearing officer will consider;
(3) You will not be given access to diagnostic opinions that could "seriously disrupt[ ] ... [your] institutional program,"[76] information obtained from a confidential source, or information that might harm another person; and
(4) The Division of Parole will not grant access to reports or materials from other agencies.[77] You will only be allowed to review the record at the prison or at the area parole office that serves the prison.[78]

8. If your Administrative Appeal is Denied

If you appeal and are denied relief and wish to seek judicial review, you can begin an Article 78 proceeding.[79] Remember, as discussed in Chapter 22 of the *JLM*, you must serve (properly deliver) your

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68. *See* People *ex rel.* Matthews v. New York State Div. of Parole, 58 N.Y.2d 196, 205, 447 N.E.2d 689, 693, 460 N.Y.S.2d 746, 750 (1983) (holding that under this particular record, denial of adjournment of parole revocation hearing did not violate due process).

69. The appeals procedure is the same for Parole Board decisions regarding a minimum period of imprisonment (MPI), parole release, parole rescission, and final revocation. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(a) (2008).

70. N.Y. Exec. Law § 259-i(4)(b) (McKinney 2010). You should write to the County Clerk for the county in which your prison is located and ask the Clerk to assign you a lawyer for the administrative appeal.

71. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(a) (2008).

72. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(b) (2008).

73. N.Y. Exec. Law § 259-i(6)(a) (McKinney 2010) states that "[t]he board shall provide for the making of a verbatim record of each parole release interview, except where a decision is made to release the inmate to parole supervision, and … except when the decision of the presiding officer after such hearings result in a dismissal of all charged violations of parole, conditional release or post release supervision."

74. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(e) (2008).

75. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(1) (2008).

76. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(2)(i) (2008).

77. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(2)(i)(b) (2008).

78. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(6) (2008).

Article 78 petition to each respondent and the New York Attorney General within four months of the date when the Appeals Unit decision becomes final.[80] This four-month limit is called the "statute of limitations."

If you pursue an Article 78 review, it is important to note that it is difficult to get a court to reverse the Parole Board's decision. The Parole Board's decisions are discretionary and are not subject to judicial review if made in accordance with statutory requirements.[81] There are two ways for a prisoner to secure a reversal of the Board's decision. A prisoner must make a "convincing showing" that either (1) the Board did not consider the required factors or considered erroneous information,[82] or (2) acted "irrationally bordering on impropriety" in reaching its decision.[83] The courts consider the following justifications for parole denial to fall *outside* the scope of the Parole Board's statutory authority: penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences were not in place.[84] This means the Parole Board cannot use any of those justifications to deny your parole. In addition, the Parole Board may consider neither "illegally seized evidence which has already been suppressed in a criminal action," nor "public pressure" in determining whether or not to grant a prisoner parole.[85] The Parole Board may not deny parole on the grounds that the "best kind of treatment" for your emotional and physical problems would be to remain incarcerated.[86] Finally, the Parole Board is required to consider any recommendations made by the sentencing court, and a reviewing court may order reversal and reconsideration if the Board fails to do so.[87]

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79. See *JLM*, Chapter 5, Part C(6), and Chapter 22 for discussions of Article 78 proceedings.

80. N.Y. C.P.L.R. 217 (McKinney 2003).

81. N.Y. Exec. Law § 259-i(5) (McKinney 2010). *See* Davis v. N.Y. State Div. of Parole, 114 A.D.2d 412, 412, 494 N.Y.S.2d 136, 137 (2d Dept. 1985) ("[T]he Division of Parole's release decisions are discretionary, and if made in accordance with the statutory requirements, such determinations are not subject to judicial review."); Ristau v. Hammock, 103 A.D.2d 944, 945, 479 N.Y.S.2d 760, 761 (3d Dept. 1984) (requiring a showing of "irrationality bordering on impropriety to warrant intervention by the courts" in a Parole Board's release decision, which is discretionary).

82. *E.g.*, Rodriguez v. Greenfield, No. 99-0058, 7 Fed. Appx. 42, 45, 2001 U.S. App. LEXIS 5093, at *6 (2d Cir. Mar. 23, 2001) (*unpublished*) (reversing the Parole Commission's decision to deny parole because the prisoner's record was incomplete, due to missing information on program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and interpersonal relationships with staff and prisoners); Plevy v. Travis, 17 A.D.3d 879, 880, 793 N.Y.S.2d 262, 263 (3d Dept. 2005) (reversing denial of parole and ordering a new parole hearing because the Parole Board improperly considered the petitioner's prior violation of parole, which had been dismissed at the time, when determining denial of parole); Lewis v. Travis, 9 A.D.3d 800, 801, 780 N.Y.S.2d 243, 245 (3d Dept. 2004) (reversing denial of parole and granting a new parole hearing due to the Parole Board's reliance on incorrect information when making its determination); Edge v. Hammock, 80 A.D.2d 953, 945, 438 N.Y.S.2d 38, 39 (3d Dept. 1981) (reversing Parole Board's determination of minimum period of imprisonment and ordering a new hearing because the Parole Board based its determination on crimes the petitioner had not been convicted of).

83. Parole Board Decision is Deemed Prejudicial to Murder Convict, N.Y.L.J., Feb. 17, 1994, at 25 (citing Quartararo v. N.Y. State Div. of Parole, 224 A.D.2d 266, N.Y.S.2d 721 (1st Dept. 1996)); *see also* Monroe v. Thigpen, 932 F.2d 1437, 1442 (11th Cir. 1991) (noting that "[a] parole board may not engage in 'flagrant or unauthorized action'" by knowingly relying on false information); Russo v. N.Y. State Bd. of Parole, 50 N.Y.2d 69, 77, 405 N.E.2d 225, 229, 427 N.Y.S.2d 982, 986 (1980) (rejecting assertion that parole board acted arbitrarily in setting minimum period of imprisonment at maximum sentence).

84. *See* King v. N.Y. State Div. of Parole, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994) (requiring a new hearing before a different panel after finding prisoner was not given a proper parole hearing because "one of the Commissioners considered factors outside the scope of the applicable statute").

85. Parole Board Decision is Deemed Prejudicial to Murder Convict, N.Y.L.J., Feb. 17, 1994, at 25. In Quartararo v. N.Y. State Div. of Parole, 224 A.D.2d 266, 637 N.Y.S.2d 721 (1st Dept. 1996), the court held that the Parole Board "improperly considered factors outside the scope of Executive Law § 259-i and in violation of a prior court order" and ordered a new hearing in front of a different panel. The court held that it was improper for the Parole Board to consider press accounts of the petitioner's crime, unchallenged *ex parte* allegations for removal from a work release program and photographs of the victim in reviewing the petitioner's application for parole. The court ultimately exercised its broad remedial powers and granted Quartararo's release on parole: "On three separate occasions … [the Board could] not or [would] not follow its own regulations, statutory mandate, or the lawful order of this court. ... The Board has failed to support any of its determinations by adequate evidence, has misconstrued its role, power and duty, prejudged each of petitioner's parole applications, and applied the wrong legal standard." Matter of Quartararo (N.Y. State Division of Parole), N.Y.L.J., Aug. 18, 1995, at 23.

86. People *ex rel.* Smith v. N.Y. State Bd. of Parole, 91 Misc. 2d 486, 487, 398 N.Y.S.2d 12, 12 (Sup. Ct. Dutchess County 1976).

87. *E.g.*, Standley v. N.Y. State Div. of Parole, 34 A.D.3d 1169, 1170, 825 N.Y.S.2d 568, 569 (3d Dept. 2006) (reversing denial of parole due to the Parole Board's repeated failure to consider the sentencing minutes and the recommendations of the sentencing court, and ordering a reconsideration that included these factors); McLaurin v. N.Y.

Again, despite these limited examples of court reversals, it is important to remember that courts generally give great deference to Parole Board decisions. Even in cases where the Parole Board based its decision to deny parole on factors other than those specified by the legislature, courts have upheld the decision, since the Parole Board may deny parole where "it is incompatible with the welfare of society."[88] Thus, the Parole Board may consider additional factors (such as lack of remorse or insight and acceptance of responsibility) to determine whether your release is compatible with the welfare of society.

9. Rescission (Reconsideration of Grant of Parole)

Even if your parole release interview goes well and you receive a parole release date, the Parole Board may be able to reconsider its decision before your release date. The New York State Division of Parole has established procedures for reconsideration of parole.[89]

The senior parole officer, or the parole officer in charge of a facility, may temporarily suspend a release date if he realizes that there may be a basis for Board reconsideration.[90] There are two general categories of events that might cause temporary suspension. The first is the discovery of "significant information which existed" or "significant misbehavior which occurred" *before* the parole release decision that was not known by the Board.[91] The second is an event that occurred *after* the Board's decision to grant release.[92] The basis for Board reconsideration may include, but is not limited to, one or more of the following circumstances:

(1) Significant misbehavior or a major violation of facility rules;
(2) An escape or removal from temporary release;
(3) A prisoner's commitment to a psychiatric treatment center;
(4) Imposition of an additional definite sentence; and
(5) Imposition of an additional indeterminate sentence.[93]

This list is not exclusive. For example, in a 2005 case, *Pugh v. Parole*, parole was rescinded because the victims' statement was not considered before granting parole. Once the victims complained, the Board considered their statements.[94] The parole officer should notify you in writing of the suspension "as soon as practicable," investigate the circumstances leading to the suspension, and prepare a "rescission report" for a Board member.[95] The Board member will then review the report and decide either to reinstate your release date or to hold a rescission hearing. If a rescission hearing is ordered, you will receive a copy of the rescission report and a notice of the rescission hearing at least seven days before the hearing.[96] The notice must state:

(1) The date and place of the hearing;
(2) The specific allegations that will be considered at the hearing; and
(3) A description of your rights at the final hearing, like your right to counsel, to testify, to present witnesses and introduce evidence, and to cross-examine most of the government's witnesses.[97]

There is no specific time limit, but the rescission hearing must be scheduled to take place within a "reasonable time after the board orders a hearing."[98] You have the right to be represented by a lawyer at a rescission hearing, but there is no requirement that a lawyer be appointed. You have the right "to appear and speak on [your] own behalf; to present witnesses and introduce documentary evidence; and to confront

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State Bd. of Parole, 27 A.D.3d 565, 565, 812 N.Y.S.2d 122, 123 (2d Dept. 2006) (affirming decision ordering Division of Parole to obtain prisoner's resentencing minutes and have a new hearing); Edwards v. Travis, 304 A.D.2d 576, 576, 758 N.Y.S.2d 121, 122 (2d Dept. 2003) (Parole Division's failure to consider sentencing judge's recommendation warranted judicial intervention).

88. Silmon v. Travis, 95 N.Y.2d 470, 477–78, 741 N.E.2d 501, 505–06, 718 N.Y.S.2d 704, 708–09 (2000) (holding that a decision by the Parole Board to deny parole for a prisoner who pleaded guilty to murdering his wife but denied culpability was not arbitrary or capricious).

89. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5 (2007).

90. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(1) (2007).

91. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(2)(i) (2007).

92. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(2)(ii) (2007).

93. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(2)(ii)(a)–(e) (2007).

94. Pugh v. N.Y. State Bd. of Parole, 19 A.D.3d 991, 993, 798 N.Y.S.2d 182, 184 (3d Dept. 2005).

95. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(3) (2007).

96. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5) (2007).

97. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5) (2007).

98. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(c)(1) (2007).

and cross-examine adverse witnesses."[99] But, you cannot force witnesses to appear if the members of the Board of Parole conducting the hearing find good cause in the record for a witness not to appear.[100]

A majority of the Board members at the hearing (that is, at least two of the three members) must find there is substantial evidence presented at the hearing to support a decision to rescind parole.[101] In general, if there was enough evidence to find you guilty of a violation of facility rules at the Superintendent's Hearing, there is probably enough evidence to uphold parole rescission.[102] The Parole Board will then rescind the release date and either set a new date for release consideration for not more than twenty-four months from the date of the original release interview, or set a new release date.[103] If the majority of the Parole Board does not believe substantial evidence exists to support a rescission of parole, it will cancel the temporary suspension and reinstate the original release date. If that date has passed, the Board will set a new one for as soon as practicable.[104] The appeal process for rescission is the same as the process for appealing parole denial.[105]

It is unclear whether rescission of parole involves a protected "liberty interest" that invokes due process protection. The Supreme Court held in *Jago v. Van Curen* that a prisoner, who had been granted a parole date which was later revoked before his release without notice or a hearing, did *not* have a liberty interest requiring due process protection.[106] In *Lanier v. Fair*,[107] the court noted *Van Curen* involved a state statute that gave the Parole Board complete discretion in determining its parole policies. Thus, in that particular instance, the statute did not create a liberty interest. But, other courts have found you have a liberty interest when your parole is rescinded, and you deserve due process protection in those cases. For example, when a state statute uses language that makes parole consideration mandatory, some courts have found that this language creates an "expectation of parole" that constitutes a liberty interest protected by the Constitution.[108] Also, some courts have decided that when a Parole Board limits its rescission authority by its own regulations, it creates a liberty interest that requires due process protection.[109] Thus, it is possible that since the New York State Division of Parole has established procedures for the reconsideration of parole, it has also created a liberty interest in parole that deserves due process protection. This issue has not yet been litigated.

G. Release on Parole

1. Release Procedures

If you are granted parole release, the first step will be completion and approval of your parole plan. Upon completion and approval of your parole plan, you will be given a "Conditions of Release" form to sign, and

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99. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5)(iii)(b)–(c) (2007).

100. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5)(iii)(c) (2007).

101. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(d)(1) (2007).

102. Brooks v. Travis, 19 A.D.3d 901, 901–02, 797 N.Y.S.2d 183, 184 (3d Dept. 2005) (prisoner's guilty plea to offense in misbehavior report was sufficient evidence of a significant misbehavior for the purpose of rescinding parole).

103. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(d)(1)(i)–(ii) (2007).

104. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(d)(2) (2001).

105. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1 (2007).

106. Jago v. Van Curen, 454 U.S. 14, 17, 102 S. Ct. 31, 34, 70 L. Ed. 2d 13, 17 (1981).

107. Lanier v. Fair, 876 F.2d 243, 251 (1st Cir. 1989).

108. *See*, *e.g.*, Watson v. DiSabato, 933 F.Supp. 390, 392 (D.N.J. 1996) (holding New Jersey's parole statute creates a sufficient expectation of parole eligibility to give rise to a liberty interest); Harper v. Young, 64 F.3d 563, 564–65 (10th Cir. 1995) ("[P]rogram participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself."); Clarkson v. Coughlin, 898 F.Supp. 1019, 1040 (S.D.N.Y. 1995) (holding that there was a state-created limited protected liberty interest in New York parole proceedings, extending as far as a prisoner's rights to be heard and to know reasons for parole denial); Wilson v. Kelkhoff, 86 F.3d 1438, 1446 (7th Cir. 1996) (holding Illinois's parole statute provides for protectable liberty interest in release for most prisoners). *But see* Allison v. Kyle, 66 F.3d 71, 73–74 (5th Cir. 1995) (holding Texas' parole statute does not create a liberty interest in parole that is entitled to due process protection); Hamm v. Latessa, 72 F.3d 947, 955 (1st Cir. 1995) (finding no state-created liberty interest in parole for a parole proceeding governed by Massachusetts state law).

109. *See* Green v. McCall, 822 F.2d 284, 287 (2d Cir. 1987) (holding that "a parole grantee has a protectable liberty interest that entitles him to due process in … parole rescission hearings" when the parole commission had limited rescission authority); Ellard v. Ala. Bd. of Pardons & Paroles, 824 F.2d 937, 943–44 (11th Cir. 1987) ("In view of the statutory restrictions on the authority of the Parole Board to revoke a parole, we conclude that [parole grantee] had a constitutionally protected liberty interest.").

will be assigned a parole officer. If you are approved for parole release prior to having an approved employment and residence program, you will be placed on "open date" status. If you do not have an approved plan within six months of receiving an "open date" program, you must reappear before the Board.[110]

If you were sentenced to a determinate sentence for a violent felony or a felony drug offense, the law requires that you serve a period of post-release supervision.[111] The additional post-release supervision may last up to five years, depending on the type of offense for which you were imprisoned.[112] The sentencing court retains the discretion to designate a lesser term depending on the nature of the crime that resulted in your conviction.[113] If your sentence requires post-release supervision, you must do further research, as this Section provides only a general overview of the law and its effects.

2. Supervision of Parole

After you are placed on parole, you will remain under supervision of the Division of Parole until the end of your maximum sentence, the end of your parole supervision (which may be granted early by the Parole Board), or your return to prison.[114] Be sure you completely understand your release conditions, including any special conditions imposed by the parole officer. Failure to follow any parole release requirement could result in a violation, which might trigger parole revocation proceedings. If you have any questions about the terms of your release or what type of activity is prohibited, ask your parole officer to explain.[115]

It is very important to develop a good working relationship with your parole officer, since he will be primarily responsible for determining your ability to serve the remainder of your sentence outside prison. In addition, your parole officer can serve as a crucial resource to assist you in many ways, like directing you to social service programs or emergency hotlines. Cooperate with your parole officer, but you should know that your interactions are not confidential. *Statements that you make about your activities that might be considered parole violations could be deemed confessions or admissions, and these statements could be used against you in parole revocation proceedings*.[116]

There are several important conditions of release you must follow carefully. Failure to do so might result in a violation of your parole, which could trigger parole revocation proceedings. The conditions of release are:

(1) Within twenty-four hours of your release, you must report directly to your designated area of release and file an *arrival report* with the office of the Division of Parole;
(2) You must keep any appointments with your parole officer and complete any required written reports;
(3) You must not leave the state or any area defined in your "Conditions of Release" plan without permission;
(4) You must let your parole officer visit your home and work and inspect your property. You must immediately tell your parole officer of any change of address or employment status;
(5) You must reply "promptly, fully, and truthfully" to any communication from your parole officer or a representative of the Division of Parole;
(6) You must advise your parole officer of any new arrest immediately. Even if the charges in the new arrest are dropped, failure to report an arrest can be a violation of your parole;
(7) You may not associate with people who have criminal records;
(8) You may not violate a law that has prison time as a possible penalty, and you may not threaten the safety of yourself or others;

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110. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(f) (2007); New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2011), at 14, *available at* https://www.parole.state.ny.us/intro_handbook.html.

111. N.Y. Penal Law § 70.45(2) (McKinney 2010).

112. Al O'Connor, 1998 Legislative Review, Pub. Def. Backup Center Rep. (N.Y. State Defenders Ass'n, Albany, N.Y.) Vol. XIII, No. 7 (1998), at 4, *available at* http://www.nysda.org/Hot_Topics/Legislation_NY/98_LegislativeReview.pdf; N.Y. Penal Law § 70.45(2) (McKinney 2004).

113. N.Y. Penal Law § 70.45(2) (McKinney 2004).

114. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.1(a) (2007); N.Y. Exec. Law § 259-j(1) (McKinney 2005 & Supp. 2008) (effective until Sept. 1, 2011).

115. *See generally* New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2007), at 17–27, *available at* https://www.parole.state.ny.us/intro_handbook.html.

116. *See*, *e.g.*, People *ex rel.* King v. N.Y. State Bd. of Parole, 65 A.D.2d 465, 468–69, 412 N.Y.S.2d 138, 140–41 (1st Dept. 1979) (holding that admission to parole officer of possession of heroin was admissible in a parole revocation hearing, even though evidence of heroin was suppressed in court proceeding because it had been illegally seized).

(9) You may not own, possess, or purchase any kind of firearm or dangerous knife without written permission from your parole officer. Other prohibited items include razors, stilettos, or imitation pistols, or any instrument that could easily cause physical injury without a satisfactory explanation for having the item;

(10) You may not use or possess any controlled substance or drug paraphernalia without medical authorization.[117]

Other special conditions of parole may be imposed based on the nature of the underlying criminal conviction. Parole conditions may be imposed by a member of the Board of Parole, the Division of Parole, or a parole officer.[118] Furthermore, the Division of Parole has special guidelines for sex offenders, which may include residency restrictions and curfews.[119] In practice, this means it may be very difficult to qualify for the conditions of parole, as you may be required to live in a place not near a school or a school bus stop, and you may be prohibited from living with a minor. For a discussion of special conditions that are often imposed on parolees convicted of sex offenses, see Chapter 32 of the *JLM*, "Special Considerations for Sex Offenders."

If you are having any trouble with your parole officer, contact the parole officer's supervisor.

3. Your Rights While on Parole

Your parole officer has a fair amount of discretion in supervising you and evaluating possible parole violations. When you sign your "Conditions of Release" form, you give "advance consent" to certain parole officer conduct that might be unconstitutional in other contexts. For example, your parole officer may search you and seize property without a warrant and without probable cause. He or she may visit your home frequently to make sure you still live there.[120] Your parole officer may also visit your place of employment.[121]

Since you are still considered to be in the constructive custody of the state, you—unlike an ordinary citizen—are not entitled to full constitutional protection against infringement of your rights. There has been some litigation on the extent of privacy and other rights that you retain as a parolee. Any searches must be knowing and voluntary, reasonably related to the rehabilitation goal, and performed by a parole officer in his or her duty to monitor your rehabilitation.[122] Since you usually must consent to searches at the time of parole, the knowing and voluntary requirement is readily met. Furthermore, it is unlikely that a court will find the other two requirements have not been met. For example, courts have held that you may be required to give blood and have your DNA kept on file in a data bank as part of a legal search. [123]

4. Special Parole

Special parole is different from regular parole. Special parole was created especially for drug offenses. It was repealed in 1984 but still governs crimes committed before November 1987.[124] Special parole follows a prison term and is imposed by the sentencing judge. Regular or traditional parole entails release before the

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117. The preceding release conditions are listed in N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2(a)–(k) (2007).

118. Dickman v. Trietley, 268 A.D.2d 914, 916, 702 N.Y.S.2d 449, 451 (3d Dept. 2000) (holding that a parolee's field parole officer was authorized to impose the parole condition prohibiting the parolee from residing with a woman the parolee had never met, since restriction was rational and violated no statutory requirement).

119. *See*, *e.g.*, Monroe v. Travis, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378 (2d Dept. 2001) (holding that Parole Division could require sex offender to secure approved housing before granting his request of conditional release); Billups v. N.Y. State Div. of Parole, 18 A.D.3d 1085, 1085, 795 N.Y.S.2d 408, 409 (3d Dept. 2005) (holding that Parole Board's imposition of requirement of suitable residence as condition of prisoner's parole release was rational, because prisoner had a history of violent conduct and sexual offenses).

120. *See* New York State Div. of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2011), at 23, *available at* https://www.parole.state.ny.us/intro_handbook.html.

121. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2(d) (2007). If you are worried that your parole officer visiting your job might be a problem, advise your parole officer about this. New York State Division of Parole, New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision (2010), at 23, *available at* https://www.parole.state.ny.us/intro_handbook.html.

122. People v. Hale, 93 N.Y.2d 454, 457, 714 N.E.2d 861, 862, 692 N.Y.S.2d 649, 650 (1999) (holding that a parole officer's search of the home of a parolee suspected of dealing drugs did not violate his constitutional rights when parolee had agreed to searches for illegal drugs as a condition of parole).

123. N.Y. Exec. Law § 995-c(3) (McKinney 2010); Kellogg v. Travis, 188 Misc. 2d 164, 167–68, 728 N.Y.S.2d 645, 647–48 (Sup. Ct. N.Y. County 2001) (holding N.Y. Exec. Law § 995-c is constitutional and withdrawal of a parolee's blood does not constitute an illegal search and seizure, even though less invasive means of getting a DNA sample exist).

124. 21 U.S.C. § 841(c) (repealed 1984).

end of a prison term and is imposed by the Parole Board. If you violate the conditions of special parole you must serve the remainder of the special parole term in prison. After serving the remainder of your special parole term, the Parole Commission may impose a new term of imprisonment. Following your imprisonment, the Parole Commission has the right to impose a term of traditional parole.[125] The Parole Commission may also re-impose another term of special parole after revoking a term of special parole.[126]

H. Revocation of Your Parole

1. How and Why Parole Revocation Begins

If you do not follow the terms of your parole release, you may have to return to prison to serve the rest of your sentence. You must violate a condition of parole "in an important respect"[127] in order for the Parole Board to revoke your parole. This standard, however, is often readily satisfied by a direct violation of one of the explicit conditions of parole, such as not making curfew[128] or being in an explicitly prohibited area.[129] Decisions by the Parole Division to revoke parole may only be reviewed by a court to determine whether the Parole Board followed the proper procedural rules. The court cannot make its own determination about the truth of your reasons for violating parole.[130] Courts usually uphold the Parole Commission's decisions. If your parole officer has "reasonable cause to believe that [you have] lapsed into criminal ways, company, or [have] violated one or more of the conditions of ... release in an important respect,"[131] he or she may report such conduct to a member of the Parole Board or a designated officer, who may then secure a warrant for retaking and temporary detention.[132] A parole violation is called a "delinquency." If it is later proven that you violated your parole, your parole will be revoked going back to the date of this delinquency. So, it is important to know exactly when you allegedly violated your parole since you will be responsible to serve the prison time dating back to the delinquency date if your parole is revoked. You will, however, be credited for time spent on parole prior to the delinquency date.[133] If your parole is being revoked, you may contact the Legal Aid Society's Parole Revocation Defense Unit at 199 Water Street, 5th Floor, New York, NY 10038.

If you are being held on a parole warrant, you are not entitled to bail or to release until the parole warrant is lifted.[134] If you are being detained on other charges (which may serve later as the basis for parole revocation), and bail is set on those charges, you still cannot be released while the parole warrant is pending.

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125. United States v. Caraballo, No. 96 Civ. 6915 (KTD), 86 Cr. 336 (KTD), 2000 U.S. Dist. LEXIS 499, at *8–9 (S.D.N.Y. Jan. 20, 2000) (*unpublished*) (holding that the Parole Commission can re-impose a term of regular parole on a prisoner who violated special parole and was imprisoned for the remaining period of his special parole).

126. Rich v. Maranville, 369 F.3d 83, 89–90 (2d Cir. 2004) (holding that "when special parole is revoked that term is suspended and continues to exist. The Commission thus creates nothing when it re-imposes that court-created term of special parole after the revocation and incarceration").

127. N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney 2010); People *ex rel.* Korn v. N.Y. State Div. of Parole, 274 A.D.2d 439, 440, 710 N.Y.S.2d 124, 125 (2d Dept. 2000) (stating that a violation of a "substantial condition" of parole is sufficient to have parole revoked).

128. People *ex rel.* Korn v. N.Y. State Div. of Parole, 274 A.D.2d 439, 440, 710 N.Y.S.2d 124, 125 (2d Dept. 2000) (holding that a prisoner violated a "substantial condition" of his parole by missing his curfew without adequately explaining this violation, and this was a reasonable ground to support revoking prisoner's parole).

129. Bellamy v. N.Y. State Div. of Parole, 274 A.D.2d 871, 872, 711 N.Y.S.2d 596, 597 (3d Dept. 2000) (holding that revocation of parole was justified where parolee who was found on a street which he was twice told not to enter as an official condition of his parole).

130. People *ex rel.* Bayham v. Meloni, 182 Misc. 2d 831, 832, 700 N.Y.S.2d 649, 650 (County Ct. Monroe County 1999) ("A court, when reviewing a determination by the Parole Board to revoke parole, may only 'examine the record to determine if the required procedural rules were followed and if there is any evidence which, if believed, would support the Parole Board's determination, but the court may not make its own determinations based on its assessment of the credibility of the witnesses.'").

131. N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.2(a)–(b) (2008).

132. N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.2(c) (2008) ("Reasonable cause exists when evidence or information which appears reliable discloses facts or circumstances that would convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that a releasee has committed the acts in question or has lapsed into criminal ways or company. Such apparently reliable evidence may include hearsay.").

133. N.Y. Penal Law § 70.40(3) (McKinney 2010).

134. *See*, *e.g.*, People *ex rel.* Calloway v. Skinner, 33 N.Y.2d 23, 34, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 184 (1973) (holding right to bail is statutory, and without statutory direction, prisoners are not entitled to either bail or release pending hearing before Board).

In *Morrissey v. Brewer*, the U.S. Supreme Court ruled a paroled convict has a liberty interest protected by due process. So, the revocation of parole release and re-incarceration must be determined in accordance with due process.[135] New York State's parole law provides for two due process hearings: preliminary and final. Within three days of the issuance of a warrant for your retaking, you must receive written notice of the charges against you and the date of the preliminary parole revocation hearing.[136] The notice shall be given within three days after the execution of a warrant for retaking and temporary detention, and not less than forty-eight hours prior to the preliminary hearing.[137] If you are out of state, you should be given written notice of the time, place, and purpose of the hearing within five days of the issuance of the warrant for your retaking.[138]

2. Preliminary Hearing

The purpose of the preliminary hearing is to determine whether there is "probable cause" that you violated, in an important respect, one or more of the conditions of your parole release.[139] The Parole Board has the burden to show evidence of your alleged violation.[140] The hearing must be held within fifteen days of the issuance of the warrant of retaking, and must be conducted by a hearing officer who has not had any prior supervisory involvement over you.[141]

At the preliminary hearing, you are entitled to the following rights:

(1) To speak on your own behalf or to obtain counsel to represent you;[142]
(2) To introduce letters and documents;[143]
(3) To present witnesses who may provide relevant information in support of your case;[144] and
(4) To confront and cross-examine witnesses testifying against you, unless the hearing officer finds good cause for their non-attendance.[145]

The regulations stipulate that you may be represented by counsel at your preliminary hearing, but it is important to note that you do *not* have an absolute right to be represented by counsel, *nor* do you have an absolute right to have an attorney appointed if you cannot afford to hire one.[146] If you believe that you need the assistance of counsel at the preliminary hearing, try to get an attorney through the county or supreme court in the district in which you are being held, or through the Legal Aid Society if you are in New York City. Unless you have an exceedingly complex case, it may be difficult to get an attorney assigned at this stage. You do not have to testify at this hearing or at the final hearing. You also do not have to make a statement to your parole officer while he or she is preparing the Parole Violation Report. Any statement you do make may be used as evidence at the final hearing.

An important difference between the preliminary hearing and the final hearing is that not all of the charges need to be heard at the preliminary hearing. If the hearing officer determines that probable cause exists after hearing one or more of the charges, the judge may determine that enough probable cause exists

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135. Morrissey v. Brewer, 408 U.S. 471, 479–84, 92 S. Ct. 2593, 2599–2602, 33 L. Ed. 2d 484, 493–96 (1972).

136. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2005 & Supp. 2008); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3 (2008).

137. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(a) (2008).

138. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(a) (2008).

139. "Probable cause" means reasonable cause.

140. This means the Parole Board must create a sufficient case of a violation, which you have to explain or refute.

141. N.Y. Exec. Law § 259-i(3)(c)(i) (McKinney 2005 & Supp. 2008); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.4 (2008).

142. The attorney must file a notice of appearance. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.5(a)– (b)(1) (2008).

143. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(2) (2008).

144. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(3) (2008).

145. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(4) (2008). You may compel the attendance at the hearing of adverse witnesses through subpoenas, unless you have already been convicted of a new crime, or the hearing officer finds good cause for their non-attendance. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2005 & Supp. 2008); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(4) (2008). If you are proceeding *pro se* (without an attorney) at this stage, you may apply to the hearing officer or Board member presiding at the hearing for the subpoenas. N.Y. C.P.L.R. 2302 (McKinney 1991 & Supp. 2008). You may also apply to the local supreme court for subpoenas for necessary witnesses or documents. N.Y. C.P.L.R. 2302(b) (McKinney 1991 & Supp. 2008).

146. *See*, *e.g.*, People *ex rel.* Calloway v. Skinner, 33 N.Y.2d 23, 32, 300 N.E.2d 716, 719, 347 N.Y.S.2d 178, 182–83 (1973) (noting that the New York State Constitution confers only a conditional or discretionary right to counsel at a preliminary parole revocation hearing).

to end the preliminary hearing and move toward a final hearing.[147] If there is proof of conviction of a crime committed after release on parole (for example, a certificate of conviction), the judge will consider that enough to show probable cause.[148] There is no opportunity at the preliminary hearing to present evidence of mitigating factors or suggestions for alternatives to incarceration, as there is at the final hearing.[149]

3. Final Hearing

Although the preliminary hearing is like an arraignment to determine whether there is probable cause to continue to hold you for a suspected parole violation, the final hearing is like a trial to determine whether you violated parole. Thus, if the hearing officer finds probable cause at the preliminary hearing (or if you have waived the preliminary hearing), a member of the Parole Board will review your case and determine whether to declare you delinquent. Depending on the decision of the Board member, you will either be scheduled for a final hearing or restored to supervision. If you are declared delinquent, you will be scheduled for a final hearing not more than ninety days after the probable cause determination.[150]

Both you and your attorney are entitled to written notice of the date, time, and place of the hearing at least fourteen days prior to the date of the hearing.[151] But, if the hearing is adjourned or delayed for some reason, there is no additional fourteen-day notice requirement.[152] If the Parole Board fails to observe the statutory time requirements, your parole violation warrant will be removed and your parole status will be restored.[153] Notice of final revocation proceedings will set forth your rights at the hearing.

Your rights at the revocation proceeding are essentially the same as those in the preliminary hearing, except for two notable distinctions. In a revocation hearing:

(1) You have an absolute right to be represented by counsel[154] (if you have pending criminal charges, you could have the attorney representing you in the criminal case also represent you at your revocation hearing); and

(2) You have a right to present mitigating evidence relevant to the restoration of parole.[155] That is, you can present evidence that might justify or excuse the conduct that is alleged to be a parole violation. The standard for revoking parole at the final hearing is a determination by a "preponderance of the evidence" (meaning that it is more likely than not) that you violated one or more conditions of release in an important respect.[156]

If you have pending criminal charges, the conduct giving rise to those charges can be considered by the Parole Board in determining whether you violated your parole. If the parole revocation hearing takes place after any criminal case against you has gone to trial, several rules may apply. For example, if you were convicted or acquitted of those charges by any defense other than an affirmative defense, the Parole Board can consider the conduct underlying the charges.[157] However, if you were acquitted through an affirmative

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147. N.Y. Exec. Law § 259-i(3)(c)(viii) (McKinney 2010).

148. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.2(c)–(d) (2008).

149. New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 30–32, *available at:* https://www.parole.state.ny.us/intro_handbook.html.

150. N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.17(a) (2008).

151. *See*, *e.g.*, People *ex rel.* Wentsley v. Hammock, 89 A.D.2d 1058, 1058, 454 N.Y.S.2d 761, 762 (4th Dept. 1982) (holding that there is only one 14-day notice requirement and that no additional period is required).

153. *See*, *e.g.*, *People ex rel.* Wentsley v. Hammock, 89 A.D.2d 1058, 1058, 454 N.Y.S.2d 761, 762 (4th Dept. 1982) ("There is no requirement that an additional 14 days' notice be given for a rescheduled or adjourned final parole revocation hearing.").

153. *See*, *e.g.*, People *ex rel.* Levy v. Dalsheim, 66 A.D.2d 827, 828, 411 N.Y.S.2d 343, 344 (2d Dept. 1978), *aff'd*, 48 N.Y.2d 1019, 402 N.E.2d 141, 425 N.Y.S.2d 802 (1980) ("[The] statute ... makes clear that a delay beyond 90 days after the probable cause determination is unreasonable per se.").

154. N.Y. Exec. Law § 259-i(3)(f)(v) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.16(a) (2008). *See* Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 2622, 33 L. Ed. 2d 484, 499 (1972) (holding a paroled convict has a "protectable" liberty interest, such that revocation of parole release and re-incarceration must be determined in accordance with due process). See Chapter 4 of the *JLM* for information on how to find a lawyer, and Appendix IV for information on how to contact the Legal Aid Society.

155. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.18(b)(5) (2007).

156. N.Y. Exec. Law § 259-i(3)(f)(viii) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.19(e) (2007). "Preponderance of the evidence" is a legal standard meaning "more likely than not." It is a lesser standard than "beyond a reasonable doubt," the legal standard for conviction of a crime.

157. Non-affirmative defenses are primarily procedural defenses. *See*, *e.g.*, People *ex rel.* Froats v. Hammock, 83

defense (for example, self-defense, alibi, entrapment, or duress), then the Parole Board probably cannot consider those charges in its parole revocation determination.[158] Courts have held that there is no denial of due process in the Board's refusal to adjourn the final revocation hearing until after the disposition of the pending criminal case, despite the lower standard of proof in parole revocation decisions.[159] Thus, the Parole Board can find that you violated your parole even if you are not later convicted of the criminal charges.

4. Appeals

You may appeal the revocation of your parole by filing a "Notice of Appeal" within thirty days of the date of the written notice of the Parole Board's decision.[160] You may be represented by an attorney during your appeal.[161] Within four months of the date on which the notice of appeal was filed, you or your attorney must file the original and two copies of the appeal letter or brief with the Appeals Unit in Albany.[162] Your appeal letter or brief must state the rules that you are challenging and explain the basis for your appeal.[163] The appeal must be based on the written record. You may get an extension "for good cause" if you request one in writing within the four months following the notice of appeal.[164]

Among the questions that may be raised on appeal are:

(1) Whether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was otherwise unlawful;
(2) Whether the Board member or members making the determination relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration;
(3) Whether the determination made was excessive;[165] and
(4) Whether the decision was supported by a preponderance of the evidence.[166]

In a revocation appeal, you cannot raise an allegation of newly discovered evidence. Such an issue must be raised in an application to the Board for a rehearing.[167] You should begin to prepare for your appeal by obtaining the minutes of the parole release hearing from the Division of Parole Appeals Unit at 97 Central Avenue, Albany, NY 12206.[168] Because the minutes can be expensive to acquire, an attorney may obtain them for you. You also may make a written request for "[a]ll other nonconfidential, discoverable documents

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A.D.2d 745, 745, 443 N.Y.S.2d 500, 501 (4th Dept. 1981) (holding that acquittal of criminal charges does not bar subsequent parole revocation based on underlying charges).

158. The Parole Board is prevented from considering the criminal charges in affirmative defense cases because of the doctrine of *collateral estoppel*, which means that issues litigated and decided in one case cannot be re-litigated by the same parties in another case. The Board is also prevented from using evidence that has been suppressed in a criminal proceeding against you in a parole revocation hearing since such evidence was gained through an illegal search and seizure. *See*, *e.g.*, People *ex rel.* Piccarillo v. N.Y. State Bd. of Parole, 48 N.Y.2d 76, 397 N.E.2d 354, 421 N.Y.S.2d 842 (1979) (stating that exclusionary rule applies to parole revocation hearings). The ruling in *Piccarillo* may no longer be good law. *Pa. Bd. of Probation v. Scott*, 524 U.S. 357, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998), held that the federal exclusionary rule does not apply to parole proceedings. Some New York courts have interpreted *Scott* as overruling *Piccarillo*, while others have refused to do so. *See* People *ex rel.* Gordon v. O'Flynn, 3 Misc. 3d 963, 965, 775 N.Y.S.2d 507, 509 (Sup. Ct., Monroe County 2004) (holding that *Scott* overruled *Piccarillo* and that the federal exclusionary rule does not apply to parole proceedings); *but see* State *ex rel.* Thompson v. Harder, 8 Misc. 3d 764, 766 n.2, 799 N.Y.S.2d 353, 355 n.2 (Sup. Ct. Broome County 2005) (holding it will continue to apply exclusionary rule to parole proceedings).

159. *See*, *e.g.*, People *ex rel.* Matthews v. N.Y. State Div. of Parole, 58 N.Y.2d 196, 447 N.E.2d 689, 460 N.Y.S.2d 746 (1983) (holding refusal to adjourn a revocation hearing until criminal charges were tried did not constitute a violation of due process). The Board only needs to find it is more likely than not you violated your parole; you can only be convicted of the crime in the first place if the court finds beyond a reasonable doubt that you committed the unlawful act.

160. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(b) (2008).

161. N.Y. Exec. Law § 259-i(4)(b) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(d) (2001). If an attorney entered a notice of appearance, the Parole Board appeals unit will not act on any correspondence from a prisoner until receiving notice the attorney is relieved. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(e) (2008).

162. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(a)–(b) (2007).

163. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(a)–(b) (2007).

164. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(a)–(b) (2007).

165. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(a) (2007).

166. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(b)(1) (2007).

167. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(c) (2007).

168. *See* N.Y. Exec. Law § 259-i(6)(a) (McKinney 2005 & Supp. 2008) ("The board shall provide for the making of a verbatim record of each parole release interview … and each preliminary and final revocation hearing ....").

relating to the appeal."[169] So, if you believe there is important information in your parole case record to support your appeal, you may request permission to access it. But, you will not receive unrestricted access.[170]

The appeal will be decided by at least three members of the Parole Board, none of whom participated in the decision that you are appealing.[171] The Board will send its written decision, including its findings of fact and law, to you or your attorney.[172]

If your appeal is unsuccessful, you have several other options. After you have pursued all possible administrative remedies with no success, you can file an Article 78 petition in New York state court.[173] You only have four months from the date the appeal decision is mailed to you to file a petition in state court. If you fail to file the petition within this time, the court will not hear your case.[174] If you are being held only on parole violation charges, and you seek to challenge the legality of your detention, you may file a petition for habeas corpus in the state supreme court.[175] See Chapters 21 and 22 of the *JLM* for more information on New York State habeas corpus and Article 78 petitions.

5. Parole Violator Reappearances

If your parole is revoked and you have been returned to prison, you will be released on the date your *time assessment* expires.[176] The Parole Board may determine that an interview is necessary before release. However, an interview is only necessary if a prisoner:

(1) Has committed a violation of facility rules;
(2) Has exhibited a significant change in his mental or emotional condition (such as being transferred to a psychiatric ward or placed on suicide watch);
(3) Has been arrested or convicted of a new felony after the final parole revocation hearing; or
(4) Is not suitable for release based on other information (such as information about self-destructive or threatening behavior).[177]

I. Release From Parole Supervision

After the expiration of your original maximum sentence, and provided you have served your time on parole supervision without interruption, you will be released from parole. The parole statute also allows for discharge from parole after three consecutive years of unrevoked parole.[178] You should talk to your parole officer if you believe you might be eligible for three-year discharge, and he or she may apply to the Parole Board for you. The Board will not entertain requests for such early discharge from a parolee.[179]

If you have a felony conviction, you may have lost certain rights or privileges, such as the right to vote, the ability to obtain a driver's license, the opportunity to be employed in a bank or an establishment that serves liquor, as well as other rights important to your life and ability to get a job. You can regain those rights after you serve out your parole term. If you have not yet completed your sentence, applications for the certificates are submitted by parole officers to the Board of Parole. If you have completed your sentence, apply directly to the Executive Clemency Bureau of the Division of Parole. If you have only one felony conviction, apply for a "Certificate of Relief from Disabilities."[180] If you have more than one felony conviction,

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169. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(e) (2007).

170. Restrictions to access parole records are set forth in this Chapter in Part F(7), "Appealing Denial of Parole Release." *See also* N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5 (2007).

171. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(d) (2007).

172. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(a)(2) (2007).

173. See Chapters 5 and 22 of the *JLM* for information on Article 78 proceedings.

174. *See* Carter v. State, 95 N.Y.2d 267, 272, 739 N.E.2d 730, 733, 716 N.Y.S. 2d 364, 367 (3d Dept. 2000) (dismissing a claim by a prisoner who brought an Article 78 claim six months after the decision was mailed to him because the claim violated the statute of limitations).

175. N.Y. C.P.L.R. 7001-12 (2001). See Chapter 13 and Chapter 21 of the *JLM* for a more detailed discussion of federal and New York state habeas corpus.

176. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.6(a) (2007). The Parole Board makes the time assessment after the revocation hearing, and it begins running from the date the parole violation warrant was lodged.

177. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.6(c) (2007).

178. N.Y. Exec. Law § 259-j (McKinney 2005 & Supp. 2008) (effective until Sept. 1, 2011).

179. N.Y. Comp. Codes R. & Regs. tit. 9, § 8007.1 (2007).

180. New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 41–42, *available at* https://www.parole.state.ny.us/intro_handbook.html.

but you have completed parole and shown five years of good conduct in the community, you should apply for a "Certificate of Good Conduct."[181]

If you are harassed or discriminated against for being an ex-offender following your release from parole, contact the Fortune Society at 29-76 Northern Boulevard, Long Island City, NY 11101 (phone (212) 691-7554) or the Legal Action Center at 225 Varick Street, New York, NY 10014 (phone (212) 243-1313 or toll free at (800) 223-4044). These agencies assist ex-offenders with their reentry into society. The New York Public Library publishes a practical handbook for pre-release and recently released prisoners called *Corrections III*. It gives information and addresses on topics including jobs, education, housing, finances, health, counseling, addiction, women's issues, homosexuality, and disability issues. *Corrections III* is available free of charge for New York State residents and prisoners from Institutional Library Services, The New York Public Library, 455 Fifth Ave., New York, NY 10016.

J. Parole in California

If you are sentenced to life in California, you must serve at least seven years before you may be eligible for parole. However, if you were sentenced under a part of the law that sets a minimum period of incarceration for a life sentence, then you will not be eligible for parole release until you have served that minimum period.[182]

One year prior to your minimum eligible parole release date, a panel of at least two Commissioners or Deputy Commissioners of the Board of Prison Terms will meet with you to set a parole release date. The Board considers aggravating and mitigating circumstances in its determination of your parole release date. Aggravating circumstances are those that might make the Board view your crime more harshly—for example, if your crime affected a large number of people. Mitigating circumstances are those that might make the Board view your crime less harshly—for example, if you had no prior criminal record. The Board may choose not to set a parole release date if it finds that the seriousness of the offense or of any past offenses are such that the interests of public safety require you to remain incarcerated longer.[183]

Within ten days after the hearing, you will be notified of the parole release date, the conditions you must meet to be released then, and the consequences of failure to meet those conditions.[184] At the parole hearing, you may present evidence and speak on your own behalf. Only prisoners serving life sentences may be represented by counsel at parole hearings.[185] In addition, victims have the right to make statements at parole hearings, but are "limited to comments concerning the effect of the crime on the victim."[186]

A decision that you are suitable for parole will become final within 120 days after the date of the hearing. During this time, the Parole Board may review the panel's decision. The Parole Board may reject the panel's decision and order a new hearing by majority vote based on an error of the law, an error of facts, or new information presented to the Board.[187] If the Board decides not to establish a parole date, you will be notified within twenty days. The Board will send you a written statement explaining why a parole date was not set. In addition, it will recommend activities in which you may participate to improve your chances of receiving a parole date at a future hearing. The Board will ordinarily rehear cases every year when it has declined to set a parole date.[188]

If you have been convicted of a violent felony in California, the state Department of Corrections will notify law enforcement agencies and the state attorney in the county to which you are scheduled to be released prior to your release on parole.[189] The victim may also be notified of your release.[190] If you have not been convicted of a violent felony, notice will be given regarding your release on parole only if the county of release requests it.[191]

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181. New York State Division of Parole, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 42–43, *available at* https://www.parole.state.ny.us/intro_handbook.html.

182. Cal. Penal Code § 3046 (West 2000).

183. Cal. Penal Code § 3041 (West 2000 & Supp. 2008).

184. Cal. Penal Code § 3041.5(b)(1) (West 2000).

185. Cal. Penal Code § 3041.7 (West 2000 & Supp. 2008).

186. Cal. Penal Code § 3043(b) (West 2000 & Supp. 2008).

187. Cal. Penal Code § 3041(b) (West 2000 & Supp. 2008).

188. Cal. Penal Code § 3041.5(b)(2) (West 2000 & Supp. 2008).

189. Cal. Penal Code § 3058.6(b) (West 2000).

190. Cal. Penal Code § 3058.8(a) (West 2000 & Supp. 2008).

191. Cal. Penal Code § 3058.8(a) (West 2000 & Supp. 2008).

You will usually be returned to the county of your last legal residence, but the Parole Board may send you to another county if found to be in the public interest. In making this decision, the Parole Board will consider:

(1) The need to protect the life or safety of a victim, the parolee, a witness, or any other person;
(2) Public concern that would reduce the chance that your parole would be successfully completed;
(3) The verified existence of a work offer, or an educational or vocational training program;
(4) The existence of family in another county with whom you have maintained strong ties and whose support would increase the chance that your parole would be successfully completed; and
(5) The lack of necessary outpatient treatment programs for parolees receiving substance abuse treatment pursuant to Section 2960.[192]

If you were convicted of a violent felony, you may not be returned on parole to a location within thirty-five miles of the actual residence of the victim or a witness to the crime.[193]

Unless the authorities can provide a good reason for it, a long delay between a re-incarceration based on a parole violation and the holding of a proper parole revocation hearing may entitle you to be restored to parole status.[194] If the Board decides to revoke your parole, you must receive a written record of the Board's decision and the opportunity to pursue an administrative appeal.[195] You can be re-incarcerated for up to twelve months if you have not had a new conviction while on parole release. However, if you commit acts of misconduct during the re-incarceration, you may be held for an additional twelve months.[196]

K. Parole in Florida

Parole has been abolished in the state of Florida.[197] If you were sentenced after October of 1983, you are ineligible for parole, and this Chapter does not apply to you. If you were sentenced prior to October of 1983, you may be eligible for parole, and this Chapter does apply to you.

You will be given an initial interview with a hearing examiner to establish a presumptive parole release date between eight months and five years after you begin your prison term.[198] Within ninety days of your initial interview, the Parole Commission will notify you of the established presumptive parole release date.[199] If your presumptive parole release date is more than two years after the initial interview, a hearing examiner will schedule an interview for review of the presumptive parole release date. This review will normally occur within two years of the initial interview and every two years thereafter.[200] However, if you were convicted of a more serious offense, including murder, attempted murder, sexual battery, or attempted sexual battery, or if you were sentenced to a minimum twenty-five year mandatory sentence, this review will only occur every five years if your presumptive release date is more than five years away.[201] Within ninety days before the presumptive parole release date, a hearing examiner will conduct a final interview with you to establish an effective parole release date and a parole release plan.

If you want to file for judicial review of the Parole Commission's calculation of your presumptive parole release date, you should file a *writ of mandamus*[202] in circuit court, rather than the district court of appeals.[203] To file a petition for *mandamus*, go to your facility's law library and ask to see a sample petition. Once you have prepared the petition to reflect the information in your case, send it to the local circuit court.

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192. Cal. Penal Code § 3003(b) (West 2000 & Supp. 2008).

193. Cal. Penal Code § 3003(f) (West 2000 & Supp. 2008).

194. *See In re* Shapiro, 537 P.2d 888, 893, 14 Cal. 3d 711, 720, 122 Cal. Rptr. 768, 773 (Cal. 1975) ("[A] prompt revocation hearing is essential because delay may result in the loss of essential witnesses or ... evidence and the continuation of unnecessary incarceration or other limitations on personal liberty.").

195. *See In re* Ruzicka, 230 Cal. App. 3d 595, 597, 281 Cal. Rptr. 435, 436 (Cal. Ct. App. 1991) (holding that parolee was entitled to a written record of the Board's parole revocation decision and to pursue an administrative appeal where the parolee filed petition for writ of habeas corpus to challenge parole revocation).

196. Cal. Penal Code § 3057(c) (West 2000 & Supp. 2008).

198. Fla. R. Crim. P. 3.701(b)(5), (d)(12) (West 2007).

198. Fla. Stat. Ann. § 947.16 (West 2001).

199. Fla. Stat. Ann. § 947.172 (West 2001).

200. Fla. Stat. Ann. § 947.174(1)(a) (West 2001).

201. Fla. Stat. Ann. § 947.14(b) (West 2001).

202. *See* Parole & Prob. Comm'n v. Fuller, 491 So. 2d 275 (Fla. 1986) (holding that judicial review of presumptive parole release dates is available only through writs of mandamus, not through writs of habeas corpus).

203. *See* Johnson v. Fla. Parole & Prob. Comm'n, 543 So. 2d 875 (Fla. 1989) (holding that writ of *mandamus* to

If your conduct during incarceration has been unsatisfactory, or if you do not have a verified parole release plan, the Parole Commission may extend the presumptive parole release date—but not for more than one year. Otherwise, the presumptive parole release date will become the effective parole release date. But, you will not be released on that date until a satisfactory plan for parole supervision has been completed.[204]

If you have been convicted of certain serious felonies, you may remain under the jurisdiction of the trial judge for up to one-third of the maximum sentence imposed. When you are otherwise eligible for parole, the parole decision will be reviewed by the judge. The judge's decision whether or not to approve the release is not appealable.[205] If the judge refuses to release you on parole, you will be re-interviewed by the Parole Commission at intervals of not longer than two years. However, if you were convicted of a more serious offense, including murder, attempted murder, sexual battery, or attempted sexual battery, or if you were sentenced to a minimum twenty-five-year mandatory sentence, this review will only occur every five years if your presumptive release date is more than five years away.[206]

You can be released on parole only if:

(1) The Parole Commission finds with reasonable probability that if you are placed on parole, you will live and conduct yourself as a respectable and law-abiding person; and
(2) Your release would be compatible with your welfare and the welfare of society.

You must also show the Parole Commission that if you are released on parole, you will be suitably employed, or at least that you will not become a public charge (collect public assistance of any kind).[207]

You may be eligible for conditional medical release if:

(1) You are not sentenced to death and are permanently physically incapacitated by an illness, disease or injury, and are therefore no longer a danger to society; or
(2) You are terminally ill and your death is imminent.[208]

If you are released on conditional medical release, you will remain under supervision for the remainder of your sentence, without reducing your sentence for any credit for good behavior. During the period of supervision, you must undergo periodic physical examinations, and if it is found your medical condition no longer incapacitates you, you will be re-incarcerated, but reductions for good-time credit will be applied.[209]

Ordinarily, a condition of parole will be reparation (compensation) or restitution (reimbursement) to the victim of your offense. Failure to pay reparation or make restitution is a violation of parole and may result in revocation.[210] A violation of the terms of parole may cause you to be arrested and returned to prison to serve out the term of your sentence. However, if your parole is revoked, the Parole Commission has the discretion to give you credit for any portion of time served satisfactorily while you were on parole release.[211]

If you are arrested for a suspected parole violation, a preliminary hearing will be held within thirty days of your arrest. You may be represented by a lawyer. If the preliminary hearing results in a finding of reasonable grounds to believe that you have committed a parole violation, a final revocation hearing will be held. You may also be represented by a lawyer at the final hearing.[212]

The parole period of supervision may not exceed the maximum period of your sentence. If you are being paroled from a single or concurrent sentence, the Parole Commission must give reasons in writing for extending the period of supervision beyond two years.[213]

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challenge suspension of prisoners' presumptive parole release dates should be filed in the circuit court, rather than the district court of appeal), *overruled on other grounds by* Sheley v. Fla. Parole Comm'n, 720 So. 2d 216 (Fla. 1998).

204. Fla. Stat. Ann. § 947.1745 (West 2001).
205. Fla. Stat. Ann. § 947.16(4)(g) (West 2001).
206. Fla. Stat. Ann. § 947.174(b) (West 2001).
207. Fla. Stat. Ann. § 947.18 (West 2001 & Supp. 2008).
208. Fla. Stat. Ann. § 947.149(1) (West 2001).
209. Fla. Stat. Ann. § 947.149 (West 2001).
210. Fla. Stat. Ann. § 947.181 (West 2001).
211. Fla. Stat. Ann. § 947.21 (West 2001).
212. Fla. Stat. Ann. § 947.23 (West 2001 & Supp. 2008).
213. Fla. Stat. Ann. § 947.24 (West 2001 & Supp. 2008).

L. Parole in Illinois

Parole has been abolished in the state of Illinois.[214] If you were sentenced after February 2, 1978, you will have received a determinate sentence, and this Chapter no longer applies to you. This Chapter only applies to you if you were sentenced prior to February 2, 1978.

The Prison Review Board (Board) sets a fixed release date for all prisoners sentenced after 1977. If you were sentenced prior to 1977, you have an indeterminate sentence.[215] In determining a fixed release date, the Board considers the sentencing court's intent, aggravating and mitigating factors, good conduct credit, and your behavior since incarceration.[216] If you accept a release date determined by the Board, you are no longer eligible for parole. If you do not accept a fixed release date from the Board, you will be eligible for parole when you have served one of the following:

(1) The minimum term of an indeterminate sentence minus time credit for good behavior, or twenty years minus time credit for good behavior, whichever is less; or
(2) Twenty years of a life sentence minus credit for good behavior; or
(3) Twenty years or one-third of a determinate sentence, whichever is less, minus credit for good behavior.[217]

In making its determination of parole, the Board considers reports prepared by corrections staff, and materials submitted by you, the State's Attorney, and the victim.[218] Even if you are eligible for parole, the Board will not parole you if it determines that:

(1) There is a substantial risk that you will not conform to reasonable conditions of parole;
(2) Your release would minimize the seriousness of the offense or promote disrespect for the law; or
(3) Your release would have a substantially adverse effect on institutional discipline.

If parole is denied, ordinarily a re-hearing is set for one year later, but no later than three years after the denial (with an exception for certain sexual crimes).[219]

The Board will specify whatever conditions of parole it thinks necessary to assist you in leading a law-abiding life; however, parole conditions will always require that you not do certain things and that you do other things. There are additional rules if you were convicted of a sex offense.

As conditions of parole, you may *not* do any of the following:

(1) Violate a criminal statute in any jurisdiction;
(2) Possess a firearm or other dangerous weapon;
(3) Use or possess narcotics or any other controlled substance or instruments to use such substances;
(4) Go to places where controlled substances are sold, used, or distributed;
(5) Associate with other people you know are on parole or mandatory supervised release without permission from your parole agent, or with people who are in an organized gang.[220]

In addition, you *must* do all of the following:

(1) Report to an agent of the Department of Corrections;
(2) Allow the agent to visit you at your house, place of employment, or other places when necessary;
(3) Attend or reside at a facility for the instruction or residence of people on parole;
(4) Obtain permission before writing or visiting a person who is incarcerated in an Illinois prison;
(5) Report arrests to an agent within twenty-four hours of release from custody;
(6) Obtain permission from an agent before leaving Illinois;
(7) Obtain permission from an agent before changing your address or job;
(8) Consent to a search of your person, property, and residence;
(9) Submit to drug testing when instructed by a parole agent; and
(10) Provide truthful information to parole agents in response to their questions.[221]

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215. 730 Ill. Comp. Stat. Ann. 5/3-3-2 (West 2007).
215. 730 Ill. Comp. Stat. Ann. 5/3-3-2.1 (West 2007).
216. 730 Ill. Comp. Stat. Ann. 5/3-3-2.1(e) (West 2007).
217. 730 Ill. Comp. Stat. Ann. 5/3-3-3(a) (West 2007).
218. 730 Ill. Comp. Stat. Ann. 5/3-3-4(d) (West 2007).
219. 730 Ill. Comp. Stat. Ann. 5/3-3-5(c) (West 2007).
220. 730 Ill. Comp. Stat. Ann. 5/3-3-7 (West 2007 & Supp. 2008).
221. 730 Ill. Comp. Stat. Ann. 5/3-3-7 (West 2007 & Supp. 2008).

If you are released on parole and then suspected of having violated a condition of parole, you will have a preliminary hearing before a hearing officer to determine whether there is cause to hold you for a revocation hearing. A preliminary hearing is not required when the possible revocation is based on new criminal charges. You may appear at a revocation hearing before at least one member of the Board to answer the charge and bring witnesses on your behalf. If you are found to have violated a condition of your parole, the Board may recommit you for any portion of the imposed maximum term of imprisonment, or it may take lesser actions that do not involve recommitment.[222] Even if you are recommitted for a parole violation, you may still be eligible for future release on parole.[223]

Every felony sentence, except a life sentence, includes a mandatory supervised release period or "parole term" that ranges from one to three years (with the exception of certain sex crimes, which have longer release periods).[224] The Board may discharge you from parole when it determines that you are likely to remain at liberty without committing another offense.[225] If you have been released on parole, and you believe you are entitled to a final discharge from your sentence, you may file a habeas corpus petition seeking to be released outright while you are on parole release.[226]

M. Parole in Texas

If you are serving a life sentence for a capital felony in Texas, you will not be eligible for release on parole until the actual calendar time that you have served is equal to forty calendar years, not including good conduct time.[227] Unless you have been convicted of certain serious felonies, including murder, indecency with a child, aggravated kidnapping, sexual assault, or robbery, you will be eligible for release on parole when your calendar time served, plus good conduct time, equals one-fourth of the maximum sentence imposed or fifteen years, whichever is less.[228] You may be released on parole when a parole panel establishes that your release will not increase the likelihood of harm to the public. Counsel may represent you at your parole hearing when you appear before the parole panel.

You may be placed on parole only when arrangements have been made for your employment or maintenance and care, and when the parole panel believes you are able and willing to fulfill the obligations of a law-abiding citizen. If you are released on parole, you may be subject to certain conditions, including attendance at substance abuse or sex offender treatment programs, electronic monitoring, residence requirements, and payment towards the cost of parole supervision. Parole may be granted early to elderly, disabled, mentally ill or retarded, or terminally ill prisoners.[229]

If you are released on parole and are then accused of or arrested for violating parole, you are ordinarily entitled to a hearing within forty days after the arrest or within a reasonable time if you are arrested in another state.[230] Proof that you were convicted and sentenced for another crime while out on parole is enough to justify parole revocation. However, you may request a hearing at which you can present mitigating factors for the later conviction. If your parole is revoked, you may not get credit for the time that you were out on parole. If you want to challenge a revocation of parole, you should file a state habeas corpus petition with the court that convicted you of the original offense from which you were paroled.[231]

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222. 730 Ill. Comp. Stat. Ann. 5/3-3-9 (West. 2007).

223. 730 Ill. Comp. Stat. Ann. 5/3-3-10 (West 2007).

224. 730 Ill. Comp. Stat. Ann. 5/5-8-1(d) (West 2007).

225. 730 Ill. Comp. Stat. Ann. 5/3-3-8(b) (West 2007).

226. *See* Collins v. Sielaff, 43 Ill. App. 3d 1022, 357 N.E.2d 1213 (Ill. App. Ct. 1976) (allowing parolee to maintain a habeas corpus action claiming entitlement to final discharge).

227. Tex. Gov't Code Ann. § 508.145(b) (Vernon 2004 & Supp. 2007) (repealed for crimes committed after Sept. 1, 2005).

228. Tex. Gov't Code Ann. § 508.145(f) (Vernon 2004 & Supp. 2007); Tex. Code Crim. Proc. Ann. art. 42.12, §§ 3g(a)(1)(A), (C)–(E), 3g(2) (Vernon 2004). Prisoners serving time for felony offenses listed in the portions of part 42.12 that are specified above will not be eligible for release on parole until "the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years." Tex. Gov't Code Ann. § 508.145(d) (Vernon 2004 & Supp. 2007).

229. Tex. Gov't Code Ann. § 508.146 (Vernon 2004 & Supp. 2007).

230. Tex. Gov't Code Ann. § 508.282 (Vernon 2004).

231. *See* Bd. of Pardons & Paroles *ex rel.* Keene v. Court of Appeals for the Eighth District, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (noting that when parolee sought state habeas corpus relief following the revocation of his parole, such a claim should be brought before the original convicting court). For more information on state habeas corpus in

To complete the parole period, you must serve out the whole term for which you were sentenced, which may or may not include the time you served prior to release on parole. Depending on your specific situation, the Paroles and Pardons Division may allow you to serve the remainder of your term without supervision.

N. Parole In Michigan

If you are serving an indeterminate sentence in a Michigan state prison, and you have served your minimum sentence minus any allowances (such as good time or a disciplinary credit), the Michigan state Parole Board may grant you parole at its discretion.[232] You may be granted "special parole" before you finish serving your minimum term, if your sentencing judge gives written approval.[233]

If you are serving a sentence for a drug offense, you may be eligible for parole before your minimum term is over—after half your minimum sentence, after five years, or after ten years—depending on the severity of your offense.[234]

If you are serving a life sentence, you may still be eligible for parole, unless you were convicted of first degree murder, adulterating medicine or selling adulterated medicine, explosives-related offenses, or criminal sexual conduct.[235] You may become eligible for parole from a life sentence within as few as ten years, depending on the crime for which you were convicted.[236] See Section 791.234(8) of the Michigan Compiled Laws for additional conditions that will apply.

If you have been sentenced for consecutive terms, you become eligible for parole when you have served the total time of the added minimum terms, minus any good time and disciplinary credits, if you are not subject to disciplinary time.[237] If you have remaining consecutive terms to serve, the Parole Board is allowed to terminate the remainder of the sentence you are currently serving once you have served the minimum term of your present sentence.[238]

The Michigan Parole Board will not grant you parole until it is satisfied that you made arrangements for employment, education, and any necessary mental health or medical care.[239] You *must* have earned your high school diploma or GED if you were not employed when you committed the crime, unless you were sentenced before December 15, 1998 or your minimum sentence was less than two years.[240]

The Parole Board must interview you at least one month before your minimum sentence has expired, minus applicable good time and disciplinary credits if you are not subject to disciplinary time.[241] You should receive a notice of intent to conduct an interview from the Parole Board at least one month before the interview date.[242] The notice must state the specific issues and concerns that will be discussed at the interview and that may be a basis for a denial of parole. The board cannot deny your parole for a reason that is not stated in the notice, except for good cause as stated to you at or before your interview, and as listed in the required written explanation.[243] Read the notice carefully, and be prepared to challenge and present evidence on any inaccurate issues stated in the notice.

Unless you are serving a life sentence, the Parole Board is allowed to decide whether to grant you parole without interviewing you. However, the Board can only do this if, after evaluating you according to the parole guidelines, they determine that you have a high probability of either being paroled or being denied

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Texas, see *JLM*, Chapter 21.

232. Mich. Comp. Laws Ann. § 791.234(1) (West 2008). Michigan does not require that every prisoner be eligible for parole. *See*, *e.g.*, People v. Merriweather, 527 N.W.2d 460, 464, 447 Mich. 799, 809 (Mich. 1994) ("We find no basis, however, to conclude … the Legislature intended … all defendants, or even simply this defendant, must be eligible for parole.").

233. Mich. Comp. Laws Ann. §§ 791.233 (1)(b)–(d) (West 2008).

234. Mich. Comp. Laws Ann. § 791.234 (West 2008).

235. Mich. Comp. Laws Ann. §§ 791.234(6)(a)–(f) (West 2008).

236. Mich. Comp. Laws Ann. § 791.234(7) (West 2008).

237. Mich. Comp. Laws Ann. §§ 791.234 (3)–(4) (West 2008).

238. Mich. Comp. Laws Ann. § 791.234 (5) (West 2008).

239. Mich. Comp. Laws Ann. § 791.233 (1)(e) (West 2008).

240. Mich. Comp. Laws Ann. § 791.233 (1)(f) (West 2008). You are exempt from this requirement if you are over 65, have a learning disability, or some other reason outside your control.

241. Mich. Comp. Laws Ann. § 791.235 (1) (West 2008).

242. Mich. Comp. Laws Ann. § 791.235 (4) (West 2008).

243. Mich. Comp. Laws Ann. § 791.235 (4) (West 2008).

parole.[244] You may also waive your right to an interview, but the waiver must be in writing and no later than thirty days after the notice of intent to conduct an interview is issued.[245]

During the interview, you may be represented by an individual of your choice, but your representative cannot be a fellow prisoner or an attorney.[246] You or your representative can present relevant evidence to support your release and challenge any inaccurate information in the notice. When making a parole determination, the Parole Board cannot consider an expunged juvenile record or any information it determines is inaccurate.[247] The Parole Board can consider—but cannot base a parole denial *solely* on—your marital history, prior arrests not resulting in conviction, or adjudication of delinquency.[248] The Parole Board must consider any statements made by a victim.[249] In addition, the Parole Board member conducting your interview must review information relevant to the notice of intent to conduct an interview, such as the parole eligibility report institutional staff prepared. The parole eligibility report includes information such as all the major misconduct of which you have been found guilty, your work and education record during confinement, and the results of any physical, mental, or psychiatric examinations performed on you.[250]

If the Michigan Parole Board decides not to release you, you will receive a written explanation of the reason for the denial, which may include specific recommendations for corrective action that you may take to improve your future chances of release.[251] Only the prosecutor or crime victim can appeal a decision made by a Parole Board; your ability to appeal the Parole Board's decision has been eliminated.[252] The appropriate standard of review for the Parole Board's determination is an abuse of discretion standard.[253] Habeas corpus is available only under extreme circumstances, such as where parole has been denied based on your race, religion, or national origin.[254] There is no statutory requirement that you be re-interviewed within the next twelve months – the Court of Appeals of Michigan has held that there is "no statutory impediment" to a Parole Board's decision not to reconsider a prisoner's eligibility for parole for two years."[255]

O. Conclusion

This Chapter provides a detailed overview of New York State parole procedures, from the release hearing to the revocation process. It also includes a brief overview of parole procedures and practices in these states: California, Florida, Illinois, Texas, and Michigan. We hope as well that prisoners in states not specifically covered in this Chapter will acquire a better understanding of parole policies. In general, this Chapter may serve as a model for ideas on how to research and whom to contact when learning about the parole system in your own state. Note, however, many states have eliminated parole and now impose determinate sentences. All prisoners, even where the information is detailed, should refer directly to the applicable statutes and regulations of their state to see if there have been changes made following the *JLM*'s publication.

244. Mich. Comp. Laws Ann. §§ 791.235 (1)–(2) (West 2008).

245. Mich. Comp. Laws Ann. § 791.235 (6) (West 2008).

246. Mich. Comp. Laws Ann. § 791.235 (6) (West 2008).

247. Mich. Comp. Laws Ann. §§ 791.235 (1)(a)–(b) (West 2008).

248. Mich. Comp. Laws Ann. §§ 791.235 (3)(a)–(b) (West 2008).

249. Mich. Comp. Laws Ann. § 791.235 (1) (West 2008).

250. Mich. Comp. Laws Ann. §§ 791.235 (5), (7)(a) –(e) (West 2008).

251. Mich. Comp. Laws Ann. § 791.235 (12) (West 2008).

252. Morales v. Mich. Parole Bd., 260 Mich. App. 29, 36, 676 N.W.2d 221, 227–28 (Mich. 2003) (noting that, "[b]y eliminating the phrase, 'shall be appealable by the prisoner,' ... the Legislature clearly intended" to eliminate the prisoner's right to appeal a parole board's decision).

253. Wayne County Prosecutor v. Parole Board, 210 Mich. App. 148, 153, 532 N.W.2d 899, 901 (1995). This discretion is restricted by Mich. Comp. Laws Ann. §§ 791.233(1), 791.235(1), (3), (4), (7)–(9) (West 2008).

254. Morales v. Mich. Parole Bd., 260 Mich. App. 29, 40, 676 N.W.2d 221, 230 (Mich. 2003) ("[T]he writ of habeas corpus deals only with radical defects which render a judgment or proceeding absolutely void.").

255. *In re* Parole of Roberts, 232 Mich. App. 253, 255, 591 N.W.2d 259, 260 (1998).

A JAILHOUSE LAWYER'S MANUAL

Chapter 33:
Rights of Incarcerated Parents

Columbia Human Rights Law Review

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CHAPTER 33

RIGHTS OF INCARCERATED PARENTS*

A. Introduction

This chapter discusses the childcare and custody rights of incarcerated parents. According to the U.S. Department of Justice, an estimated 809,800 parents of children under eighteen were serving time in state and federal prisons in 2007.[1] 1,706,600 children under eighteen had parents in prison.[2]

As a parent in prison, you may fear that your child will not be cared for, that you will lose your child, or that your relationship with your child will suffer while you are incarcerated. This Chapter focuses on New York state law and describes how the law provides parents in prison with various legal tools to prevent these things from happening.

First, however, you should be aware that federal laws regulate the rights of incarcerated parents whose children are in the child welfare system (but not if your child is under private custody or guardianship). In 1997, Congress passed the Adoption and Safe Families Act (ASFA),[3] a series of laws that make it much harder for incarcerated parents to keep their parental rights. Different states have passed laws applying ASFA in different ways, so it is important for you to know the ASFA laws that apply in your state. Some of the significant changes in New York law following AFSA include:

(1) In some cases, the state no longer has to try to reunite children in foster care with parents who are incarcerated;[4]
(2) Unless certain exceptions apply, the State *must* file to terminate parental rights[5] for children who have been in foster care for fifteen out of the last twenty-two months, children who have been abandoned, or children with parents who have been convicted of certain violent crimes;[6]
(3) People with certain criminal convictions or who live with an adult who has a criminal record cannot be foster parents.[7]

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1. Press Release, U.S. Dept. of Justice, Office of Justice Programs, An Estimated 809,800 Inmates in the Nation's Prisons Were Parents to 1,706,600 Minor Children at Midyear 2007 (Aug. 26, 2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/pptmcpr.htm (last visited Sept. 2, 2008). For a detailed report on these statistics, consult Lauren E. Glaze and Laura M. Maruschak, Special Report, Bureau of Justice Statistics, Parents in Prison and Their Minor Children (Aug. 8, 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf (last visited July 21, 2010).

2. Press Release, U.S. Dept. of Justice, Office of Justice Programs, An Estimated 809,800 Inmates in the Nation's Prisons Were Parents to 1,706,600 Minor Children at Midyear 2007 (Aug. 26, 2008), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2008/bjs08101.htm (last visited July 21, 2010).

3. The full text of ASFA can be found at 42 U.S.C. §§ 670–679b (2000). Several provisions of the Act have been amended in part or repealed in part since 1997. For further information on the history of AFSA and other federal child welfare laws, please see Factsheet, Child Welfare Information Gateway, U.S. Dept. of Health and Human Services, Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption (Feb. 2009), *available at* http://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf (last visited July 23, 2010).

4. N.Y. Soc. Serv. Law § 358-a(3)(b) (McKinney 2003), *amended by* 2005 N.Y. Sess. Laws ch. 3, pt. A, § 36 (McKinney).

5. Termination of parental rights is when the state permanently ends your rights as a parent and either takes on those rights itself or grants them to another person through adoption.

6. N.Y. Soc. Serv. Law § 384-b(3)(l)(i) (McKinney 2003), *repealed in part and amended in part by* 2006 N.Y. Sess. Laws ch. 460 (McKinney). The formula used to determine how long your child has been placed in foster care may depend on where you and your child are located. In New York, the Department will start counting from two months after either the date of placement or the date the child was removed from the home, whichever comes earlier. This means that the amount of time counted for ASFA purposes may be different than the amount of time your child has actually spent under the custody of the Department. For example, if your child was placed under custody of the Department upon your incarceration, but it took the Department one month to find placement for your child, you would have sixteen months before the State had to initiate proceedings to terminate your parental rights. So starting from the date of your incarceration, you may have up to seventeen months before the State will begin proceedings. Note that other states may calculate the time period that a child has been in foster care somewhat differently, so you should always be sure to determine what the law says in your state. For more information on legal research, see *JLM*, Chapter 2, "Introduction to Legal Research."

All of these provisions will be discussed more fully below.

As a parent in prison, you may find yourself in one of three situations:

(1) Your child is living with friends or family members who receive no state supervision or funding other than welfare.
   - This practice is known as "private placement" and will be discussed in Part B of this Chapter. ASFA does not apply to these placements.

(2) You chose to place your child in foster care.
   - Again, your child may be living with foster parents who are relatives or persons unrelated to you. The state will supervise and provide funding to these foster parents for the care of your child. This practice is known as "voluntary placement" and will be discussed in Part C of this Chapter. If your child is in foster care and you would like to put him up for adoption, your options are discussed in Part F of this Chapter.

(3) Your child was taken from your home by either the Office of Children & Family Services (a New York *state* agency) or by the Administration for Children's Services (a New York *City* agency)[8] and placed in foster care.
   - Your child may be living with foster parents who are relatives or persons unrelated to you. Again, the state will supervise and provide funding to these foster parents for your child's care. This practice is known as "involuntary foster care" and will be discussed in Part C below.

New York law generally supports parents who want to take custody of their children after being in jail. The law states that it is desirable for a child to "be returned to the birth parent because the child's need for a normal family life will usually best be met in the [natural] home, and ... parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered."[9] However, the law will only prioritize your parental rights if you show interest and involvement in your child's welfare and a commitment to parenting upon your release.[10] Evidence of involvement in your child's life may include letter writing, telephone calls, visits from your child, and efforts to communicate and cooperate with your case worker.[11]

The beginning of this Chapter discusses how your child will be cared for while you are in prison, both under private placement (Part B) and foster care (Part C). Part C explains placement in both voluntary and involuntary foster care. It describes the procedures for voluntary and involuntary placement, including court hearings and reviews. Part C then discusses placement and planning for your child, which are the same under both foster care plans. Part C then describes your rights and obligations as well as the obligations of

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7. N.Y. Soc. Serv. Law § 378-a(2)(e) (McKinney 2003).

8. The Office of Children and Family Services (OCFS) is the state agency responsible for supervising and managing foster care in New York State. The Administration for Children's Services (ACS) handles these duties in New York City, while county departments of social services manage foster care for areas outside of New York City. For simplicity, this Chapter uses "DSS" (Department of Social Services) to refer to all local child protective agencies that are responsible for foster care placement. Each county in New York has a social services department. For questions about foster care generally, you can call (800) 345-KIDS, a free phone number for OCFS. Also see the end of this chapter for more contact information for OCFS and county-specific DSS offices.

9. N.Y. Soc. Serv. Law § 384-b(1)(a)(ii) (McKinney Supp. 2003); *see also* Ruth v. Beaudoin, 55 A.D.2d 52, 53–54, 389 N.Y.S.2d 473, 474 (3d Dept. 1976) (stating that this "law contains the presumption that the best interests of the child will be promoted by returning the child to the custody of its natural parent" (quoting People *ex rel.* Patricia "BB" v. Albany County Dept. of Soc. Serv., 47 A.D.2d 974, 974, 366 N.Y.S.2d 692, 694 (3d Dept. 1975)).

10. A recent amendment to the law exempts prolonged stays in foster care from mandatory termination of parental rights if "the parent or parents are incarcerated, or participating in a residential substance abuse treatment program, or the prior incarceration or participation of a parent or parents in a residential substance abuse treatment program is a significant factor in why the child has been in foster care for fifteen of the last twenty-two months, provided that the parent maintains a meaningful role in the child's life." N.Y. Soc. Serv. Law §§ 384-b(3)(l)(i), 409(e) (McKinney 2010). *See also In re* Lindsey B., 16 A.D.3d 1078, 791 N.Y.S.2d 261 (4th Dept. 2005) (finding that a father's incarceration was not a defense to an abandonment petition where father made no effort to communicate with daughter or learn of her whereabouts); *In re* Elizabeth Susanna R., 11 A.D.3d 619, 783 N.Y.S.2d 641 (2d Dept. 2004) (stating that "a parent's incarcerated status does not excuse him or her from establishing or maintaining contact with his or her child").

11. N.Y. Soc. Serv. Law §§ 384-b(3)(l)(v), 409(e) (McKinney 2010).

the Department of Social Services (DSS),[12] while your child is in foster care. Finally, Part C explains how your child will be returned to you after your release.

Part D explains involuntary termination of your parental rights, a process that allows another person to adopt your child when he is in foster care. It details the ways you can defend yourself against involuntary termination and lists the steps you should take while your child is in foster care to make sure that your parental rights are not terminated. The end of Part D discusses the difficulties long-term prisoners face in preventing involuntary termination.

Part E discusses challenges unique to incarcerated *fathers*, explaining the extra steps fathers in prison must take in order to protect their rights. Part F discusses the procedure for voluntarily terminating your parental rights and putting your child up for adoption. Finally, Parts G and H explain your right to an attorney for different proceedings.

B. Private Placement with a Relative or Friend

Many incarcerated parents try to place their child in the home of a relative or friend without involving the foster care system. This practice is called "private placement." Private placement is the best way for parents in prison to keep their parental rights because the strict ASFA rules do not apply to children in private placements—they only apply to children in foster care. The main advantage to private placement is that your child will be cared for by someone you know and trust. It also allows your child to live in familiar surroundings, which can lessen the trauma that a child may feel from being separated from his parent. If you want a relative or friend (sometimes called a "caretaker") to care for your child, you should, if possible, enter into a written agreement signed by both you and by the relative or friend. The agreement should include three important points:

(1) You are giving temporary custody of your child to that person while you are in prison;
(2) Your child will be returned to you when you are released; and
(3) The caretaker (the relative or friend) will bring your child to visit you in prison.

This agreement will allow your child's caretaker (relative or friend) to register the child for school, get public assistance, and receive medical care for the child. It will also help secure the return of your child to your custody when you are released from prison. Note that you may have to fill out paperwork or releases in order to legally allow the caretaker to register your child for school and other public services.

If you know someone who is willing to care for your child but does not have the money to do so, he may be eligible to receive public assistance, food stamps, and Medicaid, so long as he assumes custody or guardianship. Your child can also be placed with a close relative through DSS, a practice called "kinship foster care." Under this arrangement, your child will be considered in foster care even though he is living with a relative. This arrangement, which is different from a private placement, is discussed in Part C(1)(d) of this Chapter. Granting custody or guardianship does not mean that you are permanently giving up your parental rights. The terms only mean that you are giving permission for someone else to care and be responsible for your child for a temporary period until you can resume caring for him yourself. It is worth checking with each agency to find out what paperwork you must fill out in order for the caretaker to receive assistance both for himself and for your child.

C. Foster Care

If private arrangements with your relatives or friends do not work out, you may choose to apply through DSS to have your child placed in foster care, either with a relative or with a certified foster parent who is not related to you (which can include a friend). Either way, you must make sure that someone will be caring for your child while you are in prison. If you do not arrange for the care of your child during your incarceration, permanent neglect proceedings can be initiated against you.[13] Foster care is a way of providing for children whose parents cannot care for them. The state has legal custody of children in foster care, which means that the state takes responsibility for the child. The state may hire a private foster care agency that will work with you and your child to find a placement in foster care. Foster care is not supposed to be a permanent

12. According to the State of New York, the 58 Departments of Social Services throughout the state are responsible for all publicly funded social services and cash assistance programs. Families qualify for DSS assistance based on income and other criteria. DSS assistance includes subsidies for childcare costs.

13. See Part D(1)(b) of this Chapter for a discussion of permanent neglect.

solution; it is meant to help families through difficult times and to make sure that children are living in safe and healthy environments.

There are several different ways children can be placed in foster care. When the parent or parents themselves choose to place their children in foster care, it is called "voluntary placement." When a judge orders the child to be placed in foster care because the child's previous caretakers were abusive or neglectful, it is called "involuntary placement." Children may be placed with relatives ("kinship foster care"), with an agency-approved foster family, in a group home, or in a residential facility. All foster care parents receive funding and supervision from either DSS directly or any separate foster care agency involved in the particular case.

1. Voluntary Placement

If you cannot arrange for the care of your child with family or friends or if you are not satisfied with the care your child is receiving, you may choose to place your child in foster care. Furthermore, under New York law, your child may have to be placed in foster care if you become "unavailable" due to "arrest, detainment, or imprisonment."[14]

You *do not* permanently give up your parental rights by placing your child in foster care. You are still legally his parent. It does not mean that you are giving up or abandoning your child, and it does not show that you are unfit as a parent. It only means that you are temporarily unable to provide your child with the care you think he needs. If you fulfill your foster care obligations and if you are released within a relatively short time, you will have a good chance of getting your child back after your release.

However, if you are going to be in prison for more than twelve months, then placing your child in foster care may create a risk of involuntary termination of your parental rights. You should seriously consider your decision to place your child in foster care because ASFA generally requires the state to file for termination of parental rights for children who have been in foster care for fifteen out of the last twenty-two months.

In summary, if you are able to privately place your child with a friend or relative, it may be the best way for you to protect your parental rights. It is important to consider all of your options carefully before placing your child in foster care for fifteen months or longer.

(a) Initial Placement Process

To arrange for your child's foster care, you should first contact the Department of Social Services (DSS).[15] Either you or someone you have entrusted with the care of your child can transfer your child to a foster care arrangement.[16] However, you should contact DSS yourself because if a relative or friend places your child in foster care for you, the agency might only communicate with that other person. Also, a foster care arrangement made by someone else does not affect your rights and obligations as a parent. DSS must consult with you regarding your child. If you are not being contacted, inform DSS and/or the foster care agency that you are the parent and tell them that you wish to make the decisions about your child's care.

When you make contact with DSS, a caseworker will arrange to meet with you to explain the process of placing your child in the custody of DSS and the available foster care options. He will also ask you to sign a Voluntary Placement Agreement,[17] a contract between you and DSS that places your child in foster care. By signing the Agreement, you temporarily transfer the custody and care of your child to the Commissioner of DSS. Read the form carefully because it will state what DSS must do for your child while he is in foster care. The Agreement also lists the responsibilities of DSS, as well as your obligations while the child is in foster

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14. N.Y. Comp. Codes R. & Regs. tit. 18, § 430.10(c) (1995). This section states that children must be removed from their homes and placed in foster care when removal is essential for securing proper care, nurturance, or treatment. It explains that one circumstance where foster care placement may be essential to ensuring proper care, nurturance, or treatment is when the parents of the child are arrest, detained, or imprisoned.

15. Contact the county department of social services for the county in which your child is living, or the Administration for Children's Services (ACS) if your child lives in New York City. See the end of this Chapter for contact information for ACS and all other New York counties.

16. N.Y. Soc. Serv. Law § 384-a(1) (McKinney 2003), *amended by* 2005 N.Y. Sess. Laws ch. 3, pt. A § 52 (McKinney).

17. You can obtain a New York City Voluntary Placement Agreement Form (Form W-864) by writing to the Administration for Children's Services (ACS), 150 Williams Street, 18th Floor, New York, New York 10038, or by calling ACS at (212) 341-0900. The website for ACS is www.nyc.gov/html/acs/home.html (last visited July 23, 2010).

care.[18] The Agreement must say that the agency may be required to file for termination of parental rights if your child remains in foster care for fifteen out of the most recent twenty-two months.[19]

The Agreement is a standard form, which means it is the same for everyone. If you want to add something to the agreement that you feel is important, you have a right to suggest changes. For instance, you may wish to add any or all of the following: a release date for your child (perhaps the date of your release from prison); that your children, if you have more than one, be kept together; a request that your child remain in his current school; that the child be kept near the home neighborhood; or the minimum number of hours per month that you wish to visit with your child. You should strongly consider adding these items to the Agreement form because DSS is obligated to try to provide your child with the care established in the form.[20] You should be aware that DSS might resist making changes to the standard form. If you want the Agreement changed to fit your child's needs, speak to your caseworker about it.

Whether or not you add specific conditions to the Placement Agreement, it is very important to ask for a copy of the final Agreement that you sign. You should keep your own personal file, which should include a copy of the Agreement as well as any other letters sent to you by DSS or letters that you write to DSS.

During your first visit with your caseworker, you may also be asked to sign a Designation of Religious Preference for Children.[21] On this form, you may state whether you wish for your child to be placed with an independent foster care agency affiliated with a particular religion. You can state whether you want your child to receive religious training while in foster care. If you write down a religious preference and say that you want your child to be cared for by a family of that religion, DSS must either (1) place your child with a family practicing that religion, (2) show that your child's faith will be protected in the family in which he is placed, or (3) show why finding a placement with such a family was not "practicable" or "in the best interests of the child."[22] This means that if DSS does not place your child with a family practicing your chosen religion, DSS must be able to prove that it was practically impossible to find such a family or they must be able to give a good reason why it would be better for your child not to be in such a family. If DSS does not place your child in such a family and fails to give a good reason why not, you can demand that they place your child with a family that practices your religion.

Your caseworker may ask you to sign a form in which you agree you will be legally responsible for some of the costs of maintaining your child. You must write down on this form whether or not you can contribute to your child's expenses while he is in foster care. Even though you are in prison, you still have a duty to financially support your child. However, DSS could take your situation into consideration and not expect you to contribute to your child's expenses because you are in prison and probably have little or no income.

You and the caseworker will develop a plan to help keep a close relationship between you and your child. This plan, which includes the rights and obligations of both you and the agency, is discussed in Part C(4) of this Chapter.

Finally, DSS should provide you with a list of lawyers or legal services groups to help you in placing your child. One source of help may be Prisoners' Legal Services.[23] Unfortunately, it is extremely unlikely that you will be able to find a free lawyer for a voluntary placement case, so do not be afraid to take as much time and ask as many questions as you need in order to understand the forms that DSS will make you fill out since you will probably be the person making the decisions for the voluntary placement of your child.

(b) Court Approval of the Placement—358a Hearing

The next step in voluntary placement is court approval. New York state law requires a family court judge to review and approve every voluntary placement of a child in foster care lasting longer than thirty days.[24] This proceeding is called a "358a hearing" because it is required by Section 358a of the Social

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18. These obligations are described in Part C(4) of this Chapter.

19. N.Y. Soc. Serv. Law § 384-a(2)(c)(ix) (McKinney 2003).

20. If you believe that the care your child is receiving in foster care does not satisfy the requirements set forth in the Voluntary Placement Agreement, you should first tell your caseworker. Then you or your lawyer, if you have one, should petition the family court judge who signed your child's placement order to review the care the agency is providing for your child and to order the agency to follow the Agreement.

21. The New York City Designation of Religious Preference for Children (Form CM-309) is similar to forms used throughout the state. You can get the appropriate form from the agency handling your case.

22. N.Y. Comp. Codes R. & Regs. tit. 18, § 430.11(c)(2)(iii) (2009).

23. See Appendix IV of the *JLM* for addresses of legal services organizations.

24. N.Y. Soc. Serv. Law § 358-a(1)(a) (McKinney 2003).

Services Law. DSS is responsible for filing a petition with the court asking for approval of the placement. The petition will include a notice "in conspicuous print"—which means it must be clear, obvious, and not in very small print—stating that if a child remains in foster care for fifteen of twenty-two months, the agency may be required to file for a termination of parental rights.[25]

The judge must give you notice of the hearing. In order to be present at the hearing, you should write a letter, similar to the one shown in Appendix A of this Chapter, asking the court to instruct the prison to bring you to the hearing.

Your caseworker may ask you to sign a waiver of your right to attend.[26] A waiver means that you formally agree to give up a particular right. *You do not have to sign a waiver.* Sometimes people choose to waive rights as part of a deal with the state, because they get something from the state in return for signing the waiver. If you do choose to sign a waiver of your right to attend the hearing, the court does not have to make sure that you can attend the hearing. Generally, signing a waiver is not a good idea because you give up the valuable opportunity to inform the judge of your problems or questions during the voluntary placement process.

You have a right to a lawyer for the hearing. If you cannot afford your own lawyer, the judge will assign you a free lawyer when you are brought to court for the hearing.[27] If you are using your own lawyer, make sure to contact him in advance about the proceeding. A lawyer is meant to be your voice during these proceedings, so if you have any questions or requests or if you are concerned about something, be sure to ask your lawyer.

At the hearing, the court is supposed to ensure that your child will be put in foster care only if the "best interest and welfare of the child would be promoted by the removal of such child from such home."[28] This means that foster care is appropriate only when a child would not otherwise receive proper care, nurturing, or treatment.[29] DSS must try to find relatives who can take care of your child.[30] This arrangement, called "kinship foster care," is not the same as the private placement discussed in Part B. Kinship foster care is explained in Part C(1)(d) of this Chapter. Apart from trying to find relatives, DSS must try to find and record information about your child's other parent.[31]

The judge must also verify that you *knowingly* and *voluntarily* signed the Voluntary Placement Agreement.[32] If you have any questions or problems regarding the placement process or the Voluntary Agreement, you should make them known at this hearing.

Any problems with the agency can be communicated to the judge at the hearing. Such problems might include the following situations: the agency refuses to add your requests to the Voluntary Placement Agreement; there have not been enough (or any) visits between you and your child; the agency has broken many of its promises; or it is difficult for you to communicate with the agency (in other words, the caseworker does not return your calls, the prison will not allow you to make calls, etc.). If you have signed a waiver and do not attend a 358a hearing, the judge will review the papers submitted by DSS, including the Voluntary Placement Agreement, and will generally approve the Agreement as you signed it.[33]

(c) Court Review of Placement—Permanency Hearings

(i) Automatic Review

Once a placement has been approved in a 358a hearing, the agency is required to check in with the family court from time to time for review of your child's situation in foster care. The agency must report to the family court within eight months of the date your child was removed from his home and then every six months thereafter.[34] The court may order a review at any time.[35] Also, you can ask the court for a review at

25. N.Y. Soc. Serv. Law § 358-a(2)(a) (McKinney 2003).
26. N.Y. Soc. Serv. Law § 358-a(5) (McKinney 2003).
27. N.Y. Fam. Ct. Act § 262(a)(iv) (McKinney 2010). See Part H of this Chapter for more on your right to counsel.
28. N.Y. Soc. Serv. Law § 358-a(5) (McKinney 2003); N.Y. Soc. Serv. Law § 358a(1)(a) (McKinney Supp. 2010).
29. N.Y. Comp. Codes R. & Regs. tit. 18, §§ 430.8(a)(2), 430.10(c) (2006).
30. N.Y. Soc. Serv. Law § 384-a(1-a) (McKinney 2010).
31. N.Y. Soc. Serv. Law § 384-a(1-b) (McKinney Supp. 2010).
32. N.Y. Soc. Serv. Law. § 358-a(3)(a) (McKinney 2003).
33. N.Y. Soc. Serv. Law. § 358-a(5) (McKinney 2003).
34. N.Y. Fam. Ct. Act § 1089(a)(2)–(3) (McKinney Supp. 2010).
35. *See* N.Y. Fam. Ct. Act § 1088 (McKinney Supp. 2010) (providing the family court with the express power to

any time.[36] If a court decides for any of the reasons listed in the statute[37] that the agency does not have to make reasonable efforts to reunite your family, then a permanency hearing must take place within thirty days.[38] See Part C(4)(a) of this Chapter for a discussion of "reasonable efforts."

These reviews are called "permanency hearings," because they decide a permanent plan for your child.[39] A permanent plan considers (1) whether your child will be returned to you, placed with a relative, or released for adoption; (2) whether termination of parental rights will be filed against you; and (3) what services have been provided to reunite the family where appropriate.[40] The state may create an alternative permanent placement and must use reasonable efforts to find a placement if family reunification is not in the child's best interests.[41]

The court must notify you at least fourteen days before each of these hearings, and you have a right to attend.[42] As with the 358a hearing, you must ask the judge to order the prison to take you to the permanency hearing. You or your lawyer, if you have one, should write to the judge as soon as you know when your hearing is scheduled to request such an order. Information on getting to court is included in Part H of this Chapter. Also see the sample letter included in Appendix A of this Chapter.

At the hearing, explain to the judge any problems you have with the foster care your child is receiving.[43] By law, the judge has to look at what is in the "best interests" of the child, so if there is a problem, you should try to explain how your child's "best interests" are suffering.[44] The judge can order DSS to provide a variety of services for you and your child, including arranging additional visits.[45]

(ii) Requested Review

After the initial permanency hearing, you do not need to wait for another scheduled hearing to complain about your child's foster care. You may request a permanency hearing to address problems that arise between scheduled hearings and cannot be resolved with your caseworker.[46] In a motion to the court, you must explain why you need a new hearing, the type of problem you are having, the steps you have taken to resolve the problem, and what changes you believe are necessary. You may also file a motion to force the agency to obey court orders or to live up to agreements it has made with you.

(d) Kinship Foster Care

DSS will sometimes approve close relatives to become "kinship foster parents."[47] If you have a relative who would like to care for your child, you may be able to arrange for kinship foster care. The technical name for this arrangement is "approved relative home."[48] Under this program, your child lives with your relative.

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rehear the case whenever it deems rehearing necessary or desirable).

36. *See* N.Y. Fam. Ct. Act § 1088 (McKinney Supp. 2010) (providing the family court with the power to rehear the case when another party to the case makes a motion to do so).

37. N.Y. Soc. Serv. Law § 358-a(3)(b) (McKinney 2003).

38. N.Y. Soc. Serv. Law § 358-a(3)(b) (McKinney 2003).

39. N.Y. Fam. Ct. Act § 1012(k) (McKinney Supp. 2010).

40. See N.Y. Fam. Ct. Act § 1089(c) (McKinney Supp. 2010) for a full description of what needs to be included in the permanency plan.

41. N.Y. Soc. Serv. Law § 384-b(1)(a)(iv) (McKinney 2010).

42. N.Y. Fam. Ct. Act § 1089(b)(1)(i) (McKinney Supp. 2010).

43. Although you may wait until your court appearance to voice your complaints, you should try to write out any problems you have with your child's foster care ahead of time. You can discuss your concerns with your lawyer, if you have one. You may mail the concerns to the judge, DSS, or the child's attorney. You should also take a copy of the list of complaints to court. You or your lawyer should mention your complaints in court so that they are not overlooked.

44. The court must determine how to protect the best interests of the children placed in the state's care by a voluntary placement agreement. *See, e.g.*, Nicholson v. Scoppetta, 3 N.Y.3d 357, 376–81, 820 N.E.2d 840, 850–54, 787 N.Y.S.2d 196, 206–10 (N.Y. 2004) (determining whether the removal of the child was in the child's "best interests," according to the legislative requirement).

45. N.Y. Fam. Ct. Act § 1089(d)(2)(viii)(F) (McKinney Supp. 2010).

46. N.Y. Fam. Ct. Act § 1088 (McKinney Supp. 2010).

47. A relative may be approved as a foster parent if DSS believes that living with him is the best way to maintain continuity in the child's environment.

48. This arrangement is approved by N.Y. Soc. Serv. Law §§ 371, 375 (McKinney 2003). "Approved relative home" is defined in N.Y. Comp. Codes R. & Regs. tit. 18, § 443.1 (2008).

However, unlike in the private placement described above in Part B, DSS has legal custody of children in kinship foster care, just as it does in any foster care arrangement.

ASFA has made it more difficult for people with certain kinds of criminal records to be approved as foster parents. The ASFA restrictions may affect your decision to place your child in kinship foster care because the relatives you choose may no longer be allowed to be foster parents. In New York, a criminal history check will be performed on potential foster parents and on anyone over eighteen who is living in the home before the home can be certified as a foster home.[49] The criminal history check will also be repeated every time the foster parents apply for re-certification.[50]

A prospective foster parent can be denied for several reasons, including:

(1) Conviction at any time of a felony involving child abuse or neglect, spousal abuse, a crime against a child including child pornography, a violent crime including rape, sexual assault, or homicide;[51] or
(2) Felony conviction within the past five years for assault, battery, or a drug-related offense;[52] or
(3) Charge for an above-listed crime that has not been resolved yet;[53] or
(4) Felony conviction that may be for an above listed crime, when it is unclear whether such a crime was involved.[54]

If a prospective foster parent has been convicted of one or more of the crimes listed above, the foster care agency will remove any foster child living with the foster parent.[55]

(1) Requests to become a foster parent can also be denied if:
(2) The prospective foster parent has a criminal history consisting of crimes other than those specified above;[56] or
(3) Any other person over eighteen living in the proposed foster home has a criminal history (including a criminal charge or conviction).[57]

If any of these factors are found, the agency will check the safety of the home, including whether the person who committed the crime lives there, the amount of contact that person has with the child, and the nature of the charge.[58] Removing the child may be required to protect the child's health and safety.[59]

A disadvantage of kinship foster care in comparison with private placement is that DSS will be involved in your relationship with your child. DSS could decide to have your child removed from your relative's home to another foster home. It also means that you will not be able to simply ask your relative to return your child when you are released from prison, but must instead petition DSS to get custody of your child again.[60] Also, DSS may attempt to terminate your parental rights so that your relative or another person can adopt the child.[61]

An advantage of kinship foster care is that your child's caretaker is eligible for the same foster care payments available to unrelated foster care parents.[62] You and the potential kinship foster parent should consult DSS together about the funds available to him. Another advantage is DSS's obligation to support you with services, including providing regular visitation, parenting training, counseling for you or your child, and other services. For incarcerated parents, DSS's duty to you is generally limited to services offered by your facility, although your child is entitled to any services offered by the agency.

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49. N.Y. Soc. Serv. Law § 378-a(2)(a) (McKinney 2010).
50. N.Y. Soc. Serv. Law § 378-a(2)(a) (McKinney 2010).
51. N.Y. Soc. Serv. Law § 378-a(2)(e)(1)(A) (McKinney 2010).
52. N.Y. Soc. Serv. Law § 378-a(2)(e)(1)(B) (McKinney 2010).
53. N.Y. Soc. Serv. Law § 378-a(2)(e)(2)(A) (McKinney 2010).
54. N.Y. Soc. Serv. Law § 378-a(2)(e)(2)(B) (McKinney 2010).
55. N.Y. Soc. Serv. Law § 378-a(2)(h) (McKinney 2010).
56. N.Y. Soc. Serv. Law § 378-a(2)(e)(3)(A) (McKinney 2010).
57. N.Y. Soc. Serv. Law § 378-a(2)(e)(3)(B) (McKinney 2010).
58. N.Y. Soc. Serv. Law § 378-a(2)(h) (McKinney 2010).
59. N.Y. Soc. Serv. Law § 378-a(2)(h) (McKinney 2010).
60. Petitioning for return of your child is discussed in Part C(5) of this Chapter.
61. Involuntary termination of parental rights is discussed in Part D of this Chapter.
62. Before relatives can get such payments, the DSS Commissioner must complete a foster care certification study of the relative's home. But, in an emergency, a relative can receive funds immediately. The caretaker can also receive Medicaid for the child but cannot get other forms of public assistance because foster care payments would replace them.

DSS should support your wishes for your child to be in kinship foster care because it is obligated to search for a relative to take care of your child.[63] If you disapprove of a particular relative that DSS is considering, you can tell the judge your concerns and ask that your child be placed with a different family member. At the hearing, you will have to convince the judge that the placement DSS wishes to make is not in the best interests of your child or that the individual being considered is unfit to care for your child. If you can arrange for the relative of your choice to attend the court hearing, the judge may have an opportunity to meet him.

2. Involuntary Placement

In some circumstances, your child may be placed in foster care without your consent. This is known as "involuntary placement." Involuntary placement can occur prior to, or as a result of, your incarceration. If you do not consent in writing to the removal of your child and a preliminary hearing has not yet been held, your child can be removed only if there is an *immediate* danger to his health or life. In such an emergency, the court may order removal without a hearing, or DSS may remove your child before receiving a court order.[64]

Involuntary placement does not mean that your child has been permanently taken from you. However, in order to avoid termination of your parental rights, you must fulfill certain obligations and demonstrate some responsibility for your child. The state also has a duty to make "diligent efforts"[65] to foster a close relationship between you and your child and to help you fulfill your duties as a parent so that you can get custody of your child back. ASFA has created some exceptions to the State's duty to show "diligent efforts." These obligations, rights, and exceptions are discussed below in Part C(4)(a) of this Chapter.

(a) Preliminary Hearing

DSS must petition the family court to hold a "preliminary hearing" during which the judge will decide whether your child must be removed from your home temporarily. The judge will look to see if there is an immediate risk to your child's health or life.[66] This hearing must be held the day after the petition to hold the hearing is filed.[67] If your child has already been removed, the judge will determine whether the child should remain in care outside of the home by also looking to see if there is an immediate risk to your child's health or life.[68] As in voluntary foster care placements, the state must search for a suitable relative to take your child. The court can order DSS to locate your child's other parent and any relatives and to inform them of the procedure for seeking custody or becoming foster parents of your child.[69]

DSS must try to notify you of the petition and proceedings, and you are allowed to attend them. However, the judge may proceed with the hearing even if you are not present.[70] If your child is removed, a date will be set for a permanency hearing.[71] It is important for you to note this date, which will be included in the court's order removing your child.

(b) Fact-Finding Hearing

After the preliminary hearing, the court will hold a full hearing to decide whether or not your child was neglected or abused, or is at risk of being neglected or abused.[72] This part of the case is called the "fact-

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63. New York state law requires that the state attempt to locate adequate living arrangements with a relative or friend of yours before it places your child with strangers. N.Y. Comp. Codes R. & Regs. tit. 18, § 430.10(b)(2) (2011); *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 430.11(c)(1)(i) (2001) (temporary Emergency Regulation in effect until April 1, 2011, describing continuity in the child's environment); N.Y. Soc. Serv. Law § 384-a(1-a) (McKinney 2003) (describing voluntary placement); N.Y. Fam. Ct. Act § 1017 (McKinney 2009) (describing involuntary placement).

64. N.Y. Fam. Ct. Act §§ 1022(a)(1)(B), 1024(a) (McKinney 2009).

65. See Section 4(a) of this Part for examples of what DSS must do in order to meet the "diligent efforts" standard.

66. N.Y. Fam. Ct. Act § 1027(a)(i) (McKinney 2009).

67. N.Y. Fam. Ct. Act § 1027(a)(i) (McKinney 2009).

68. N.Y. Fam. Ct. Act § 1027(b)(i) (McKinney 2009).

69. N.Y. Fam. Ct. Act § 1017 (McKinney 2009).

70. N.Y. Fam. Ct. Act §§ 1023, 1027(a)(iv), (b) (McKinney 2009).

71. N.Y. Fam. Ct. Act § 1027(h) (McKinney 2009); see also Subsection (d) of this Section, "Permanency Hearings."

72. A child is "neglected" if he has suffered or is in danger of suffering physical, mental, or emotional harm because the parent cannot or will not provide the proper care. N.Y. Fam. Ct. Act § 1012(f) (McKinney 2009). A child is "abused" when the parent causes, allows, or creates a risk of serious emotional or physical injury that is likely to cause death or serious physical harm, and the parent does not do so accidentally. A child is also considered abused when a

finding hearing." Since you will not be in the home while you are in prison, the state can easily show that your child is at risk of neglect, unless you have arranged for a relative or a friend to take care of your child in your absence.

The judge must make sure that you are present at the hearing or that every reasonable effort has been made to notify you of it.[73] If you choose not to appear, the court will proceed without you.[74] If you do not have money to retain a lawyer, the judge must appoint a free lawyer to represent you at this hearing (and the later dispositional and permanency hearings) and must also appoint a lawyer to represent your child.[75]

To ensure you will be at the hearing, you or your lawyer should ask the judge to order the prison, using an Order to Produce, to bring you to court that day. Appendix A has a sample letter requesting that the judge submit an Order to Produce to your prison. If, because of your incarceration, you cannot be at the hearing on the day it is scheduled, you or your lawyer should explain that to the judge. The judge should change the date to make sure you can be there.

(c) Dispositional Hearing

If the court makes a finding of abuse or neglect, it will hold another hearing, called the "dispositional hearing." This hearing may take place directly after the fact-finding hearing,[76] but it usually happens after an adjournment (when the court postpones the hearing until a later date). You and your lawyer have the right to participate in the dispositional hearing, and the judge cannot proceed without proof that the agency actually notified you of the hearing. After hearing the case, the judge can make several rulings: return your child to you, adjourn the case for several months with the intention of dismissing the case later, or order placement of your child in foster care.[77]

The judge should inform you that if you fail either to maintain contact with your child or plan for your child's future, your parental rights may be terminated. Your duties as the natural parent are discussed in Part (C)(4)(b), and termination of parental rights is discussed in Part D of this Chapter.

Also, at the dispositional hearing or at the permanency hearing, (discussed in Subsection (d) of this Section), the court can order the foster care agency to make "diligent efforts" to "encourage and strengthen the parental relationship."[78] For example, the judge can order the agency to arrange visits between you and your child by bringing your child to visit you. You or your lawyer should ask the judge to order this visitation because visiting with your child will strengthen your relationship and will help you when you ask for your child to be returned to you. The judge can also order the agency to assist you with housing, employment, counseling, medical care, psychiatric treatment, and any other appropriate services that your prison facility can provide. The dispositional order:

(1) will include a description of the visitation plan;
(2) will state that you have a right to attend planning conferences (with a lawyer) about your child's foster care and that you should be told when those meetings will occur;[79] and
(3) must contain a notice that if your child remains in foster care for fifteen of the most recent twenty-two months, the agency may be required to file a termination of your parental rights.[80]

You have a right to a copy of this order, so remember to ask for a copy if one is not provided.[81]

(d) Permanency Hearings

The agency with custody of your child must conduct a permanency hearing within eight months of your child's removal.[82] The permanency hearing should have been scheduled during the original hearing when it

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parent commits or allows to be committed a sex offense against the child. N.Y. Fam. Ct. Act § 1012(e) (McKinney 2009).

73. N.Y. Fam. Ct. Act § 1041 (McKinney 2009).

74. N.Y. Fam. Ct. Act § 1042 (McKinney 2009). If you did not willfully refuse to appear at the hearing, you may petition the court for a rehearing, which the court should grant.

75. N.Y. Fam. Ct. Act §§ 249 , 262 (McKinney 2009).

76. N.Y. Fam. Ct. Act § 1047(a) (McKinney 2009).

77. N.Y. Fam. Ct. Act § 1052(a) (McKinney 2009).

78. N.Y. Fam. Ct. Act § 1089(d)(2)(viii)(F) (McKinney Supp. 2007).

79. N.Y. Fam. Ct. Act § 1089(d)(2)(vii)(B) (McKinney Supp. 2007).

80. N.Y. Fam. Ct. Act § 1089(d)(2)(vii)(D) (McKinney Supp. 2007).

81. N.Y. Fam. Ct. Act § 1089(e) (McKinney Supp. 2007).

82. N.Y. Fam. Ct. Act § 1089(a)(2) (McKinney Supp. 2007). The statute states that the permanency hearing must take place "no later than six months from the date which is 60 days after the child was removed from his or her home …

was decided that your child would be removed, and it is assumed you will already know this date.[83] Still, the law requires that you be re-notified of the date of the permanency hearing at least fourteen days in advance.[84] The court has to hold a permanency hearing to decide what the permanency plan for your child should be.[85] The court will also examine whether you and the agency have been going along with the plan for your child and whether the plan should be adjusted because of changed circumstances.[86] In considering whether extension of placement is in the best interests of your child, the court will look at the permanency goal.[87] As a result of the ASFA, the statute was changed to allow alternative permanent plans to be made for the child, like discharge to a "fit and willing relative."[88]

As the natural parent, you are a necessary party to the hearing, and you have a right to be present and to have the court appoint a lawyer to represent you. It is very important to attend the permanency hearing. You should receive both a notice of the hearing and a copy of the agency's permanency hearing report,[89] a document that includes an update on your child's well-being and on the agency's recommendation for your child's future placement.[90]

If you are released from prison and want your child back immediately, or before the next permanency hearing, you should request that the agency return your child. If the agency does not fulfill your request within thirty days, you can move the court to terminate your child's placement.[91] But, this motion does not mean that the court will return your child immediately. The court will first have a hearing to determine whether your child should be returned.

3. Working with Foster Care Agencies

(a) Placement with an Agency

Soon after your child enters the foster care system, responsibility for the case may be transferred from DSS to an authorized private foster care agency. This transfer is often done in New York City cases, but usually not in the rest of New York state. The transfer does not mean your child will be moved but only that an agency other than DSS will supervise the placement.

If your child is placed with a private agency, you should be told the name of the agency as well as the agency caseworker assigned to your child. Until you receive this notice, you should maintain contact with the caseworker from DSS.[92] If you do not hear from the new caseworker, write to DSS and the new agency to let them know. You should show them that you are concerned about your child's well-being and that you want to be kept informed of your child's whereabouts. The more interest and concern you show for your child, the less likely it is that DSS will seek, or the court will approve, termination of your parental rights. It may also make the foster care agency more open to using one of the ASFA exceptions to the requirements for terminating parental rights. Termination of parental rights is discussed fully in Part D of this Chapter.

[and] shall be completed within thirty days of commencement." Adding the six months and 60 days requirement means that the hearing must happen within eight months from the day your child was removed from your home.

83. N.Y. Fam. Ct. Act § 1089(a)(2) (McKinney Supp. 2007).

84. N.Y. Fam. Ct. Act § 1089(b)(1)(i) (McKinney Supp. 2007); *see In re* Frederick W., 120 Misc. 2d 335, 342, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983) (requiring dismissal of agency's petition to extend the placement of the child where the agency failed to give notice to parent).

85. N.Y. Fam. Ct. Act § 1089(a) (McKinney Supp. 2007).

86. N.Y. Fam. Ct. Act § 1089(c)(5)(i) (McKinney Supp. 2007).

87. N.Y. Fam. Ct. Act § 1089(c)(1) (McKinney Supp. 2007).

88. N.Y. Fam. Ct. Act § 1089(c)(1)(iv) (McKinney Supp. 2007).

89. N.Y. Fam. Ct. Act. § 1089(b)(1)(i) (McKinney Supp. 2007); *see also In re* Three Children Free for Adoption, 138 Misc. 2d 584, 586, 525 N.Y.S.2d 135, 137 (Fam. Ct. Delaware County, 1988) (dismissing petition for a permanency hearing as it would require the notice of parents even for children freed from adoption); *In re* Frederick W., 120 Misc. 2d 335, 341–42, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983) (dismissing petition to extend placement of child for failure to serve parent with petition).

90. N.Y. Fam. Ct. Act § 1087(e) (McKinney Supp. 2007); *see also In re* Frederick W., 120 Misc. 2d 335, 341–42, 465 N.Y.S.2d 828, 833 (Fam. Ct. Queens County 1983).

91. N.Y. Fam. Ct. Act § 1062 (McKinney 2009). You or your lawyer should go to the Petition Room at the family court. Someone there will help you put your case on the court calendar, which schedules a hearing to determine whether your child will be returned to you.

92. *See* N.Y. Soc. Serv. Law § 384-a(2)(c)(v) (McKinney 2003) (describing parents' obligations when they have a child in foster care).

(b) Development of a Service Plan

When you are assigned a caseworker from DSS or a private agency, the caseworker should contact you to arrange a meeting to discuss your child's service plan. However, this is not usually done while you are incarcerated, so you should request a meeting in writing. It may be possible to arrange a conference by telephone. You should also try to keep the agency caseworker informed about programs you are participating in while incarcerated, such as drug treatment or parenting skills classes.

If you and the caseworker are able to meet, you will develop a plan for your child's time in foster care.[93] It is more likely, though, that the agency will develop the plan in your absence. If you voluntarily placed your child in foster care, the Voluntary Agreement Form might be the basis for this plan. The plan:

(1) Will include guidelines for the treatment your child will receive;
(2) Will state that a termination of parental rights proceeding may be filed against you by the agency if your child remains in foster care for fifteen out of twenty-two months;[94]
(3) Will outline the agency's program for helping to reunite you and your child;
(4) Should describe the care and services your child will receive while in foster care;
(5) Should state how often you will receive visits from your child;[95]
(6) Will state what you need to do to get your child back; and
(7) Will list your obligations for working to achieve a permanent home for your child.[96]

It is not always easy to get a copy of the plan. You should request it in writing. If the agency still does not provide you with the service plan for your family, you should inform the DSS case manager immediately in writing, as well as the judge at the next permanency hearing. When you get a copy of the plan, be sure to keep it for your records.

4. Rights and Obligations Under Voluntary or Involuntary Foster Care

Both you and the agency have obligations towards each other and towards your child. If you do not fulfill your obligations, the agency may go to court to try to terminate your parental rights, which means that someone else could adopt your child without your consent. In a termination of parental rights proceeding charging permanent neglect, the agency will first have to prove that it fulfilled its own obligations before the judge will consider ending your parental rights.

(a) The Department of Social Services' ("DSS") Obligations

DSS has certain responsibilities when it takes custody of your child. As previously discussed, its first obligation is to try to find a home for your child with a relative.[97] Again, if you know someone who can take good care of your child and whom your child likes, you can suggest this person or family member to DSS.

If DSS cannot find family members with whom your child might be able to live, it must do the following:

(1) Place your child in a setting that is the most like your home, if possible (for example, in your neighborhood or with someone of the same religion);[98]
(2) Keep a record of your child's progress;[99]
(3) Provide a caseworker who will regularly meet with you, your child, and your child's foster parents and who, with your help, will write a plan for the care of your child;[100]
(4) Make every effort to follow the plan;[101] and
(5) Provide reasonable care for and supervision of the child during the course of the placement.[102]

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93. N.Y. Comp. Codes R. & Regs. tit. 18, § 428.1 (2005).
94. N.Y. Soc. Serv. Law § 384-a(2)(c)(ix) (McKinney 2003).
95. N.Y. Soc. Serv. Law § 384-a(2)(c)(iv) (McKinney 2003).
96. N.Y. Soc. Serv. Law § 384-a(2)(c)(v) (McKinney 2003).
97. N.Y. Soc. Serv. Law § 384-a(1-a)(a) (McKinney 2003 & Supp. 2008); N.Y. Comp. Codes R. & Regs. tit. 18, § 430.10(b)(2) (2010) (describing standard for necessary activities prior to placement); N.Y. Fam. Ct. Act § 1017(1) (McKinney Supp. 2008) (describing DSS obligations for placing children).
98. N.Y. Comp. Codes R. & Regs. tit. 18, § 430.11(c)(1)(i), (d)(1) (2010).
99. N.Y. Comp. Codes R. & Regs. tit. 18, § 428.3(b)(1)(vi) (2010).
100. N.Y. Comp. Codes R. & Regs. tit. 18, § 428.1 (2010).
101. N.Y. Soc. Serv. Law § 384-a (McKinney 2003 & Supp. 2008); N.Y. Comp. Codes R. & Regs. tit. 18, § 428.1 (2010).
102. *See* Andrews v. County of Otsego, 112 Misc. 2d 37, 39, 446 N.Y.S.2d 169, 171 (Sup. Ct. Otsego County 1982)

More importantly, in most cases, DSS has a general legal obligation to make what the law calls "diligent efforts" to encourage a relationship between you and your child, with some exceptions created by ASFA.[103] "Diligent efforts" include:

(1) Keeping you informed of your child's progress;[104]
(2) Making arrangements with your correctional facility for your child to visit you regularly in the facility;[105] and
(3) Providing counseling or other services to resolve problems that may prevent your child's eventual return to you.[106]

The exact meaning of "diligent efforts" will depend on the individual case. The agency may be required to investigate your financial problems, maintain regular contact with you, and inform you that failure to contact and plan for your child may result in a termination of your parental rights.[107] In one case, the court found an agency did not make diligent efforts when it did not help parents satisfy agency requirements for the return of their child. Although the parents did not fulfill the agency's plan, which included finding a suitable home, having the means to support the child, and going to family counseling, the court held the agency should have made efforts to address problems, such as poverty, that kept the parents from fulfilling the requirements.[108] In another case, an agency did not satisfy its statutory requirement when it failed to offer counseling to a child's incarcerated father, made no effort to help the father get visitation rights, and made no attempt to involve the father in his child's life.[109]

In defining "diligent efforts" the highest court of New York has said that the foster care agency must have made "meaningful efforts" to:

(1) Provide you and/or your child with counseling for any problem, such as drug or alcohol abuse, that might be an obstacle to your child's eventual return to you;
(2) Help you find housing or employment;

(holding that a county with custody of a foster care child has a continuing obligation to protect the child's health, safety, and welfare and can be held liable for negligent placement or supervision of a child).

103. N.Y. Soc. Serv. Law § 384-b(7)(f) (McKinney 2003); *see also In re* Sheila G., 61 N.Y.2d 368, 385, 462 N.E.2d 1139, 1148, 474 N.Y.S.2d 421, 430 (1984) (explaining that the agency must make "affirmative, repeated, and meaningful efforts to assist" a parent before initiating a parental rights termination proceeding); *In re* Erika M., 285 A.D.2d 986, 986, 727 N.Y.S.2d 234, 234 (4th Dept. 2001) (dismissing petition for termination of parental rights because agency did not show, by clear and convincing evidence, that it made "diligent efforts" to strengthen the parent-child bond); *In re* Jamie M., 96 A.D.2d 737, 737, 465 N.Y.S.2d 339, 340 (4th Dept. 1983) (finding that the agency failed to make "diligent efforts" to help parents solve the very problems requiring removal of the children and causing the termination proceedings), *aff'd*, 63 N.Y.2d 388, 472 N.E.2d 311, 482 N.Y.S.2d 461 (1984).

104. N.Y. Soc. Serv. Law § 384-b(7)(f)(4) (McKinney 2003); *see also* Seaman's Soc. For Children and Families v. Tanya V., 7 Misc.3d 1021(A), 801 N.Y.S.2d 242, at *3 (Fam. Ct. Richmond County Apr. 12, 2005) (holding that petitioner satisfied the requirement by providing father with "service plan reviews where child's health and progress was discussed").

105. N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney 2003 & Supp. 2008). The agency is also responsible for making arrangements to transport your child to and from the facility to visit with you. *See* Seaman's Soc. For Children and Families v. Tanya V., 7 Misc. 3d 1021(A), 801 N.Y.S.2d 242, at *3 (Fam. Ct. Richmond County Apr. 12, 2005) (holding that "long trip" did not "absolve the Agency's duty to facilitate visitation").

106. N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney 2003 & Supp. 2008) (requiring the agency to coordinate with the prison to provide "rehabilitative services to resolve or correct the problems, other than incarceration itself, that impair the incarcerated parent's ability to maintain contact with the child"); *see also In re* Sheila G., 61 N.Y.2d 368, 373, 462 N.E.2d 1139, 1140–41, 474 N.Y.S.2d 421, 422–23 (1984) (approving dismissal of permanent neglect petition filed by foster care agency where father had made visits regularly, established paternity, and developed a plan to take custody of the child but the agency did not fulfill its "diligent efforts" requirement).

107. *See In re* Shannon U., 210 A.D.2d 752, 753–54, 620 N.Y.S.2d 851, 852 (3d Dept. 1994) (holding that agency was found to satisfy its duty because it had maintained regular contact with parents by phone, mail, home visits, and meetings and had arranged visits, counseling, and parenting classes), *leave to appeal denied*, 85 N.Y.2d 807, 651 N.E.2d 918, 628 N.Y.S.2d 50 (1995); *In re* Suzanne N.Y., 102 Misc. 2d 215, 223, 423 N.Y.S.2d 394, 400 (Fam. Ct. N.Y. County 1979) (dismissing petition for termination of parental rights because the agency failed to assist the mother with her financial problems and inform her of her obligations in order not to lose her child), *rev'd on other grounds*, 86 A.D.2d 556, 446 N.Y.S.2d 81 (1st Dept. 1982), *aff'd*, 54 N.Y.2d 824, 427 N.E.2d 1187, 443 N.Y.S.2d 722 (1981).

108. *See In re* Jamie M., 63 N.Y.2d 388, 394–95, 472 N.E.2d 311, 314, 482 N.Y.S.2d 461, 464 (1984) (dismissing petition for termination of parental rights because the agency failed to show diligent efforts in addressing the unemployment and financial instability of parents).

109. *See In re* Jennifer Ann W., 198 A.D.2d 881, 882, 605 N.Y.S.2d 698, 699 (4th Dept. 1993).

(3) Help you plan for your child's future; and
(4) Provide opportunities for you and your child to have visits.[110]

Until the agency has demonstrated "some attempt" to assist you in these ways, a termination of parental rights should not be granted.[111]

However, ASFA has changed the Department of Social Services' obligation to provide reasonable, and therefore diligent, efforts to preserve the family in some circumstances. In New York, the law states that if an incarcerated parent has failed more than once while incarcerated to cooperate with the agency in its efforts to assist the parent to plan for the future of the child (or in the agency's efforts to plan and arrange visits with the child), then the agency will not have to present evidence that they made "diligent efforts."[112] Additionally, the law states that in making determinations involving reasonable or diligent efforts, "the child's health and safety" is the most important concern.[113] Reasonable efforts should be made to prevent removal of the child or to make it possible for the child to return home safely.[114] Reasonable efforts should also be made if it is in the best interests of the child's health and safety and would probably result in reunification of the parent and child in the near future.

Reasonable efforts to prevent the removal of a child or to reunite a child with the birth family are not required in the following situations:

(1) When a court has determined that the parent has subjected the child to aggravated circumstances, defined in New York as severe or repeated abuse;[115]
(2) When a court has determined that a parent has committed a serious act of violence, including murder or voluntary manslaughter of one of the parent's children; attempted, conspired, or solicited to commit such murder or voluntary manslaughter; or committed assault or aggravated assault on a child under eleven years old, resulting in serious bodily harm to the child or another child of the parent;[116] or
(3) When the parent's rights to one of the child's siblings (including half-siblings) have been terminated involuntarily.[117]

If the agency decides not to make reasonable efforts to reunite your family, it must file a motion in court and the judge will decide if the agency can stop such efforts.[118] You should be notified of and given a copy of the motion. The statute does not say whether a hearing has to be held by the court to decide the matter, nor does it say what the burden of proof to stop reasonable or diligent efforts would be.

(b) Your Obligations as a Parent

Like DSS, you must meet certain obligations while your child is in foster care. If you fail to satisfy these requirements, DSS may claim that you have abandoned or permanently neglected your child and may ask a court to terminate your parental rights. New York law states that a parent who wishes to be reunited with a child in foster care has the following obligations:

(1) To visit with the child;
(2) To plan for the future of the child;[119]

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110. *In re* Sheila G., 61 N.Y.2d 368, 387–88, 462 N.E.2d 1139, 1148–49, 474 N.Y.S.2d 421, 431–32 (1984).

111. *In re* Jamie M., 63 N.Y.2d 388, 395, 472 N.E.2d 311, 314, 482 N.Y.S.2d 461, 464 (1984).

112. N.Y. Soc. Serv. Law § 384-b(7)(e)(ii) (McKinney 2010); *see also In re* Heart Share Human Services of N.Y., 906 N.Y.S.2d 472, 486 (Fam. Ct. Queens County 2010).

113. N.Y. Soc. Serv. Law § 358-a(3)(c) (McKinney 2010).

114. N.Y. Soc. Serv. Law § 358-a(2) (McKinney 2010).

115. N.Y. Soc. Serv. Law § 358-a(12) (McKinney 2010). Severe abuse is defined to include conviction for (1) committing or soliciting murder or manslaughter of another child of the parent or another child for whom the parent is legally responsible; (2) assault against a child less than eleven years old; and (3) conviction for an above crime in any other jurisdiction. N.Y. Soc. Serv. Law § 384-b(8)(a) (McKinney 2010). Repeated abuse is defined to include (1) a finding of abuse against the child, child's sibling, or any other child for whom the parent is legally responsible within the past five years; and (2) a finding that diligent efforts by the agency to encourage the parental relationship and to rehabilitate the parent have been unsuccessful and are "unlikely to be successful in the foreseeable future." N.Y. Soc. Serv. Law § 384-b(8)(b) (McKinney 2010).

116. N.Y. Soc. Serv. Law § 358-a(12) (McKinney 2010).

117. N.Y. Soc. Serv. Law § 358-a(3)(b)(6) (McKinney 2010).

118. N.Y. Soc. Serv. Law § 358-a(1) (McKinney 2010).

119. For a definition of planning for the future of the child, see N.Y. Soc. Serv. Law § 384-b(7)(c) (McKinney 2010)

(3) To consult with the foster agency about the child's foster care plan;
(4) To contribute financially to the support of the child, if the parent is able;
(5) To inform the agency of the parent's address every six months, even if it remains the same, and to inform the agency immediately of any change of name or address; and
(6) To cooperate with the agency.[120]

The courts interpret these requirements with an eye to both "the particular facts and [the] totality of circumstances."[121] Thus, the court will look at the facts of your particular case when deciding whether you are living up to your obligations. Also, the law says that, at the very least, an incarcerated parent has to "cooperate with [the agency] in its efforts to ... plan for the future of the child." [122] If an incarcerated parent on more than one occasion fails to cooperate or has failed to inform the agency of his address for six months, the agency does not have to continue making diligent efforts to preserve the family, including providing for visitation.[123]

If you want to retain your parental rights, you should make every effort to fulfill your obligations. In a termination proceeding, DSS has the burden of proof to show, by clear and convincing evidence, that you failed to fulfill your obligations.

(i) Visiting with Your Child

The law recognizes that incarcerated parents may have a difficult time arranging to visit with their children and planning for their children's futures. It will not be held against you if you cannot visit with your child as often as you would like or if the agency fails to provide you with visits.[124] Remember, though, that visiting regularly is one of the most effective ways to maintain a healthy relationship with your child and to avoid termination of your parental rights. It is generally accepted that visitation and other parental contacts, such as letters and phone calls, are in the best interests of the child.

Not visiting with your child can be proof of abandonment or permanent neglect and can lead to termination of your parental rights. For example, one court held that a parent who failed to substantially maintain contact with her children during a period of over one year had not lived up to her foster care obligations.[125] You should try very hard to maintain contact with your child. Whether your child is in the custody of a relative, a friend, your ex-spouse, or in foster care, that person should bring your child to visit you.[126] Your parental rights are at stake, so make sure that you continuously try to visit with your child even if the foster parents or agency are making it more difficult for you to see your child. If the judge sees that you did all that you could to try and maintain contact with your child, it will help in regaining custody of your child when you are released. Some prisons have programs to help prisoners keep in contact with their children.[127] You should look into any such programs available at your facility and tell your caseworker that you and your child wish to participate in the programs.

The foster care agency has a legal duty to make "diligent efforts" to encourage frequent and regular visits between you and your child.[128] The agency is typically under an obligation to provide biweekly visits if

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and the discussion in Part C(4)(b)(ii) below.

120. N.Y. Soc. Serv. Law §§ 384-a(2)(c)(v), 384-b(5), 384-b(7) (McKinney 2010).

121. *In re* Orlando F., 40 N.Y.2d 103, 111, 351 N.E.2d 711, 716, 386 N.Y.S.2d 64, 68 (N.Y. 1976) (holding that finding of permanent neglect and termination of parental rights was appropriate where mother maintained contact with son but failed to plan for his future by not getting stable housing for three years).

122. N.Y. Soc. Serv. Law § 384-b(7)(e)(ii) (McKinney 2010).

123. N.Y. Soc. Serv. Law § 384-b(7)(e) (McKinney 2010).

124. N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney 2010).

125. *See In re* Comm'r. of Soc. Servs., 84 Misc. 2d 253, 258–59, 376 N.Y.S.2d 387, 393 (Fam. Ct. Ulster County 1975); *see also In re* I.R., 153 A.D.2d 559, 561, 544 N.Y.S.2d 216, 217–18 (2d Dept. 1989) (explaining that incarceration alone does not excuse a parent from maintaining contact with his child).

126. *See* Wise v. Del Toro, 122 A.D.2d 714, 714–15, 505 N.Y.S.2d 880, 881 (1st Dept. 1986) (reversing denial of visitation to an incarcerated father because he did not have the opportunity to present evidence and because incarceration alone does not make visitation inappropriate); R.J. v. D.J., 133 Misc. 2d 883, 887, 508 N.Y.S.2d 838, 841 (Fam. Ct. Broome County 1986) (holding that while incarceration alone does not prevent visitation with parent's child, here frequent visits were unnecessary because of stress to the mother who had to take the child to visits).

127. You may, for example, be eligible to apply for the Family Reunion Program ("FRP") if it is offered by your correctional facility. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 220.2 (2010).

128. N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney 2003 & Supp. 2010).

the permanency plan for the child is returning the child to you (or "reunification").[129] The agency must provide financial assistance, arrange transportation, or do anything else in its power to ensure you and your child meet.[130] A court may even order that you be allowed to visit with your child in a different facility if that will make it easier for your child to visit you, but this will generally be a day trip with a guard and not a permanent arrangement.[131]

Because prisons generally restrict visitation hours, it may be difficult for a caseworker to arrange for your child to meet with you in prison. If you are having difficulty arranging visits, remember that the law requires both the caseworker to set up visits and corrections officials to cooperate with the caseworker in making suitable visitation arrangements.[132] Prison officials do not have to set up visits between you and your child outside of your correctional facility unless it is "reasonably feasible" (not very difficult or inconvenient) and is in the best interests of your child.[133]

A court can also determine that visitation is harmful to the child's welfare and order that no visits occur. In New York, "[t]he denial of visitation to a natural parent is a drastic remedy and should be done only where there are compelling reasons and substantial evidence that such visitation is detrimental to the children's welfare."[134] This means there has to be an extremely important reason why visits would be harmful to your child, and the agency must be able to prove that such a reason actually exists and that it is truly harmful. Also, if visitation is not permitted, then the fact that you have not visited with your child cannot be the basis for a permanent neglect or abandonment proceeding.[135]

(ii) Planning for Your Child

Courts recognize that your ability to participate in your child's upbringing is limited because you are incarcerated. Nevertheless, they still require that you think ahead and plan for your child. This may include finding a home for your child among friends or relatives or preparing yourself for reunification with your child.

According to one parental rights specialist, plans should include the following:

(1) How you will support yourself and your child after your release (for example, by getting public assistance or finding a job);
(2) Where you and your child will live;
(3) Where your child will go to school;
(4) How you will provide for your child's medical needs (for example, with Medicaid);
(5) What kind of religious upbringing, if any, you want for your child;
(6) Who will watch your child if you are out of the house; and
(7) How you will provide for any special needs your child may have.[136]

It is important that you plan ahead for how you will appropriately care for your child after your release from prison. This planning will be viewed as a sign that you care about child and have an interest in being his parent.

To prepare yourself as a parent, you should take part in any parenting courses available at your institution, attend vocational training classes that will improve your chances of getting a job, and join drug

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129. N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(d)(1)(i) (2010).

130. N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(d)(1) (2010).

131. *See In re* Gadson, 124 Misc. 2d 1024, 1026–27, 478 N.Y.S.2d 498, 500 (Fam. Ct. Onondaga County 1984) (permitting visitation at a facility different from the one where parent was incarcerated because it was in the best interests of the child, the alternate facility allowed for meaningful visitation, and transportation was feasible).

132. N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney 2010); N.Y. Correct. Law § 619 (McKinney 2003).

133. N.Y. Soc. Serv. Law § 384-b(7)(f)(2) (McKinney 2010).

134. Parker v. Ford, 89 A.D.2d 806, 807, 453 N.Y.S.2d 465, 466 (4th Dept. 1982) (holding that petitioner father, despite alcohol abuse, was improperly denied supervised visitation, where there was no evidence that supervised visitation would be detrimental to the child's welfare). *But see* Sullivan County Dept. of Soc. Servs. v. Richard C., 260 A.D.2d 680, 682–83, 687 N.Y.S.2d 470, 472 (3d Dept. 1999) (denying visitation between father and child where psychologist and child's therapist recommended that visits be suspended until child developed the strength to deal with family problems, since child consistently showed regression after contact with father).

135. N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney 2010).

136. Philip M. Genty, Memorandum for Incarcerated Parents with Children in Foster Care 3 (1988) (on file with the *Columbia Human Rights Law Review*).

or alcohol rehabilitation classes if necessary or ordered by a court. You should make every effort to participate in programs that your caseworker suggests.

It is also important to understand that if you are incarcerated for an extended period of time, arranging long-term foster care (as opposed to adoption) may *not* be considered an acceptable plan for your child's future. The state will not excuse you from the responsibility of planning for your child's future just because you are incarcerated.[137] In such a situation the state has the authority to terminate your parental rights.

(iii) Contact with Your Child and the Foster Care Agency

In addition to visiting with your child whenever you can, you should maintain contact by sending letters, birthday and holiday cards, and gifts to your child. If your child is too young to read, draw a picture or send a note that someone else can read aloud. These actions will show the court that you are interested in, and are planning for, your child's future and that you have made an effort to fulfill your foster care obligations. You should also contact your caseworker regularly both to inform him of your progress in prison and to ask about your child. If you fail to keep the agency informed of your address for six months or more, even if the address remained the same, the agency is not required to make diligent efforts to encourage and strengthen the relationship between you and your child.[138] Keep a record of all communications with your child and your caseworker, such as copies of letters and cards and a list of phone calls you make. Keeping accurate records is very important because if the agency ever petitions to terminate your parental rights, you will have proof that you were, in fact, fulfilling your obligations.

5. Assuming Care of Your Child After Release

If you voluntarily place your child in foster care, your Voluntary Placement Form may include a specific release date for your child. In that case, the agency must return the child to you on that date.[139] If you will still be incarcerated on the release date specified in the Voluntary Placement Form, you should inform your caseworker. A new release date can be established, and your child can remain in foster care until then.[140]

You may wish to have your child returned earlier than the date listed on the Voluntary Placement Form. If so, send a written request to the agency stating the new date of return and your reasons for changing the date.[141] The agency may either return the child or, within ten days, deny your request.[142] If your request is denied, you can challenge the decision in court.[143]

If the Placement Form does not mention a specific release date, you can request the return of your child at any time by writing a letter to the agency. The agency must return your child to you within twenty days or get a court order extending the care, in which case the agency probably will bring neglect proceedings.[144] Generally, the agency will have to prove that you would not be able to provide for your child—meaning that your child would be at risk of neglect or abuse—before it can get an order extending your child's care.

If you did not voluntarily place your child in foster care, but were forced to do so by the state involuntarily, you may file a motion with the court to terminate the involuntary placement.[145] However, you may file the motion with the court only after you have first applied to the agency for a termination of the placement and were denied.

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137. *In re* Gregory B., 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (upholding termination of parental rights for incarcerated parents who made arrangements for long-term foster care until children were no longer minors); *In re* "Female" V., 21 A.D.3d 1118, 1119, 803 N.Y.S.2d 636, 637–38 (2d Dept. 2005) (upholding termination of parental rights for an incarcerated father who, among other things, "was unable to provide any 'realistic and feasible' alternative to having" his children remain in foster care until they became adults or he was released from prison (quoting N.Y. Soc. Serv. Law § 384-b(7)(c) (McKinney 2010))).

138. N.Y. Soc. Serv. Law § 384-b(7)(e)(i) (McKinney 2010).

139. N.Y. Soc. Serv. Law § 384-a(2)(a) (McKinney 2010).

140. *See* N.Y. Soc. Serv. Law § 384-a(3) (McKinney 2010) (describing how to amend a Voluntary Placement Form).

141. N.Y. Soc. Serv. Law § 384-a(2)(a) (McKinney 2010). Valid reasons for changing the date of your child's release from foster care might include a shorter prison sentence than originally anticipated or your decision to place your child with a relative or friend.

142. N.Y. Soc. Serv. Law § 384-a(2)(a) (McKinney 2010).

143. N.Y. Soc. Serv. Law § 384-a(2)(a) (McKinney 2010); *see also* N.Y. Soc. Serv. Law § 358-a(8) (McKinney 2010) (pointing out that any order by a family court can be appealed pursuant to Article 11 of the Family Court Act).

144. N.Y. Soc. Serv. Law § 384-a(2)(a) (McKinney 2010).

145. *See* N.Y. Fam. Ct. Act § 1062 (McKinney 2009).

Whether your child has been placed in foster care voluntarily or involuntarily, you may be eligible for assistance from DSS once you are released from prison and have regained custody of your child. After your release, DSS must provide supportive and rehabilitative services, called "preventive services," to you and your family if there is a serious risk that you cannot care for your child and that he will be put in foster care again.[146] You should discuss getting additional assistance with your caseworker *before* your release from prison. If you fail to do this, and then return home and realize you need additional assistance, you still have an opportunity to discuss this with your caseworker afterwards because your caseworker must meet with you at least three times after your child is released from foster care.[147]

If you require housing after your release from prison, you may be eligible for a housing subsidy of up to $300 every month for up to three years. This subsidy is provided by DSS when the primary reason that a child is kept in foster care is that parents cannot find adequate housing.[148] If you are in need of such assistance, ask your caseworker about the subsidy and explain that you want to apply for it.

D. Involuntary Termination of Parental Rights

DSS, foster parents, or the child's legal guardian may begin proceedings to convince a court that terminating your parental rights and placing your child up for adoption is the best solution for your child.[149] New York state law specifically says that the state cannot terminate your parental rights just because you are in prison.[150] The law also recognizes that incarcerated parents have special circumstances that judges should consider when looking at a parent's efforts to maintain contact with and plan for their children.[151] However, ASFA has made it easier for the state to terminate your rights as a parent.

If you do not consent to the adoption of your child, a court can terminate your parental rights *only* if it finds that at least one of the following things is true:

(1) You have abandoned your child for a period of at least six months immediately prior to the date on which the termination petition was filed;[152]
(2) You permanently neglected your child;[153]
(3) You cannot and will not be able to provide proper care because of mental illness or mental retardation;[154] or
(4) You have severely or repeatedly abused your child;[155]

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146. You may be eligible for any of the services described in N.Y. Comp. Codes R. & Regs. tit. 18, § 423.2 (2010), which include daycare, housekeeper/chore services, psychiatric counseling, and parent training services. *See also* N.Y. Soc. Serv. Law §§ 409, 409-a (McKinney 2003 & Supp. 2008) (defining preventive services); N.Y. Soc. Serv. Law § 384-a(2)(c)(iv)–(vii) (McKinney 2010) (describing the terms for transfer of care and custody of children).

147. N.Y. Comp. Codes R. & Regs. tit. 18, § 423.4(h) (2010).

148. N.Y. Soc. Serv. Law § 409-a(5)(c) (McKinney 2003 & Supp. 2008).

149. N.Y. Soc. Serv. Law § 384-b(3)(b) (McKinney 2003 & Supp. 2008).

150. N.Y. Soc. Serv. Law § 384-b(2)(b) (McKinney 2003 & Supp. 2008) (stating that the term parent "shall include an incarcerated parent unless otherwise qualified"). *But see In re* Love Russell J., 7 A.D.3d 799, 800, 776 N.Y.S.2d 859, 859 (2d Dept. 2004) (finding that termination of parental rights due to permanent neglect was proper against an incarcerated father whose only plan for his children's welfare was extended placement in foster care, especially when he had been warned by the agency that this plan was insufficient).

151. *See* N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 2003 & Supp. 2008); *see also In re* Custody & Guardianship of Sasha R., 246 A.D.2d 1, 7, 675 N.Y.S.2d 605, 609 (1st Dept. 1998) (discussing how the New York legislature acknowledged that incarcerated parents have "special circumstances" that should be taken into account when evaluating the parent's efforts to meet the statutory contact and planning requirements (citing *In re* Gregory B., 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1057, 544 N.Y.S.2d 535, 540–41 (1989))).

152. N.Y. Soc. Serv. Law § 384-b(4)(b) (McKinney 2003 & Supp. 2008). Under New York state law, a parent abandons a child when he shows "an intent to forego his or her parental rights and obligations … by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." N.Y. Soc. Serv. Law § 384-b(5)(a) (McKinney 2003 & Supp. 2008).

153. N.Y. Soc. Serv. Law § 384-b(4)(d) (McKinney 2003 & Supp. 2008). A parent permanently neglects a child when he "continuously or repeatedly" fails for a period of either one year, or fifteen out of the most recent twenty-two months, "to maintain contact with or plan for the future of the child, although physically and financially able to do so." N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 2003 & Supp. 2008).

154. N.Y. Soc. Serv. Law § 384-b(4)(c) (McKinney 2003 & Supp. 2008).

155. N.Y. Soc. Serv. Law § 384-b(4)(e) (McKinney 2003 & Supp. 2008). See Part C(4)(a) of this Chapter for a definition of severe and repeated abuse. Under N.Y. Soc. Serv. Law § 384-b(8)(b)(ii)(A) (McKinney 2003 & Supp. 2008), repeated abuse for the termination of parental rights also includes a parent committing or "knowingly" allowing a felony

Under ASFA in New York, if any of the following are true, the foster care agency *must* file for termination of parental rights:

(1) The child has been in foster care for fifteen of the most recent twenty-two months;[156]
(2) The child has been determined by a court to be abandoned;[157]
(3) The parent has been convicted of a crime including conspiring, soliciting, attempting, or committing murder or manslaughter of another of his or her children for whom the parent is legally responsible;[158] attempting or committing assault on a child under eleven years of age who is a child of the parent or a child for whom the parent is legally responsible;[159] or
(4) The parent has been convicted of any of the above crimes in another jurisdiction.[160]

The State is still required to prove its case in order to actually terminate your rights. But even if any of the four above grounds are present (where the agency is required to file under AFSA), the agency does not need to file for termination proceedings if any of the following are also present:

(1) The child is being cared for by a relative;[161]
(2) The agency has documented in the plan a compelling reason that filing a petition to terminate parental rights would not be in the best interest of the child;[162] or
(3) The agency has not provided the parent(s) with adequate reunification services in cases where those services are part of the reasonable efforts requirement.[163]

When the foster care agency alleges in a petition that your case falls into one of the four categories listed above and files for termination of parental rights, the court will first hold a fact-finding hearing to see if the agency's allegation is correct. Then, in all cases involving permanent neglect or severe or repeated abuse, it will hold a dispositional hearing.[164] In the dispositional hearing, the judge will decide whether terminating your parental rights is in the best interests of your child. In cases of abandonment or mental illness, dispositional hearings are not required, and your parental rights may be terminated automatically upon a finding of abandonment or mental illness in the fact-finding hearing. However, the court may choose to hold a dispositional hearing.

One possible compromise in a proceeding to terminate parental rights is a suspended judgment for one year.[165] A suspended judgment means the actual judgment won't be given for a year so the court can monitor the situation during that time and see what to do. It is a type of probation that contains a number of conditions you must satisfy, like communication and visits with your child, enrollment in counseling programs, and cooperation with the agency in planning for your child's future. If you do not comply with the conditions of the order, the court may withdraw the suspended order and terminate your parental rights.

1. DSS-Initiated Termination Proceedings

Most termination proceedings against incarcerated parents charge the parent with abandonment or permanent neglect. These terms are defined below.

(a) Abandonment

In a proceeding based on abandonment, DSS only has to prove that for a period of six months prior to the date on which the termination petition was filed, the parent failed to communicate and visit with the child[166]

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sex offense to be committed against his child.

156. N.Y. Soc. Serv. Law § 384-b(3)(l)(i) (McKinney 2003 & Supp. 2008).

157. N.Y. Soc. Serv. Law § 384-b(3)(l)(i) (McKinney 2003 & Supp. 2008).

158. N.Y. Soc. Serv. Law § 384-b(8)(a)(iii)(A)–(B) (McKinney 2003 & Supp. 2008).

159. N.Y. Soc. Serv. Law § 384-b(8)(a)(iii)(C) (McKinney 2003 & Supp. 2008).

160. N.Y. Soc. Serv. Law § 384-b(8)(a)(iii)(D) (McKinney 2003 & Supp. 2008).

161. N.Y. Soc. Serv. Law § 384-b(3)(l)(i)(A) (McKinney 2003 & Supp. 2008).

162. N.Y. Soc. Serv. Law § 384-b(3)(l)(i)(B) (McKinney 2003 & Supp. 2008). Compelling reasons are defined in N.Y. Soc. Serv. Law § 384-b(3)(l)(ii) (McKinney 2003 & Supp. 2008).

163. N.Y. Soc. Serv. Law § 384-b(3)(l)(i)(C) (McKinney 2003 & Supp. 2008).

164. N.Y. Soc. Serv. Law § 384-b(3) (McKinney 2003); N.Y. Fam. Ct. Act § 623 (McKinney Supp. 2008).

165. N.Y. Fam. Ct. Act § 633 (McKinney 1999 & Supp. 2007); *see also* Comm'r v. Rufelle C., 156 Misc. 2d 410, 416, 593 N.Y.S.2d 401, 405 (Fam. Ct. Kings County 1992) (granting respondent parent a rehearing to determine whether parent had fulfilled the conditions of the suspended judgment).

166. N.Y. Soc. Serv. Law § 384-b(4)(b) (McKinney 2003 & Supp. 2008).

"although able to do so and not prevented or discouraged from doing so by the agency."[167] In order to prove abandonment, the agency does not have to show that it attempted to help the parent.[168] Thus, it is good to keep records of your attempts to communicate with the child and with the agency.

(b) Permanent Neglect

Under New York law, a parent permanently neglects his child when, although physically and financially able to do so, he fails to maintain contact with or plan for the future of the child for a period of either one year or fifteen out of the most recent twenty-two months while the child is in the care of an authorized agency, even though the agency has made diligent efforts to strengthen the parental relationship.[169] The agency does not have to make diligent efforts where a court has previously decided that reasonable efforts are not necessary.[170]

In cases charging permanent neglect, the law and the courts require that the court must first examine the DSS actions in your case before they examine your behavior. DSS must prove that, where required, it or the foster care agency involved made diligent efforts (as discussed in Part C(4)(a)) to strengthen the relationship between you and your child and to reunite your family.[171] If you believe that the agency has not made diligent efforts, explain this to the judge. Your lawyer will need to show that diligent efforts have not been made. Perhaps you can show that the agency never brought your child to the prison for visits, despite your repeated requests, or that you did not receive the help that you asked for on another problem. Use telephone logs and copies of bills to establish that you made these efforts. Ask your lawyer to subpoena people from the prison to testify on your behalf.

Once a court has found permanent neglect, it will hold a dispositional hearing to consider the best interests of the child. A child's best interests (legally speaking) involve his physical and emotional well-being, including a permanent home and a normal, stable family atmosphere.[172]

2. Defending Yourself Against Termination of Parental Rights

It is very important that you be present at the termination hearing. The agency must serve you with notice (to let you know the time and location) of the hearing,[173] and you have a right to attend.[174] At the

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167. N.Y. Soc. Serv. Law § 384-b(5)(a) (McKinney 2003 & Supp. 2008).

168. N.Y. Soc. Serv. Law § 384-b(5)(b) (McKinney 2003 & Supp. 2008).

169. N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 2003 & Supp. 2008); *compare In re* Sheila G., 61 N.Y.2d 368, 380, 462 N.E.2d 1139, 1145, 474 N.Y.S.2d 421, 427 (N.Y. 1984) (finding that the foster care agency did not exercise diligent efforts in fostering the relationship between a biological father and his child). *But see In re* Demetrius F., 176 A.D.2d 940, 941, 575 N.Y.S.2d 552, 552 (2d Dept. 1991) (finding that it is unnecessary for the agency to show that it exercised diligent efforts to foster the relationship where the ground for termination is mental illness).

170. N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 2003 & Supp. 2008).

171. N.Y. Soc. Serv. Law § 384-b(7)(f) (McKinney 2003 & Supp. 2008).

172. *In re* Michael B., 80 N.Y.2d 299, 311–12, 314–15, 604 N.E.2d 122, 129–31, 590 N.Y.S.2d 60, 67, 69 (N.Y. 1992) (concluding that awarding legal custody to respondent foster parents instead of biological father was error because the Appellate Division had used an erroneous "best interest" test; the Appellate Division relied on the child's length of stay and bonding with foster parents, instead of considering the fitness of the biological parent, the agency's plan for the child, and the child's emotional well-being); *In re* Suzanne N.Y., 77 A.D.2d 433, 434, 433 N.Y.S.2d 580, 581–82 (1st Dept. 1980) (granting termination of parental rights where an eight-year-old child had lived with her foster parents since the age of four months and mother was a schizophrenic who required medication to remain minimally functional), *rev'd on other grounds*, 54 N.Y.2d 824, 427 N.E.2d 1187, 443 N.Y.S.2d 722 (N.Y. 1981).

173. N.Y. Soc. Serv. Law § 384-b(3)(e) (McKinney 2003 & Supp. 2008).

174. New York courts have recognized the right to attend termination proceedings. *See In re* Daniel Aaron D., 49 N.Y.2d 788, 790, 403 N.E.2d 451, 452, 426 N.Y.S.2d 729, 730 (1980) (ruling that the mother should have been present at the hearing during the testimony of the court-appointed psychiatrist since mother had not waived her right to be present); *see also In re* Cleveland W., 256 A.D.2d 1151, 1151–52, 684 N.Y.S.2d 121, 121 (4th Dept. 1998) (finding family court abused its discretion by proceeding with termination hearing even though respondent mother had called the court to inform them that she was too ill to attend, her attorney appeared and also told the court, and mother supplied a note from a doctor documenting her illness); *In re* Kendra M., 175 A.D.2d 657, 658, 572 N.Y.S.2d 583, 585 (4th Dept. 1991) (finding that family court erred in conducting fact-finding hearing on a date when incarcerated parent could not attend and should have made arrangements to have parent brought from jail to be present at the hearing); *In re* Robert Allen V., 78 A.D. 2d 843, 844, 433 N.Y.S.2d 445, 446 (1st Dept. 1980), *aff'd*, 52 N.Y.2d 1071 (N.Y. 1981) (affirming the right of a father of a child born out of wedlock to participate and be heard at all stages of the proceeding regarding the child's foster care status); *In re* Tyrell M., 283 A.D.2d 500, 501, 724 N.Y.S.2d 874, 875 (2d Dept. 2001) (finding that the family court erred in not allowing the mother to testify on her own behalf at the next court date prior to finding that she had

hearing, DSS will challenge your capabilities as a parent, and you should be there to respond to any issues raised. If you are not at the hearing, you will not be able to defend yourself, and it might look like you are not interested in protecting your parental rights.

Although you have a right to attend the hearing, if you are in a facility outside of the state where the hearing will be held, the officials at your correctional facility probably will not bring you to the hearing. In one such case, a court held that a hearing could proceed without the presence of the incarcerated parent because the interests of the state and the child outweighed the parent's interest in being at the hearing.[175] Thus, the court found that the reasons for the state and child to go on with the hearing were stronger than the reasons to wait for the parent. Other ways to participate in the hearing include testifying by deposition (a deposition is a special legal document where you answer questions or make statements in another place and it is brought before the court in writing instead of you being there in person), aggressive representation by your attorney (get your lawyer to really advocate for you), and a telephone conference call during the hearing.

To find that you have not "abandoned" or "permanently neglected" your child, the court must find that you (a) made an effort to keep in contact with your child (which includes contact with the agency); and (b) planned for your child's future during your incarceration. These two conditions were discussed above.

In New York, you have a right to a lawyer for the termination hearing.[176] The lawyer will help you argue your case for keeping your parental rights. You can either hire a lawyer yourself or ask the judge to assign one to you. Unfortunately, the family court is unlikely to appoint an attorney if you do not appear at the hearing. You may try to write to the court and respond to the allegations in the petition or ask to have an attorney appointed.

(a) Maintaining Contact with Your Child

The best way to demonstrate that you have maintained contact with your child is to give the judge copies of all letters and proof of other communications that you have had with DSS, the caseworker, your child, the family court, the foster parent, and anyone else involved in your child's foster care. You should keep a file with photocopies or carbon copies of all of these documents to help with this task. If you cannot photocopy the letters, keep a written record of each letter and a brief summary of what you wrote in the letter. You should also keep a telephone log of all of the calls you make. If you get charged for and pay for phone calls that you make, make sure to get receipts to show the judge.

Incarceration does not justify not staying in contact with your child. An incarcerated parent who does not make an effort to keep in touch with the child may be charged with permanent neglect or abandonment.[177] A parent must personally make contact and cannot rely on a relative to make contact.[178]

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neglected her children). The only other states that have found such a right are Arizona, California, and Florida. Texas has held specifically that a prisoner has no right to be at the termination hearing. *See* Philip M. Genty, Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis, 30 J. Fam. L. 757, 774–75 (1991/92).

175. *See In re* A.O., 157 Misc. 2d 177, 179, 596 N.Y.S.2d 971, 973 (Fam. Ct. Bronx County 1993) (finding that hearing could proceed because incarcerated father's correctional facility in Connecticut refused to produce him and father refused alternate methods for out-of-court participation, such as telephone conference and written sworn testimony); *see also In re* James Carton K., III, 245 A.D.2d 374, 376–77, 665 N.Y.S.2d 426, 428–29 (2d Dept. 1997) (affirming termination of parental rights despite parent's absence because a parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute since the child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication), *appeal denied*, 91 N.Y.2d 809, 693 N.E.2d 750, 670 N.Y.S.2d 403 (N.Y. 1998). All the states that have decided this issue have ruled that a prisoner incarcerated out of state does not have a right to be produced for the termination hearing. *See* Philip M. Genty, Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis, 30 J. Fam. L. 757, 775–76 (1991/92).

176. N.Y. Fam. Ct. Act § 262(a)(iv) (McKinney 1999). See Part H of this Chapter for more information on your right to counsel.

177. *See In re* Antia Siami D., 192 A.D.2d 389, 389, 596 N.Y.S.2d 64, 64 (1st Dept. 1993) (terminating incarcerated parent's rights because parent had failed to contact child for more than six months); *In re* Ravon Paul H., 161 A.D.2d 257, 257, 555 N.Y.S.2d 49, 49 (1st Dept. 1990) (finding termination of parental rights to be in the best interests of the child where incarcerated parent did not write, send gifts, telephone, or otherwise try to keep a relationship with the child or the agency; stating that "sporadic and minimal attempts to maintain a parental relationship are insufficient to prevent a finding of abandonment"); *see also In re* Shannon Q., 262 A.D.2d 679, 680, 690 N.Y.S.2d 788, 789 (3d Dept. 1999) (stating that "incarceration alone does not excuse respondent's failure to contact his

Also, visitation and contact may not be enough if the court finds the quality of the visits or contacts poor or too infrequent.[179]

The court may decide not to terminate your parental rights if you can show a good reason for failing to communicate with your child and the agency. The standard generally requires that it was *impossible* for you to communicate.[180] However, in one case, an abandonment proceeding failed where an incarcerated father adequately explained his failure to contact the child or agency for six months.[181] The father argued that he was concerned that his child would be upset by visiting him in a prison setting, that the child was an infant and therefore could not have read letters or talked on the telephone, and that he was scared to contact the agency because he was incarcerated. Also, he had once attempted to contact the agency (although this attempt was not successful), had made plans for his child's future, and had asked his girlfriend to seek visitation with the child. The court concluded that the father's conduct did not demonstrate an intent to give up his rights and responsibilities.[182]

(b) Planning for Your Child

The second requirement you must satisfy to maintain your parental rights is planning for your child. Planning for your child is discussed above in Part C(4)(b)(ii). Your plan must be reasonable and achievable.[183]

Efforts that can demonstrate planning for your child's future include participating in whatever programs your facility offers for parents, such as parenting courses and drug and alcohol abuse counseling. It is critical that you have evidence of such participation, so you should try to get a certificate of participation in or completion of the program. Otherwise, you can ask your lawyer to *subpoena* a supervisor or counselor who can testify at the hearing about your progress and participation in a program.

3. Termination Proceedings Against Prisoners with Long-Term Sentences

Prisoners with long-term sentences are at a particular disadvantage with respect to maintaining their parental rights. A plan for long-term foster care, even with adequate visitations and contacts, is insufficient to fulfill the obligation of planning for an alternative living arrangement for your child.[184] ASFA's time limits make the protection of parental rights especially difficult in this context.

New York's highest court has held that parents who will be in prison for ten to twenty years or twenty-five years to life, and who have no plan for their children other than to have the children remain in long-term foster care, should lose their parental rights.[185] The court found that the legislature did not mean "to approve a plan of indefinite foster care for the child of an incarcerated parent who is serving a lengthy prison term and who cannot provide the child with an alternative living arrangement."[186] In other words, foster

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child" where parent did not try to contact Social Services to find the location of his daughter).

178. *See In re* Thomas G., Jr., 165 A.D.2d 729, 729, 564 N.Y.S.2d 32, 33 (1st Dept. 1990) (refusing to consider communication between paternal grandmother and agency to satisfy the incarcerated father's obligation to make contact with his child); *see also In re* Christopher MM., 210 A.D.2d 767, 767, 620 N.Y.S.2d 853, 854 (3d Dept. 1994) (finding father's contacts "minimal and insubstantial" for purposes of abandonment proceeding when the only attempts to contact the child were three phone calls placed to child's grandparents), *appeal denied*, 85 N.Y.2d 807, 651 N.E.2d 918, 628 N.Y.S.2d 50 (N.Y. 1995).

179. *See In re* Cecelia "A," 199 A.D.2d 582, 583, 604 N.Y.S.2d 327, 329 (3d Dept. 1993) (finding "sporadic and unsubstantial contacts" insufficient to defeat an abandonment petition supported by "clear and convincing evidence"); *In re* Tasha Monica B., 156 A.D.2d 247, 247, 548 N.Y.S.2d 508, 509 (1st Dept. 1989) (finding visitation alone insufficient to show parent was fulfilling obligations where the quality of visitation was poor).

180. *See In re* Trudell J.W., 119 A.D.2d 828, 829, 501 N.Y.S.2d 453, 453 (2d Dept. 1986) (finding termination of parental rights appropriate where the mother did not produce evidence that her failure to contact the child or agency was a result of circumstances that made it impossible for her to do so).

181. *See In re* Baby Girl I., 210 A.D.2d 601, 619 N.Y.S.2d 832 (3d Dept. 1994).

182. *See In re* Baby Girl I., 210 A.D.2d 601, 602–03, 619 N.Y.S.2d 832, 833 (3d Dept. 1994).

183. *See In re* Leon RR, 48 N.Y.2d 117, 125–26, 397 N.E.2d 374, 379, 421 N.Y.S.2d 863, 868–69 (1979) (finding parents' plans for child's future adequate where they solved personal problems that had led to the child's initial removal, found employment, found suitable housing, and sought psychological counseling).

184. *See In re* Gregory B., 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan).

185. *See In re* Gregory B., 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (finding that leaving a child to foster care until he is no longer a child is not an acceptable plan).

186. *In re* Gregory B., 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (finding that

care cannot be used to preserve your parental rights if it is clear that you will never be able to care for your children, and you have not on your own arranged for another person to care for them while you are in prison. The court noted that even though there is a legislative concern for the rights of incarcerated parents, the law states that a child deserves a "normal family life in a *permanent* home" with a nurturing family relationship.[187] In the court's eyes, a parent who will be incarcerated for more than ten years cannot provide such a nurturing family relationship.

Another case terminating the parental rights of a long-term prisoner involved a father who would be eligible for parole in seven years. The court reached a similar conclusion, holding long-term foster care was not an appropriate plan.[188] Likewise, a father's plan for his child to remain in foster care for six years or more while he was incarcerated was found to be inappropriate. The father's parental rights in that case were terminated for permanent neglect.[189]

A plan for long-term foster care is not adequate for a parent to keep his parental rights even when that parent has maintained contact and a close relationship with the child. If you are serving a long sentence and your child is in foster care, it is very important that you attempt to remove your child from foster care by privately placing him with a relative or another person. If relatives are found who will care for the child, termination of your parental rights might not be ordered.[190] Otherwise, you risk losing your parental rights.

4. Practical Tips for Preventing Termination of Parental Rights

(1) *Know the Legal Status of Your Child in Placement.* Is he in foster care or private custody? If he is in foster care, what type is it? Was your child voluntarily or involuntarily placed? Gather all documents relating to your child's placement in one place, and keep safe and precise records.

(2) *Maintain Contact with Your Child.* Write letters and cards. If possible, telephone your child. Try to arrange for visitation as often as possible. Keep copies of everything you send and a log of your phone calls.

(3) *Maintain Contact with Your Caseworker or Your Child's Guardian.* Write or telephone him often. Ask about your child's progress in school, interests, health, problems, etc. Also ask to establish a regular schedule for visitation. Again keep accurate records of your contact with caseworkers and guardians.

(4) *If Your Child Is in Foster Care, Maintain Contact with the Social Services Agency.* At least once every six months, notify the agency of your current address in writing. Cooperate with the foster care agency if it attempts to arrange visits or help you plan for your child's future by asking you to attend classes or complete programs at your facility.

(5) *Attend Court Hearings.* Make sure that the judge knows you are involved and are concerned about your child. If you learn that a court hearing has been scheduled, send a letter to the family court clerk asking that you be produced in court and asking to have legal representation assigned to you. Once your lawyer is assigned, make sure you know his name, address, and telephone number.

(6) *Most Importantly, Keep Records.* Make a record of every phone call you make to your child, your caseworker, a court, or foster care agency. If possible, make copies of every letter you send. This is very important and might mean the difference between keeping and losing your child after you are released.

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leaving a child to foster care until he is no longer a child is not an acceptable plan).

187. *In re* Gregory B., 74 N.Y.2d 77, 89, 542 N.E.2d 1052, 1058, 544 N.Y.S.2d 535, 541 (N.Y. 1989) (quoting *In re* Joyce T., 65 N.Y.2d 39, 47, 478 N.E.2d 1306, 1311–12, 489 N.Y.S.2d 705, 711 (N.Y. 1985) (emphasis added)); *see also* N.Y. Soc. Serv. Law § 384-b(1)(a) (McKinney 2010) (describing legislative intent behind guardianship and custody statutes).

188. *See In re* Omar Garry G., 198 A.D.2d 149, 149, 603 N.Y.S.2d 860, 861 (1st Dept. 1993) (finding termination of parental rights appropriate where incarcerated parent's only plan for his child was to have the child remain in foster care until his release, especially since there were relatives who appeared to be "ready, willing, and able" to care for the child during his incarceration), *appeal denied*, 83 N.Y.2d 753, 634 N.E.2d 603, 612 N.Y.S.2d 107 (N.Y. 1994).

189. *See In re* Guardianship and Custody of Latasha C., 196 A.D.2d 756, 756, 602 N.Y.S.2d 11, 11 (1st Dept. 1993).

190. *See In re* Omar Garry G., 198 A.D.2d 149, 149, 603 N.Y.S.2d 860, 861 (1st Dept. 1993); *see also In re* Gregory B., 74 N.Y.2d 77, 88, 542 N.E.2d 1052, 1057, 544 N.Y.S.2d 535, 540 (N.Y. 1989).

E. Incarcerated Fathers with Children in Foster Care

Incarcerated fathers with children in foster care face unique challenges. As a father, your biological link to your child is not enough to protect your rights as a parent.[191] You must take affirmative actions to protect your rights, such as maintaining contact with your child while he is in foster care. Without these actions, you risk losing your child to adoption without the court seeking your consent or even notifying you of its actions.

1. Establishing Paternity—Becoming a "Legal Father"

In order to exercise the parental rights described in this Chapter, you must establish paternity by proving to a court that you are the legal father of your child. Apart from giving you rights, establishing paternity also gives you responsibilities. One of the major responsibilities that goes along with a court finding that you are a child's father is a possible obligation to pay child support.[192]

Establishing paternity is only necessary if your child was born out of wedlock. If you were or are married to the mother of your child, you are automatically considered to be the father of all children conceived or born to the mother *during* the marriage, and you do not have to establish paternity. However, if you are unmarried, you are not the child's legal father even if you lived with the mother of your children for a number of years. Additionally, having your name on your child's birth certificate does not automatically make you the child's legal father.[193] Therefore, if you were not married to the mother of your child when your child was conceived or born, you will have to prove your paternity. This requirement extends to fathers who married their child's mother *after* the child was born.

To prove your paternity, you should file a petition for an order of "filiation"[194] (another word for paternity) in family court in the county where either the child or the child's mother lives.

Your paternity petition:

(1) Must be in writing. You must write or type the petition.
(2) Must state that you ("petitioner") are the father of the child. You must say you are the father of the child and why. This is done by alleging that you had sexual intercourse with the child's mother during a time about nine months prior to the child's birth.
(3) Must be verified. You must have a notarized statement that the reasons you give in the petition and the claims you make about paternity are true.
(4) Must be served on the respondent. This means you must have someone over the age of eighteen deliver a copy of the petition to your child's mother. This will inform the mother of the paternity proceedings in family court so that she can be present during the proceedings.[195]

If on the court date the mother agrees that you are the child's father, the judge may find that paternity has been proven. If the mother disputes that you are the father, the judge may order DNA testing to prove

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191. *In re* Robert O., 80 N.Y.2d 254, 265, 604 N.E.2d 99, 104, 590 N.Y.S.2d 37, 42 (1992) (holding that the biological link of the father is insufficient to create a constitutionally protected interest and that the unwed biological father must demonstrate some action for him to enjoy protection of his parental rights); *see also* Caban v. Mohammad, 441 U.S. 380, 392, 99 S. Ct. 1760, 1768, 60 L. Ed. 2d 297, 307 (1979) (finding that where the father has not taken action to "participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child").

192. N.Y. Fam. Ct. Act § 413 (McKinney 2010).

193. *See In re* Strong's Estate, 168 Misc. 716, 723, 6 N.Y.S.2d 300, 306 (Sur. Ct. N.Y. County 1938) ("The fact of birth may be established by a birth certificate, although such certificate is not admissible to establish parentage."), *aff'd*, 256 A.D. 971, 11 N.Y.S. 2d 225 (1st Dept. 1939); *see also* Stanford v. Union Labor Life Ins. Co., 74 Misc. 2d 781, 786, 345 N.Y.S.2d 928, 934 (Sup. Ct. Monroe County 1973) ("It is the rule in New York that a birth … certificate is admissible as a public document only to show the fact of birth …, and not as evidence of the additional facts recited therein pursuant to law.").

194. N.Y. Fam. Ct. Act § 542 (McKinney 2009).

195. This step may be both difficult and expensive, but it is required. If you do not do this, the court will dismiss your petition and you will have to start all over again. However, if reasonable and numerous attempts are made to serve the mother and these are documented with affidavits of attempted service, the court can authorize "service by alternative means," which can include sending a letter to her last known address, putting an advertisement in a local paper, or posting a legal notice in the local post office. *See* New York City, Administration for Children's Services, Out of Sight, Not out of Mind: Important Information for Incarcerated Parents Whose Children Are in Foster Care (February 5, 2005). You can obtain a copy of this pamphlet by writing to the Administration for Children's Services, 150 William Street, 18th Floor, New York, New York 10038, or by calling ACS at (212) 341-0900.

paternity, which you may be required to pay for. Once your paternity is established, you have the right to request visits with your child and to be involved in planning for your child's future (permanency planning) while he is in foster care. If paternity is not proven, you do not have a legal right to visits or to a say in permanency planning.

Even if paternity is proven, you may not necessarily have the right to stop your child's adoption proceedings. The following Section outlines the steps you can take to become a "consent" father (one who has the right to consent to adoption). It also explains the requirements for being considered a "notice" father (one who has a right to be notified of termination of parental rights and subsequent adoption).

2. Types of Fathers

As explained in Part D, while your child is in foster care, proceedings may begin to convince the court that terminating parental rights and placing your child for adoption is the best option for your child. Your permission, or consent, may or may not be required for these proceedings to go forward. Your right to consent to adoption or even be notified about the adoption depends on how the law classifies you as a father.

(a) Married Fathers

Married fathers have all the rights and obligations that a biological mother would have.[196] If you are a married father, your consent will be needed before any adoption takes place, and you have the right to be present at all hearings, as well as to initiate hearings, as described generally in Part D of this Chapter.

(b) Consent Fathers

If your child was born out of wedlock, you will retain your right to withhold consent for your child's adoption only if you fulfill the obligations of a "consent father." As a consent father, you will have the right to be present at all proceedings concerning your child, and, unless your parental rights have been terminated, you must give consent for your child to be adopted.[197] In order to be considered a consent father, you must maintain "substantial and continuous" contact with your child.[198] Substantial and continuous contact is demonstrated by paying a reasonable sum to support the child.[199] Additionally, you must demonstrate that you have either:

(1) Visited the child at least monthly when physically and financially able to do so, unless you were prevented from visiting by the person or agency with custody of your child; or
(2) Had regular communication with your child (or the person or agency with custody) when you are unable to visit.[200]

Even if you are a consent father, if the court rules that you have abandoned your child (see Part D(1)(a) of this Chapter), the court will say that you have lost your right to consent to the adoption and will not require your consent for the adoption to proceed.[201]

(c) Notice Fathers

Being a "notice father" means that the court must inform you if proceedings to terminate parental rights of your child and/or free him for adoption are initiated. As a notice father, your consent will not be required

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196. *See* N.Y. Fam. Ct. Act § 417 (McKinney 2008) ("A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage."); N.Y. Dom. Rel. Law § 111(1)(b) (McKinney 2008) ("[C]onsent to adoption shall be required … of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock.").

197. Note that until your child is six months old, if you are not married to the mother of your child, she can place the child for adoption without your consent. In this case, you can attempt to block the adoption only by seeking full custody of the child. *In re* Raquel Marie X, 76 N.Y.2d 387, 408, 559 N.E.2d 418, 428, 559 N.Y.S.2d 855, 865 (N.Y. 1990).

198. N.Y. Dom. Rel. Law § 111(1)(d) (McKinney 2008).

199. N.Y. Dom. Rel. Law § 111(1)(d)(i) (McKinney 2008).

200. N.Y. Dom. Rel. Law § 111(d) (McKinney 2008).

201. N.Y. Dom. Rel. Law § 111(2)(a) (McKinney 1999); see *In re* Eugene "MM," 132 A.D.2d 780, 781, 517 N.Y.S. 2d 326, 328 (3d Dept. 1987) (holding that father who had minimal contact with mother and child, had failed to pay any child support, and had never requested visitation while incarcerated, failed to meet the threshold criteria needed to require his consent to the adoption); *In re* Joshua II, 296 A.D.2d 646, 647–48, 745 N.Y.S.2d 112, 113 (3d Dept. 2002) (holding that incarcerated father's consent to adoption was not required because father abandoned child).

before your child is adopted, but you will be able to present evidence to the court about what you believe is in the best interest of your child. If you do not satisfy the requirements to be considered a consent father, but you meet one of the following requirements, you may be considered a notice father:

(1) If you have been "adjudicated" by a court to be the father of your child;[202]
(2) If you have filed a notice to claim paternity of your child;[203]
(3) If you are on the child's birth certificate;[204]
(4) If you were openly living with your child and his mother when the proceedings started, and you held yourself out to the world as his father;[205]
(5) If the mother has identified you as a father in a written sworn statement;[206]
(6) If you were married to the child's mother within six months after the birth;[207] or
(7) If you have filed an Acknowledgement of Paternity (a sworn statement on a prescribed form) with the Putative Father Registry.[208]

Note that these categories include persons who are listed on the child's birth certificate and persons who have been found to be "legal fathers" by the court. Therefore, even if you are the legal father or the father on the birth certificate, your consent may not be required before your child is adopted, unless you meet the additional requirements listed above for consent fathers. Your status as a notice father or consent father is not permanent. You can move from the notice category to the consent category by maintaining substantial and continuous contact with your child. Likewise, if you stop maintaining contact with your child, the court will consider you a notice father, even if at one point you may have qualified as a consent father.

If you have had minimal or no contact with your child and you do not fall under any of the above categories (married, notice, consent, or legal father), you have no rights or duties respecting your child. The court need not notify you or ask for your consent before placing your child for adoption.

F. Voluntary Adoption

You might decide that the best choice for your child is adoption. In order to do this, you must "surrender" your child, which generally means that you give up all of your parental rights to that child. Generally, you give up the right to visit your child, call your child, or even learn how your child is doing.[209] However, it may be possible to negotiate some conditions to the surrender of your child, such as naming the person who adopts your child or preserving your right to see your child after adoption.[210] This option is called a "conditional surrender." If you negotiate these conditions and the person who adopts your child prevents you from seeing him, you may petition a court for visitation. The court would then conduct a hearing to determine if visitation is in the best interests of the child.[211]

Whether you choose a total or conditional surrender, this is a serious decision and you should get all the advice and help that you think you need. You have the right to talk with a lawyer before you sign a "Surrender Instrument," which is the form you sign to give up your child. If your child is in foster care, you have the right to supportive counseling before you sign the surrender instrument.[212] Make sure you have read and fully understand any and all documents that you are asked to sign. If you do not understand something in the document, ask your lawyer to explain it. Do not sign anything until you are sure that you

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202. N.Y. Dom. Rel. Law § 111-a(2)(a) (McKinney 1999).
203. N.Y. Dom. Rel. Law § 111-a(2)(c) (McKinney 1999).
204. N.Y. Dom. Rel. Law § 111-a (2)(d) (McKinney 1999).
205. N.Y. Dom. Rel. Law § 111-a(2)(e) (McKinney 1999).
206. N.Y. Dom. Rel. Law § 111-a(2)(f) (McKinney 1999).
207. N.Y. Dom. Rel. Law § 111-a(2)(g) (McKinney 1999). Note that marriage within six months of the child's birth makes you a notice father, but not necessarily a consent father. You can become a consent father by maintaining substantial and continuous contact with your child.
208. N.Y. Dom. Rel. Law § 111-a(2)(h) (McKinney 1999).
209. N.Y. Soc. Serv. Law § 383-c(3)(b) (McKinney 2003 & Supp. 2010). However, a surrender of a child in foster care may include a provision for visitation with the child after adoption.
210. N.Y. Soc. Serv. Law § 383-c(2) (McKinney 2003 & Supp. 2010).
211. *See In re* Sabrina H., 245 A.D.2d 1134, 1135, 666 N.Y.S.2d 531, 531 (4th Dept. 1997) (finding that a biological mother can petition the court for enforcement of conditions in the surrender agreement). However, an adoptive parent's refusal to let a biological parent see the child would not allow the biological parent to automatically revoke the surrender.
212. N.Y. Soc. Serv. Law §§ 383-c(3)(b), (5)(b)(i) (McKinney 2003 & Supp. 2010).

understand what the consequences of signing will be and are sure that this is what you want to do and what you think is best for your child.

The adoption process is different depending on whether your child is in foster care or has been placed privately with friends or relatives.

1. If Your Child Is in Private Placement

If your child is living with a friend or relative through a private arrangement, you can surrender your child either by giving him to a foster care or adoption agency or by making a private adoption agreement.[213] The surrender is made by signing the form in or out of court.

After you have surrendered your child to the agency, you have thirty days to change your mind.[214] If you change your mind after thirty days, you may regain your parental rights only if the child has not yet been placed in an adoptive home.[215] If you change your mind about the surrender and the child is already in an adoptive home, the judge will decide who has legal custody based on the "best interests of the child."[216]

2. If Your Child Is in Foster Care

If your child is in foster care, contact your child's caseworker and explain that you are interested in giving up your child for adoption. The surrender can take place in one of two ways when the child is already in foster care. The first is to "execute and acknowledge" the surrender instrument in court before a judge.[217] If the surrender takes place in court, the termination of your parental rights is irrevocable.[218] This means you cannot change your mind and regain the rights to your child. The second type of surrender takes place outside of court and is called an "extra-judicial surrender." If you sign the surrender instrument outside of court, you have forty-five days after signing the surrender to change your mind.[219]

As with foster parents, ASFA requires that the agency check the criminal records of prospective adoptive parents. The requirements for approval or denial of an adoptive parent are the same as for a foster parent.[220]

G. Getting to Court

Parents have a right to attend all court proceedings involving the foster care and adoption of their child. For parents who are prisoners, you will have to arrange to be brought to court. You should request permission to attend such proceedings from your correctional facility as far in advance of the court date as possible. You should also contact your caseworker and tell him you wish to attend. You have to write to the judge well in advance of the hearing date and explain why your presence at the hearing is essential and request that the judge order the Department of Correctional Services to produce you in court. See Appendix A of this Chapter for a sample letter asking the judge to order you to be produced for the hearing.

H. The Right to Counsel

Even though the U.S. Supreme Court has held that there is no constitutional guarantee of a right to a lawyer in proceedings for termination of parental rights or foster care, New York state law guarantees this right.[221] In most other states, the right to a lawyer in such proceedings has been granted either by the state constitution or by state law. Usually, if you cannot afford to hire your own attorney, the court will appoint what in New York is called an "18-b attorney" when you get to court.[222] You also can try to contact a legal services organization for help, but attorneys at those organizations are generally unavailable for these kinds of cases. See Appendix B of this Chapter, as well as Appendix IV of the *JLM*, for a list of legal service organizations.

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213. N.Y. Dom. Rel. Law §§ 115–16 (McKinney 1999 & Supp. 2010). A private adoption involves a contract between the birth parents and adoptive parents without agency involvement.

214. N.Y. Soc. Serv. Law § 384(5) (McKinney 2003 & Supp. 2010).

215. N.Y. Soc. Serv. Law § 384(5) (McKinney 2003 & Supp. 2010).

216. N.Y. Soc. Serv. Law § 384(6) (McKinney 2003 & Supp. 2010).

217. N.Y. Soc. Serv. Law § 383-c(3)(a) (McKinney 2003 & Supp. 2010).

218. N.Y. Soc. Serv. Law § 383-c(3)(b)(McKinney 2003 & Supp. 2010).

219. N.Y. Soc. Serv. Law § 383-c(5)(d)(ii) (McKinney 2003 & Supp. 2010).

220. *See* N.Y. Soc. Serv. Law § 378-a (McKinney 2003 & Supp. 2010); see also Part C(1)(d) of this Chapter.

221. N.Y. Fam. Ct. Act § 262 (McKinney 2008 & Supp. 2010).

222. "18-b" refers to a free attorney assigned by the court under Article 18-b of the County Law. N.Y. County Law § 722 (McKinney 2004 & Supp. 2010).

I. Conclusion

If you are incarcerated and have a child, it is important for you to know the options you have in order to maintain your relationship with your child. First, you should decide whether you want your child in private placement (with a family or friend) or in foster care. Different benefits attach to different situations, so it is important to weigh all of your options. In order to have the best opportunity possible to retain custody of your child when you are outside of prison, you should maintain contact with your child and with your caseworker. You should also keep records of all of the contact you have with both your child and caseworker in case you need to prove your efforts. You should also maintain contact with the custodian of the child and keep records of all contact.

APPENDIX A

REQUEST FOR AN ORDER TO PRODUCE

Date:_____, 20__

ATTENTION: Court Clerk
Family Court
State of New York
County of [*Name of County*]
[*Street Address*]
[*City or Town*], New York, [*Zip Code*]

RE: [*Child's Name*], [*Child's Birth Date*]

Dear Sir or Madam:

I respectfully request to be present for the hearing that is to be held on the [##] day of [*month*], 20[##}, for my child/children, [*Name of Children*]. I am presently incarcerated at [*name of facility*], located at the below address. Please submit an "Order to Produce" upon this institution, so that I may be available for this pending hearing.

I am also requesting that the court assign an attorney to represent me in the above proceeding and that all court proceedings be adjourned until I am able to be physically present.

[*If applicable:* I have not been informed of the date that my child/children will be appearing before your court. Would you kindly notify me of the date and enter this into the record as a Notice of Appearance and request to be produced.]

NOTIFY: [*Warden's Name*]
[*Your Name and Address*]

Sworn to me on the [##] day of [*month*] of 20[##].

Name of Parent (Print): _____

NYSID #:_____

Signature of Parent: _____

Notary Public Signature: _____

APPENDIX B

SERVICES FOR INCARCERATED PARENTS

Edwin Gould Services for Children and Families
Incarcerated Mothers Program
P.O. Box 287926
New York, NY 10128
Phone: (646) 315-7604
Area Served: New York City
The purpose of this organization is to prevent placement of children in foster care. This organization provides counseling for mothers incarcerated in New York City or New York State, makes monthly visits to your children, and encourages visits between mothers and children. To be eligible for these services, your child or children must be under 18 years old and must not already be in foster care.

Women in Prison Project
Correctional Association of New York, Inc.
2900 Adam Clayton Powell Blvd., Suite 200
New York, NY 10027
Phone: (212) 254-5700 ext. 306
Area Served: New York State

Legal Action Center
200 Varick Street
New York, NY 10014
Phone: (212) 243-1313
Area Served: New York State
Provides legal information for people with criminal records.

Administration for Children's Services ("ACS")
Office of Advocacy
Parents' and Children's Rights Ombudsman
150 Williams Street, First Floor
New York, NY 10038
Phone: (212) 676-9421
You can contact this branch of ACS if your child is in foster care in New York City and your child's foster care agency is refusing to bring your child to visit you in prison.

The Osborne Association, "Family Resource Center" and "Family Works"
175 Remsen Street, 8th Floor
Brooklyn, NY 11201
Toll-Free Hotline: 1-800-344-3314
Phone: (718) 637-6560
www.osborneny.org
Area Served: New York State
The Family Resource Center runs a toll free hotline and a support group. Family Works manages a parent education program for incarcerated fathers and a children's center in the visiting areas at Sing Sing, Woodbourne, and Shawangunk Correctional Facilities.

Hour Children
36-11A 12th Street
Long Island City, NY 11106
Phone: (718) 433-4724
Area Served: New York State
Provides five community residential programs for female ex-offenders and their children. Provides parent education, enhanced visiting, and transportation assistance for women incarcerated in two New York State prisons.

Women's Prison Association
110 Second Avenue
New York, NY 10003
Phone: (646) 336-6100
Area served: New York City
Provides comprehensive services to incarcerated and formerly incarcerated women. Services include parent education, self-help support group, information, referrals, case management, mentoring, group activities, gifts for children, nursery family reunification support, family therapy, community residential services, and legal services and information.

The following organizations provide free legal services in New York City. Contact them if you need to take some action for your child and you cannot afford a lawyer. For a more extensive list of legal services organizations throughout New York State, turn to Appendix IV of the *JLM*.

Legal Services for New York City (PLSNY)
350 Broadway, 6th Floor
New York, NY 10013
Phone: (646) 442-3600

Prisoners' Legal Services of NY

102 Prospect Street
Ithaca, NY 14850
Phone: (607) 273-2283
Prisons Served: *Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.*

Albany Office
41 State Street, Suite M112
Albany, NY, 12207
Phone: (518) 438-8046
Prisons Served: *Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.*

Buffalo Office
237 Main Street, Suite 1535
Buffalo, NY 14203
Prisons Served: *Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.*

Plattsburgh Office
121 Bridge Street, Suite 202
Plattsburgh, NY 12901
Prisons served: *Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.*

REGIONAL OCFS OFFICES

ALBANY REGIONAL OFFICE

Room 309 South Building
52 Washington Street
Rensselaer, NY 12144
Phone: (518) 402-3038
Counties served: *Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren, Washington*

BUFFALO REGIONAL OFFICE

Ellicott Square Building, Room 545
295 Main Street
Buffalo, NY 14203
Phone: (716) 847-3828
Counties served: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming

LONG ISLAND REGIONAL OFFICE

Courthouse Corporate Center
320 Carelton Avenue, Suite 4000
Central Islip, NY 11722
Phone: (631) 342-7100
Counties served: Nassau, Suffolk

NEW YORK CITY REGIONAL OFFICE

2 Lafayette Street, 22nd Floor
New York, NY 10007
Phone: (212) 676-2444
Fax: (212) 676-2424
Counties served: 5 Boroughs of New York City

ROCHESTER REGIONAL OFFICE

259 Monroe Avenue, 3rd Fl. Monroe Square
Rochester, NY 14607
Phone: (585) 238-8531
Counties served: Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, Yates

SYRACUSE REGIONAL OFFICE

The Atrium
100 S. Salina Street, Suite 350
Syracuse, NY 13202
Phone: (315) 423 1202
Counties served: Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga, Tompkins

SPRING VALLEY REGIONAL OFFICE

11 Perlman Drive, Pascack Plaza
Spring Valley, NY 10977
Phone: (845) 708-2400
Counties served: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester

CONTACT INFORMATION FOR COUNTY DEPARTMENTS OF SOCIAL SERVICES

Albany County DSS
162 Washington Avenue
Albany, NY 12210
Phone: (518) 447-7300

Allegany County DSS
County Office Building
7 Court Street
Belmont, NY 14813-1077
Phone: (585) 268-9622

Broome County DSS
Thomas P. Hoke Human Services Center
36-42 Main Street
Binghamton, NY 13905-3199
Phone: (607) 778-8850

Cattaraugus County DSS
One Leo Moss Drive, Suite 600
Olean, NY 14760-1158
Phone: (716) 373-8065

Cayuga County DSS
County Office Building
160 Genesee Street
Auburn, NY 13021-3433
Phone: (315) 253-1207

Chautauqua County DSS
Hall R. Clothier Building
7 North Erie Street
Mayville, NY 14757
Phone: (716) 753-4421

Chemung County DSS
Human Resource Center
425 Pennsylvania Avenue
P.O. Box 588
Elmira, NY 14902
Phone: (607) 737-5309

Chenango County DSS
5 Court Street
Norwich, NY 13815
Phone: (607) 337-1500
Toll Free: (877) 337-1501

Clinton County DSS
13 Durkee Street
Plattsburgh, NY 12901-2911
Phone: (518) 565-3222

Columbia County DSS
25 Railroad Avenue
P.O. Box 458
Hudson, NY 12534
Phone: (518) 828-9411

Cortland County DSS
County Office Building
60 Central Avenue
Cortland, NY 13045-5590
Phone: (607) 753-5248

Delaware County DSS
111 Main Street
Delhi, NY 13753
Phone: (607) 832-5300

Dutchess County DSS
60 Market Street
Poughkeepsie, NY 12601-3299
Phone: (845) 486-3000

Erie County DSS
Services for Children, Families, and Adults
Hens & Kelly Building
478 Main Street
Buffalo, NY 14202-3959
Phone: (716) 858-8000

Essex County DSS
7551 Court Street
P.O. Box 217
Elizabethtown, NY 12932
Phone: (518) 873-3441

Franklin County DSS
355 West Main Street
Malone, NY 12953
Phone: (518) 483-6770

Fulton County DSS
4 Daisy Lane
P.O. Box 549
Johnstown, NY 12095
Phone: (518) 736-5600

Genesee County DSS
5130 East Main Street, Suite #3
Batavia, NY 14020-3700
Phone: (585) 344-2580

Greene County DSS
411 Main Street
P.O. Box 528
Catskill, NY 12414-1716
Phone: (518) 943-3200

Hamilton County DSS
White Birch Lane
P.O. Box 725
Indian Lake, NY 12842-0725
Phone: (518) 648-6131

Herkimer County DSS
301 North Washington Street, Suite 2110
Herkimer, NY 13350
Phone: (315) 867-1291

Jefferson County DSS
250 Arsenal Street
Watertown, NY 13601
Phone: (315) 782-9030

Lewis County DSS
5274 Outer Stowe Street
Lowville, NY 13367
Phone: (315) 376-5400

Livingston County DSS
1 Murray Hill Drive
Mt. Morris, NY 14510
Phone: (585) 243-7300

Madison County DSS
Madison County Complex, Building 1
133 North Court Street
P.O. Box 637
Wampsville, NY 13163
Phone: (315) 366-2211

Monroe County DSS
111 Westfall Road
Rochester, NY 14620
Phone: (585) 753-6298

Montgomery County DSS
County Office Building
P.O. Box 745
Fonda, NY 12068
Phone: (518) 853-4646

Nassau County DSS
60 Charles Lindbergh Blvd.
Uniondale, NY 11553
Phone: (516) 227-8265

New York City DSS (merged with the Human Resources Administration)
180 Water Street, 25th Floor
New York, NY 10038
Toll-Free: (877) 472-8411
Outside NYC: (718) 557-1399

NYC Administration for Children's Services
150 William Street, 18th Floor
New York, NY 10038
Phone: (212) 341-0900

Human Resources Administration
Office of Legal Affairs
Records Access Officer
180 Water Street, 17th Floor
New York, NY 10038
Toll-free: (877) 472-8411

Niagara County DSS
20 East Avenue
P.O. Box 506
Lockport, NY 14095
Phone: (716) 439-7600

Oneida County DSS
County Office Building
800 Park Avenue
Utica, NY 13501
Phone: (315) 798-5700

Onondaga County DSS
John H. Mulroy Civic Center, 12th Floor
421 Montgomery Street
Syracuse, NY 13202-2923
Phone: (315) 435-2985

Ontario County DSS
3010 County Complex Drive
Canandaigua, NY 14424-1296
Phone: (585) 396-4060
Toll-free: (877) 814-6907

Orange County DSS
11 Quarry Road, Box Z
Goshen, NY 10924-0678
Phone: (845) 291-4000

Orleans County DSS
14016 Route 31 West
Albion, NY 14411-9365
Phone: (585) 589-7000

Oswego County DSS
100 Spring Street
P.O. Box 1320
Mexico, NY 13114
Phone: (315) 963-5000

Otsego County DSS
County Office Building
197 Main Street
Cooperstown, NY 13326-1196
Phone: (607) 547-4355

Putnam County DSS
110 Old Route Six Center, Building #2
Carmel, NY 10512
Phone: (845) 808-1500

Rensselaer County DSS
127 Bloomingrove Drive
Troy, NY 12180
Phone: (518) 833-6000

Rockland County DSS
Robert L. Yeager Health Center
Building L, Sanatorium Road
Pomona, NY 10970
Phone: (845) 364-2000

St. Lawrence County DSS
6 Judson Street
Canton, NY 13617
Phone: (315) 379-2111

Saratoga County DSS
152 West High Street
Ballston Spa, NY 12020
Phone: (518) 884-4140

Schenectady County DSS
797 Broadway
Schenectady, NY 12305-2704
Phone: (518) 388-4470

Schoharie County DSS
P.O. Box 687
Schoharie, NY 12157
Phone: (518) 295-8334

Schuyler County DSS
323 Owego Street – Unit 3
Montour Falls, NY 14865
Phone: (607) 535-8303

Seneca County DSS
1 DiPronio Drive
P.O. Box 690
Waterloo, NY 13165-0690
Phone: (315) 539-1865

Steuben County DSS
3 East Pulteney Square
Bath, NY 14810
Phone: (607) 776-7611

Suffolk County DSS
3085 Veterans Memorial Highway
Ronkonkama, NY 11779
Phone: (631) 854-9935

Sullivan County DSS
P.O. Box 231
Liberty, NY 12754
Phone: (845) 292-0100

Tioga County DSS
P.O. Box 240
Owego, NY 13827
Phone: (607) 687-8300

Tompkins County DSS
320 West State Street
Ithaca, NY. 14850
Phone: (607) 274-5252

Ulster County DSS
1061 Development Court
Kingston, NY 12401-1959
Phone: (845) 334-5000

Warren County DSS
1340 State Route 9
Lake George, NY 12845-9803
Phone: (518) 761-6300

Washington County DSS
Municipal Center, Building B
383 Broadway
Fort Edward, NY 12828
Phone: (518) 746-2300

Wayne County DSS
77 Water Street
P.O. Box 10
Lyons, NY 14489-0010
Phone: (315) 946-4881

Westchester County DSS
County Office Building #2
112 East Post Road
White Plains, NY 10601-5113
Phone: (914) 995-5000

Wyoming County DSS
P.O. Box 231
Warsaw, NY 14569
Phone: (716) 786-8900

Yates County DSS
County Office Building
417 Liberty Street, Suite 2122
Penn Yan, NY 14527-1118
Phone: (315) 536-5183

A JAILHOUSE LAWYER'S MANUAL

Chapter 34:
The Rights of Pretrial Detainees

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER 34

THE RIGHTS OF PRETRIAL DETAINEES*

Pretrial detention is the time period that you are incarcerated between being arrested and your trial. Detention is only supposed to be used to ensure that the person will not flee prior to trial or pose a danger to other people. It is not supposed to be used to punish or rehabilitate that person. This is because as a pretrial detainee, you have not been convicted of a crime and are not guilty since under the U.S. Constitution, a person accused of a crime is presumed innocent until proven guilty.

Because of this difference between pretrial detainees and convicted prisoners, you might think that detainees would retain greater rights and privileges than other incarcerated persons. Pretrial detainees, however, are rarely treated much differently than convicted prisoners. In many instances, the conditions at jails, where pretrial detainees are often held, are substantially worse than in state prisons.

This Chapter covers your rights under the Fifth and Sixth Amendments of the U.S. Constitution after the police have deemed you a suspect. Part A discusses interrogation law and your Fifth Amendment right to counsel. Your Sixth Amendment right to counsel is discussed in Part B. Part C discusses bail and Part D discusses your right to a speedy trial. Part E covers the conditions of your pretrial detention, including punishment, medical treatment, protection from violence, food and housing, excessive force, access to counsel, and voting rights.

This Chapter does not cover most "search and seizure" law under the Fourth Amendment, which determines when the police can legally arrest you or search you or your possessions. This area of law is complicated and beyond the scope of this Chapter.[1] Instead, this Chapter discusses your rights after the police have already detained you. It focuses specifically on interrogation law and your right to counsel under the Fifth and Sixth Amendments of the U.S. Constitution.

If you are not a U.S. citizen, you also have a treaty right to communicate with consular officers from your home government.[2] If you have citizenship with some other country Chapter II of the *JLM Immigration and Consular Access Supplement* (*ICA*) is of special interest to you. It explains your right to consular access as well as the reasons why you may want to contact your consulate and reasons why you may not want to do so. Consular officers may be able to help you in criminal cases—for example, they can gather mitigating evidence in death penalty cases. Your consular officers may also help you if your rights have been violated, and they will often assist you in deportation proceedings. That Chapter will give you some practical advice on when and how to contact your consulate.

A. Your Rights During Investigation and Interrogation

The U.S. Constitution protects you against compelled self-incrimination during a police interrogation[3], regardless of whether you are charged with a federal or state offense.[4] In other words, you cannot be forced to confess to a crime or any part of a crime. Your state constitution may also protect you,[5] but regardless of what protections the state constitution provides, the police must, at a minimum, satisfy the relevant federal tests.[6] Therefore, before you are interrogated, the police must always give you your *"Miranda* warnings."[7]

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* This Chapter was revised by Julian Perez, based in part on previous versions by Jared Pittman, Sarah Abramowicz, Kai-lin Hsu, Christian Parker, Elif Uras, Erica Bazzell, and Julie Caskey. Special thanks to John Boston and Steven Wasserman of the Legal Aid Society for their valuable comments.

1. If you want to learn more about search and seizure law, a good overview is found in 1 Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure (4th ed. 2006). You should also read the cases regarding search and seizure law in your own state.

2. See *JLM ICA Supplement,* Chapter II "The Right to Consular Access"; Vienna Convention on Consular Relations, *adopted* Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261).

3. The term "Police" here may include state agents such as jailhouse informants, i.e., fellow prisoners that are cooperating closely with and acting for the police.

4. U.S. Const. amend. V; *see* Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (holding that the states cannot abridge your 5th Amendment right against self-incrimination because the 14th Amendment makes the 5th Amendment applicable to states); Missouri v. Seibert, 542 U.S. 600, 607, 124 S. Ct. 2601, 2607, 159 L. Ed. 2d 643, 652 (2004) (noting that the 5th and 14th Amendment voluntariness tests are identical) (citing Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964))).

5. *See, e.g.,* Cal. Const. art. I, § 15, cl. 6; N.Y. Const. art. I, § 6; Tex. Const. art. I, §10.

6. State constitutional standards may give you more protection than the U.S. Constitution. Read the cases that

The exact nature of these warnings and when they apply is set forth in the next three subsections. In brief, under *Miranda*, you are entitled to a lawyer both before and during police custodial interrogation, and you have the right to refuse to answer any and all questions asked of you by the police.[8] If a proper *Miranda* warning has not been given and you have not waived your rights, any incriminating statements made by you during an interrogation cannot be used against you at trial. However, a statement taken in violation of *Miranda* can be used during your trial to "impeach" you (to cast doubt on your credibility),[9] as can any physical evidence obtained as a result of the statements you made. [10]

1. Your *Miranda* Rights

Your *Miranda* rights are: (1) the right to remain silent, since anything you say may be used against you in court; (2) the right to counsel, both before and during interrogation; and (3) the right to a free lawyer, if you cannot afford one.[11] You may have heard these warnings on TV shows, and many people can recite them by heart. However, even though the police on television always read the warnings to a suspect at the time of arrest, *Miranda* applies to interrogation, not arrest. Importantly, the U.S. Supreme Court has ruled that there are no "special words" which the police must say in order to satisfy their constitutional obligations. As long as the police explain all of your rights to you, they have complied with *Miranda*.[12]

Furthermore, *Miranda* applies only during "custodial interrogations."[13] "Custodial" in this case means either: (1) after you have been taken into police custody;[14] or (2) when you have been deprived of your freedom of movement.[15] "Interrogation" can be either: (1) direct questioning by the police; or (2) the "functional equivalent" of direct questioning.[16] It is considered interrogation whenever the police say or do something to you that they should know is likely to cause you to confess or say something incriminating.[17]

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interpret your state's constitution to find out what specific rights are guaranteed to you by the state. For an introduction to legal research, see Chapter 2 of the JLM.

7. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (holding that procedural safeguards are required to protect the 5th Amendment privilege against self-incrimination); *see also* Dickerson v. United States, 530 U.S. 428, 444, 120 S. Ct. 2326, 2336, 147 L. Ed. 2d 405, 420 (2000) (holding that *Miranda's* warning-based approach to determining admissibility of a statement made by the accused during custodial interrogation was constitutionally-based, and could not be overruled by a legislative act).

8. Miranda v. Arizona, 384 U.S. 436, 469–74, 86 S. Ct. 1602, 1625–28, 16 L. Ed. 2d 694, 720–24 (1966).

9. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (holding that the state may use previous statements for the purposes of impeachment even if the statements were obtained in violation of the detainee's *Miranda* rights). *Contra* State v. Santiago, 53 Haw. 254, 266, 492 P.2d 657, (1971) (rejecting *Harris* and finding state use of a statement obtained in violation of *Miranda* for impeachment purposes violated Hawaii Constitution). Note that Hawaii is the only state that does not follow *Harris*.

10. United States v. Patane, 542 U.S. 630, 634, 124 S. Ct. 2620, 2624, 159 L. Ed. 2d 667, 673 (2004) (holding that physical evidence obtained as a result of "unwarned" statements—i.e. statements made without being told your Miranda rights—is still admissible in court as long as the statement was voluntary). The statements leading to the discovery of the evidence still must have been made voluntarily. *But see* Com. v. Martin, 827 N.E.2d 198, 444 Mass. 213 (2005) (holding that Massachusetts state constitution prohibits law enforcement from using evidence obtained from "unwarned" statements); State v. Knapp, 285 Wis.2d 86, 700 N.W.2d 899, 2005 WI 127 (2005) (holding that where physical evidence is obtained as the result of an intentional *Miranda* violation, the Wisconsin state constitution requires that the evidence be suppressed).

11. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706–07 (1966).

12. *See* California v. Prysock, 453 U.S. 355, 359–61, 101 S. Ct. 2806, 2809, 69 L. Ed. 2d 696, 701 (1981) (*per curiam*) (holding that *Miranda* warnings did not have to use precise language of the *Miranda* opinion as long as the warnings reasonably conveyed to a suspect his rights).

13. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966).

14. Whether you are considered "in custody" depends on "how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984).

15. *See* Berkemer v. McCarty, 468 U.S. 420, 441–42, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 335–36 (1984) (holding that an ordinary traffic stop, where the officer had decided that the suspect would be taken into custody as soon as he exited his car but did not tell the defendant of that decision, did not constitute custody for *Miranda* purposes).

16. Rhode Island v. Innis, 446 U.S. 291, 300–01, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307–08 (1980) ("[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

17. *See* Rhode Island v. Innis, 446 U.S. 291, 303, 100 S. Ct. 1682, 1691, 64 L. Ed. 2d 297, 309 (1980) (holding that a short conversation between policemen in front of a suspect was not the "functional equivalent" of interrogation, as a reasonable police officer would not think that the conversation would provoke an incriminating statement from the suspect).

Some law enforcement departments have developed a two-step interrogation technique to get around the *Miranda* requirements. They start by questioning the suspect without giving him the *Miranda* warnings until he confesses to committing the crime (this statement cannot be admitted in court except for impeachment purposes, to challenge the defendant's credibility). He is then given his *Miranda* warnings and the officer asks similar questions to try to get the suspect to give up the same information.[18] The suspect often confesses again, believing that since he already confessed once, there is no harm in doing so again. However, any suspect being questioned in this situation should be careful, because in some cases the second confession can be used against you.

It is unclear whether the second, post-*Miranda* confession is admissible due to a recent Supreme Court decision, Missouri v. Seibert,[19] and its relation to an earlier decision, Oregon v. Elstad.[20] The Court suggested that the proper test was an evaluation of how effective the "*Miranda* warnings delivered midstream," actually were.[21] One concurring opinion instead thought the important question was whether the two-step interrogation was deliberately designed to get around the *Miranda* rule or instead resulted from decisions made in good faith by law enforcement officials.[22] Given this uncertainty, the most basic principle to remember is that sometimes it's not in your best interests to cooperate with questioning that occurs after you have received your *Miranda* warnings simply because you already made potentially incriminating statements. The earlier statements may not be admissible and you have a right to ask for and receive counsel.

During any interrogation, your right to counsel is guaranteed under the Fifth Amendment. Your Fifth Amendment right to counsel is designed to protect you from self-incrimination.[23] Under *Miranda*, you are entitled to the advice of counsel before the interrogation and while the interrogation is taking place. If you ask for a lawyer, any interrogation should stop.[24]

2. Voluntariness

The confession you make to the police must be voluntary in order to be used at your trial.[25] The word voluntary may be confusing, however, because in this context what it actually means is something like "not coerced."[26] Several things can make a court decide that your confession was not voluntary. The police cannot use[27] or threaten to use[28] physical violence in order to get you to confess. If the police threaten to administer

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18. *See* Missouri v. Seibert, 542 U.S. 600, 604–06, 124 S. Ct. 2601, 2605–06, 159 L. Ed. 2d 643, 650–51 (2004) (plurality opinion) for a full discussion of the two-step interrogation and an example of this technique.

19. Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (plurality opinion) (holding that the second confession, made after Miranda warnings, was not admissible in the circumstances of the case).

20. Oregon v. Elstad, 470 U.S. 298, 309, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222, 232 (1985) (holding that a second confession was admissible where the two-step process resulted from a simple failure to administer Miranda warnings, unaccompanied by actual coercion, and was later corrected by the giving of the Miranda warnings).

21. Missouri v. Seibert, 542 U.S. 600, 615–16, 124 S. Ct. 2601, 2612–13, 159 L. Ed. 2d 643, 657–58 (2004) (plurality opinion) (considering the most important factors to be "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, the degree to which the interrogator's questions treated the second round as continuous with the first," and any statements by the police officers to let the suspect know whether his statements made prior to the Miranda warnings would be admissible).

22. Missouri v. Seibert, 542 U.S. 600, 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643, 661 (2004) (Kennedy, J., concurring in the judgment).

23. This is different from the 6th Amendment right to counsel discussed in Part B of this Chapter. The 6th Amendment right ensures that you have good representation once formal criminal proceedings have been initiated against you.

24. *See* Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 387 (1981) ("[I]t is inconsistent with Miranda … for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.").

25. *See* Miranda v. Arizona, 384 U.S. 436, 462, 86 S. Ct. 1602, 1621, 16 L. Ed. 2d 694, 716–17 (1966) (holding that a confession must be excluded where the accused was "involuntarily impelled to make a statement when but for the improper influences he would have remained silent.").

26. *See* Colorado v. Connelly, 479 U.S. 157, 165, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473, 483 (1986) (holding that there must be "an essential link between coercive activity of the State … and a resulting confession by a defendant" if the evidence is to be excluded).

27. *See* Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936) (holding that the defendant could not be convicted on the basis of a confession obtained during a physical beating by a police officer); United States v. Abu Ali, 395 F. Supp. 2d 338, 379–80 (E.D.Va. 2005), *aff'd*, 528 F.3d 210 (4th Cir. 2008) (holding that evidence obtained by extreme physical coercion "ha[s] no place in the American system of justice").

a painful medical procedure in an attempt to get you to confess, even though they may be legally entitled to order this procedure, the court may consider your subsequent statements to be involuntary.[29] Your confession may not be considered voluntary if it occurs after the police have interrogated you for a long period of time.[30] Likewise, confessions from detainees who have been deprived of food or sleep[31] have been deemed involuntary or if the interrogation room is in extremely poor condition,[32] courts may find your confession to be involuntary. In addition, the use of deception or promises of leniency in sentencing can sometimes make the confession involuntary.[33] If your confession is involuntary, that is, if it has been improperly compelled, it cannot be used at trial for any purpose.[34]

3. Waiving your *Miranda* Rights

If you waive (give up) your *Miranda* rights, the burden is on the prosecutor to show that you waived them "voluntarily, knowingly, and intelligently."[35] If you never read or had your *Miranda* rights explained to you, then the prosecutor will have a hard time showing that you knowingly and intelligently waived them.

If, after having your *Miranda* rights read to you, you assert your right to be silent, the interrogation must stop.[36] However, you must say that you are asserting your right to be silent. Simply remaining silent will not be considered enough to demonstrate that you have chosen to exercise your rights, and officers may continue interrogating you despite your silence until you make clear your choice to remain silent and no longer cooperate with the interrogation[37]. If you ask for a lawyer during the interrogation, the interrogation

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28. *See* Arizona v. Fulminante, 499 U.S. 279, 287, 111 S. Ct. 1246, 1252–53, 113 L. Ed. 2d 302, 316 (1991) (noting that "a finding of coercion need not depend upon actual violence by a government agent," and a "credible threat of physical violence" is enough to find coercion); Colorado v. Connelly, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473, 486 (1986) ("The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word.").

29. *See, e.g.*, State v. Phelps, 456 N.W.2d 290, 235 Neb. 569 (1990) (holding that a rape suspect's confession, made after police described a painful penile swab procedure that would be unnecessary if suspect confessed, was involuntary).

30. *See* Spano v. New York, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) (finding a confession involuntary, in part, because the suspect was subjected to prolonged interrogation of almost eight hours); Ashcraft v. Tennessee, 322 U.S. 143, 154, 64 S. Ct. 921, 926, 88 L. Ed. 1192, 1199 (1944) (finding a confession to be coerced where suspect was questioned for thirty-six hours without sleep or rest). *See also* Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 57 L. Ed. 2d 290 (1978) (holding that the statements of a suspect were involuntary where an interrogation lasted for four hours while the suspect was severely injured).

31. *See* Stidham v. Swenson, 506 F.2d 478, 480–81 (8th Cir. 1974) (holding a prisoner's confession to be coerced in part because he was denied food and water for a four-day period); Ashcraft v. Tennessee, 322 U.S. 143, 154, 64 S. Ct. 921, 926, 88 L. Ed. 1192, 1199 (1944) (finding a confession to be coerced where suspect was questioned for thirty-six hours without sleep or rest).

32. *See* Stidham v. Swenson, 506 F.2d 478, 481 (8th Cir. 1974) (holding a prisoner's confession to be coerced in part because the condition of his cell was "subhuman").

33. *See* Lynumn v. Illinois, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963) (finding confession to be involuntary where police told defendant that state financial aid to her child would be cut off and her children taken from her if she failed to cooperate); United States v. Tingle, 658 F.2d 1332, 1335–36 (9th Cir. 1981) (holding that intentionally causing the suspect to fear that she would not see her children for a "long time" was "patently coercive").

34. *See* Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290, 303 (1978) (noting that any use at trial of an involuntary statement violates the defendant's due process rights).

35. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 707 (1966). The prosecution does *not* need to prove this beyond a reasonable doubt, however. Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 485 (1986) ("[T]he State need prove waiver only by a preponderance of the evidence."). *See also*, People v. Seymour, 14 A.D.3d 799, 801, 788 N.Y.S.2d 260, 261–62 (3d Dept. 2005) (a valid waiver of Miranda rights is established if defendant understood the immediate meaning of the warnings).

36. Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966). Note that the police can continue to question you about unrelated crimes. *See* Michigan v. Mosley, 423 U.S. 96, 104–07, 96 S. Ct. 321, 326–28, 46 L. Ed. 2d 313, 322–323 (1975) (holding that although the suspect invoked the right to remain silent on robbery charges, several hours later another police officer could permissibly question the suspect about an unrelated homicide upon providing the *Miranda* warnings and securing a waiver from the suspect). *But see* People v. Boyer, 48 Cal. 3d 247, 273, 768 P.2d 610, 623, 256 Cal. Rptr. 96, 109 (1989) (finding that under California state law, police can no longer attempt to question a suspect in custody once the suspect has invoked both a right to remain silent and to an attorney), *overruled on other grounds by* People v. Stansbury 889 P.2d 588 (Cal. 1995).

37. *See* United States v. Ramirez, 79 F.3d 298, 305 (2d Cir. 1996) (holding that a suspect can selectively assert his right to remain silent but simply failing to answer some questions "does not constitute the invocation of the right to remain silent").

must stop until you have had time to talk to a lawyer or until you reinitiate the interrogation.[38] However, you must be clear that you are asking for an attorney to represent you in this circumstance.[39] In addition, you are entitled to an attorney whenever the interrogation resumes.[40]

B. Your Right to Counsel at Trial

Your right to counsel is protected by the Fifth and Sixth Amendments of the U.S. Constitution. It is important to realize that these two amendments differ in the kind of protections that they provide you. This chapter is concerned with your right to the assistance of counsel under the Sixth Amendment. In short, you should know that statements made by you, outside the presence of your counsel and when you have not waived your right to counsel may not be used against you at your trial. It is important to realize, however, that the Sixth Amendment is "offense specific."[41] Offense specific means that, while you are detained, the state may continue investigating you for other crimes with which you have not yet been charged and may use your statements against you to prove those crimes.

1. Overview of the Sixth Amendment

The Sixth Amendment guarantees your right to the assistance of counsel,[42] among other things.[43] This right is different and independent from your Fifth Amendment right to counsel during custodial interrogations.[44] The Sixth Amendment right to counsel has special significance for you as a pretrial detainee because it begins the moment formal criminal proceedings are started against you[45] and continues through trial preparation, the trial itself, the sentencing phase,[46] and beyond.[47] If you cannot afford a lawyer, the government must provide one for you if: (1) you are being prosecuted in a federal court; or (2) you are charged with a felony in state court.[48] The state is not required to appoint a lawyer to represent you if

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38. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 , 101 S. Ct. 1880, 1884–85, 68 L. Ed. 2d 378, 386 (1981) (holding that once the suspect asks for an attorney, interrogation cannot resume until counsel has been made available, or the accused himself initiates further conversations with the police). *But see* Berkemer v. McCarty, 468 U.S. 420, 437, 104 S. Ct. 3138, 3148–49, 82 L. Ed. 2d 317, 333 (1984) (holding that *Miranda* must be enforced strictly but only in those situations where "the concerns that powered the decision are present"). This has been interpreted by lower courts as allowing police to ask clarifying questions to suspects who have volunteered information after asserting their rights to remain silent and to counsel. *See e.g.*, United States v. Rommy, 506 F.3d 108, 133 (2nd Cir. 2007), *cert, den'd*, 128 S. Ct. 1681, 170 L. Ed. 2d 358 (2008) (holding that "simple clarifying questions do not necessarily constitute interrogation").

39. *See* Davis v. United States, 512 U.S. 452, 462, 114 S. Ct. 2350, 2356–57, 129 L. Ed. 2d 362, 373 (1994) (holding that a suspect must be clear in his desire for counsel; it is not enough for the suspect to state, "Maybe I should talk to a lawyer.").

40. Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 723 (1966).

41. *See* McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991) ("The Sixth Amendment right … is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced…."); Rothgery v. Gillespie County, 128 S. Ct. 2578, 2602, 171 L. Ed. 2d 366, 395 (2008) (stating that the 6th Amendment right to counsel "attaches only to those offenses for which the defendant has been formally charged").

42. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense."). Note that the 6th Amendment does not apply to civil proceedings. For example, if you were to bring a 42 U.S.C. § 1983 civil rights claim against the state, you would not have 6th Amendment protections during that case.

43. The 6th Amendment also guarantees your right to a speedy trial. *See* Part D(1) of this Chapter for more information. Other rights under the 6th Amendment not covered in this Chapter include trial by jury and the right to cross-examine witnesses against you.

44. For information concerning your 5th Amendment right to counsel, see Part A(1) of this Chapter.

45. *See* Fellers v. United States, 540 U.S. 519, 523, 124 S. Ct. 1019, 1022, 157 L. Ed. 2d 1016, 1022 (2004) (holding that the right to counsel under the 6th Amendment "is triggered 'at or after the time that judicial proceedings have been initiated ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977))).

46. Mempa v. Rhay, 389 U.S. 128, 137, 88 S. Ct. 254, 258, 19 L. Ed. 2d 336, 342 (1967) (holding that the right to counsel extends to every stage of criminal proceedings where the substantive rights of the accused might be affected, including post-conviction sentencing and revocation of probation).

47. See *JLM*, Chapter 9 for information on the appeals process.

48. *See* Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that the 6th Amendment should be interpreted to mean that defendants must be provided with counsel in federal courts, unless the right is waived, and that this right is extended to state court matters through the 14th Amendment).

you are facing a misdemeanor or less (even if imprisonment is a possible sentence upon conviction).[49] However, if the state does not appoint a lawyer, and you are convicted, you may not be imprisoned.[50]

Unlike your Fifth Amendment right to counsel, under the Sixth Amendment your right to counsel does not depend upon your request for a lawyer.[51] The state, including police investigators and prosecutors, has a duty to protect and to respect this right.[52] Officials may not deliberately elicit incriminating statements from you to use against you at your trial while you are unrepresented.[53] As explained in the next section, the Sixth Amendment has become especially important in cases where the police (or police informants) have "interrogated" or questioned defendants prior to trial.

This Sixth Amendment right applies in both federal and state court trials.[54] If you are facing state proceedings, that state may also have a similar provision in its state constitution, which may provide you with additional protection.

The state (which is defined to include the Department of Corrections and your prison) has an "affirmative obligation" to respect your right to counsel.[55] Some courts have held that this means the state may not take certain actions—such as transferring you to a distant prison, or curtailing your telephone access—which might make it significantly more difficult for you to consult with your attorney.[56] Your right to counsel, however, as with all constitutional rights, will be balanced against the state's legitimate interests, such as security or order.[57] See Part E(4) of this Chapter for more information on pretrial detainees' right of access to counsel.

2. The "Deliberately Elicited" Test

Under the Sixth Amendment, at trial, the state may not use incriminating remarks which were deliberately elicited from you after you were charged with a crime if: (1) the statements are about the crime

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49. Argersinger v. Hamlin, 407 U.S. 25, 40, 92 S. Ct. 2006, 2014, 32 L. Ed. 2d 530, 540 (1972) (stating that imprisonment cannot be imposed without representation by counsel, even if the charge is a misdemeanor which results in a conviction). *See also* Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002) (holding that defendant may not receive a suspended prison sentence which could be triggered by a subsequent violation of probation unless counsel is provided).

50. Scott v. Illinois, 440 U.S. 367, 374, 99 S. Ct. 1158, 1162, 59 L. Ed. 2d 383, 389 (1979) (holding that a defendant can be sentenced to imprisonment, but that he cannot actually be imprisoned unless he was represented by counsel).

51. *See* Carnley v. Cochran, 369 U.S. 506, 513, 82 S. Ct. 884, 889, 8 L. Ed. 2d 70, 76 (1962) (holding that "it is settled that where the assistance of counsel is a constitutional requisite, the right to be [appointed] counsel does not depend on a request.").

52. *See* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.").

53. *See* Fellers v. United States, 540 U.S. 519, 524, 124 S. Ct. 1019, 1023, 157 L. Ed. 2d 1016, 1023 (2004) (holding that evidence derived from a discussion that took place after the defendant's indictment was inadmissible because it was obtained "outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights"); Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (holding that petitioner's 6th Amendment protections had been violated where evidence of his own incriminating words were used against him at his trial and agents had intentionally elicited those words after he had been indicted without his counsel present).

54. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that the right to a counsel applies in state proceedings).

55. *See* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.").

56. *See, e.g.,* Covino v. Vermont Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991) (noting that a prison transfer making it difficult for the detainee to talk to his lawyer—due to the distance the lawyer would have to travel—might violate right to counsel); Tucker v. Randall, 948 F.2d 388, 390 (7th Cir. 1991) (noting that denying a pretrial detainee telephone access for four days, if no other contact with the attorney was allowed, would possibly violate the 6th Amendment); Cobb v. Aytch, 643 F.2d 946, 951, 957 (3d Cir. 1981) (finding that transferring detainees from Philadelphia jails to Pennsylvania facilities hundreds of miles away, when most detainees were represented by city public defenders, violated the detainees' right to counsel). *See also* Benjamin v. Fraser, 264 F.3d 175, 184 (2d Cir. 2001) (noting that courts, when determining whether a burden on the prisoners' right of access to the courts is unjustifiable, will "weigh[ ] the financial and time costs imposed on attorneys by travel to remote prisons")

57. *See, e.g.*, Feeley v. Sampson, 570 F.2d 364, 373–74 (1st Cir. 1978) (finding that jail officials should be given discretion to balance detainee's legitimate need to communicate with attorneys against security concerns of unlimited phone calls, subject to judicial review to prevent unreasonable restrictions).

you are charged with;[58] and (2) you have not waived your right to counsel.[59] Exactly when the state has "deliberately elicited" incriminating statements can be confusing. The Sixth Amendment is not violated just because the state receives incriminating statements "by luck or happenstance."[60] Instead, the government has "deliberately elicited" statements whenever it intentionally creates a situation where it is likely that the defendant will make incriminating statements without the assistance of counsel.[61] In addition, the government is also considered to have violated the test when it knowingly takes advantage of a situation to interrogate the accused without counsel present.[62] Proof that the state "must have known" its agent was likely to receive incriminating statements is enough to find a Sixth Amendment violation.[63]

You may be able to better understand the "deliberately elicited" test by familiarizing yourself with two of the Supreme Court's Sixth Amendment cases. In *Massiah v. United States*,[64] the defendant (Massiah) and his co-defendant (Colson) were charged with drug crimes and then released on bail. Without Massiah's knowledge, Colson agreed to cooperate with the police. Colson allowed the police to put a radio transmitter under the front seat of his car so the police could listen to conversations taking place there. Colson then had a conversation in his car with Massiah while the police listened. During this conversation, Massiah made incriminating statements, which were used in his trial and led to his conviction.

The Supreme Court reversed Massiah's conviction, finding that federal agents had deliberately elicited these incriminating statements from Massiah after his Sixth Amendment right to counsel had attached. Even though the "interrogation" was not conducted in police custody, and despite the fact that Massiah was not aware he was being interrogated, the Supreme Court held the Sixth Amendment protection still applied. For the Sixth Amendment to have any force, the Supreme Court said, it must apply to "indirect and surreptitious [undercover] interrogations as well as those conducted in the jailhouse."[65]

United States v. Henry,[66] another Sixth Amendment case, shows how the state's use of paid informants to elicit incriminating statements can sometimes make those statements inadmissible. In *Henry*, the defendant was charged with armed robbery and placed in jail to await trial. An FBI agent contacted a paid informant, who was in the same cell block as Henry. The FBI agent told the informant to listen to what Henry said and report back any incriminating statements Henry made. By telling the informant not to question Henry, the FBI agent was trying to comply with the Sixth Amendment restrictions on eliciting incriminating statements. The paid informant talked to Henry in prison about the charged crimes.

The Supreme Court found that this arrangement violated the Sixth Amendment by interfering with Henry's right to counsel. The Court cited three reasons for its decision. First, the paid informant got his orders from the FBI, and he was paid only if he produced useful information. Thus, despite the agent's instruction not to question Henry, the agent *must have known* that the arrangement would likely lead to the

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58. *See* Part B(3) of this Chapter for more information on this limitation.

59. *See* Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (finding that the 6th Amendment was violated when prosecutors relied on defendant's words that were "deliberately elicited'" from him after he had been indicted and in the absence of his counsel); *see also* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek" the assistance of counsel); Brewer v. Williams, 430 U.S. 387, 415, 97 S. Ct. 1232, 1248, 51 L. Ed. 2d 424, 447 (1977) ("[T]he lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the [suspect]. If …we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.") (Stevens, J., concurring).

60. Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985) (holding that defendant's right to counsel was violated when co-defendant, in cooperation with police, recorded incriminating statements made to him by defendant after indictment).

61. *See* United States v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 125 (1980).

62. *See* Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985) (stating that at the very least, the prosecutor and the police have a duty not to act in a manner aimed at getting around the protection created by the right to counsel).

63. *See* Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985) (finding a 6th Amendment violation when police knew that defendant would make statements to their agent that he had a constitutional right not to make before consulting counsel, even though police had told their informant not to interrogate the defendant).

64. Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

65. Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (quoting United States v. Massiah, 307 F.2d 62, 72–73 (2d Cir. 1962) (Hays, J., dissenting)).

66. United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

informant trying to secure incriminating statements from Henry without counsel present.[67] Second, the informant pretended to be nothing more than a fellow inmate. Conversation in such a situation may elicit information which would not be revealed to known government agents. Henry could not have "knowingly and voluntarily" waived his Sixth Amendment rights, since he did not know the paid informant actually worked for the police.[68] Finally, the fact that Henry was in prison was important to the Court's decision.

Even if your confession is normally inadmissible under the Sixth Amendment because it was deliberately elicited, the state *can* admit that confession to impeach your testimony. In other words, if you give testimony at trial that differs from the informant's account of your conversations, the informant can testify *afterwards* that your testimony is unreliable.[69]

3. Offense Specific Limitation

The Sixth Amendment is "offense specific."[70] Offense specific means that the state may continue investigating you for other crimes with which you have not been charged and may use your statements against you. For example, imagine you are in jail waiting to be tried for a drug crime and the police suspect you of robbery (but you have not been charged with the robbery). The police could use any of the *Massiah* or *Henry* techniques to get information about the robbery, but not about the drug crime. Although the Sixth Amendment is offense specific, in some instances your Fifth Amendment *Miranda* rights could be implicated,[71] which is important to keep in mind when appealing your conviction.

4. Waiver of Your Right to Counsel

As with your Fifth Amendment right to counsel, your Sixth Amendment right to counsel can be waived. You must have waived your Sixth Amendment right knowingly and voluntarily.[72] The burden is on the prosecution to show that your waiver meets those conditions.[73] Importantly, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[74]

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67. United States v. Henry, 447 U.S. 264, 270–71, 100 S. Ct. 2183, 2186–87, 65 L. Ed. 2d 115, 122 (1980).

68. United States v. Henry, 447 U.S. 264, 273, 100 S. Ct. 2183, 2188, 65 L. Ed. 2d 115, 124 (1980). For more information on waiver, see Section 4 of this Part.

69. Kansas v. Ventris, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).

70. *See* Texas v. Cobb, 532 U.S. 162, 174, 121 S. Ct. 1335, 1344, 149 L. Ed. 2d 321, 332 (2001) (holding that where a pretrial detainee had been indicted for one crime but had not yet been charged with a closely related crime, his "Sixth Amendment right to counsel did not bar police from interrogating" him regarding the related crime); McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991) ("The Sixth Amendment right … is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced…"); Rothgery v. Gillespie County, 128 S. Ct. 2578, 2602 171 L. Ed. 2d 366, 395 (2008) (stating that the 6th Amendment right to counsel "attaches only to those offenses for which the defendant has been formally charged"). Some states treat the question of crime relatedness slightly differently and depending on where you have been charged this may be to your advantage. *See, e.g.*, People v. Bing, 76 N.Y.2d 331, 350–51, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990) ("[P]ermitting questioning on unrelated crimes violates neither the State Constitution nor … our prior right to counsel cases.").

71. *Compare* Illinois v. Perkins, 496 U.S. 292, 299–300, 110 S. Ct. 2394, 2398–99, 110 L. Ed. 2d 243, 252–53 (1990) (holding that an undercover agent, while in jail posing as a fellow prisoner, may question a prisoner about a crime without giving a *Miranda* warning if the prisoner has not yet been charged with that crime), *with* Mathis v. United States, 391 U.S. 1, 4–5, 88 S. Ct. 1503, 1505, 20 L. Ed. 2d 381, 385 (1968) (holding that questioning of a prisoner by a person known to be an Internal Revenue Service official about tax violations, without the giving of a *Miranda* warning, violated the prisoner's 5th Amendment rights, when the prisoner was in prison for an entirely different offense). See Part A of this Chapter for more information on your 5th Amendment rights.

72. Faretta v. California, 422 U.S. 806, 835–36, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581–82 (1974) (holding that waiver of the right to counsel must be made knowingly, voluntarily, and intelligently). Note that while the waiver must also be made competently and intelligently, those criteria are generally satisfied if you are competent to stand trial. *Compare* Godinez v. Moran, 509 U.S. 389, 396–97, 113 S. Ct. 2680, 2685, 125 L. Ed. 2d 321, 330–31 (1993) (holding that if a person is competent to stand trial, he is also competent to waive the right to counsel or to plead guilty), *with* Indiana v. Edwards, 128 S. Ct. 2379, 2387–88, 171 L. Ed. 2d 345, 357 (2008) (holding that "the Constitution permits States to insist upon representation by counsel" for defendants who are competent enough to stand trial but "who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves").

73. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424, 439 (1977) (noting that "it [is] incumbent upon the State" to prove the validity of a waiver).

74. Montejo v. Louisiana, 129 S. Ct. 2079, 2091, 173 L. Ed. 2d 955 (2009) ("What matters in [Sixth Amendment cases] is what happens when the defendant is approached for interrogation, and (if he consents) what happens during

C. Bail

Bail is the release from custody of a charged suspect who must appear before the court at later date. The suspect may be required to pay money or post bond in an amount set by the judge in order to make sure he appears in the future.[75] The judge is allowed to decide whether you will be released or held for trial; there is no constitutional right to bail. The only constitutional rights you have regarding bail are: (1) the court's discretion cannot be exercised arbitrarily (randomly) in making the determination whether to release you on bail or to detain you; and (2) excessive bail cannot be imposed because that is expressly prohibited by the Eighth Amendment.[76] However, despite the weak constitutional standards regarding bail, the federal government and many states have passed legislation protecting the rights of pretrial detainees to bail.

1. The Federal Bail Reform Act

The Federal Bail Reform Act describes the federal government's authority to detain or release prisoners before trial, appeals of a release or detention order, penalties for failure to appear and for offenses committed while on release, and pretrial services for detainees.[77] In *United States v. Salerno*, the Supreme Court considered a constitutional challenge to the Federal Bail Reform Act by a pretrial detainee.[78] The defendants in *Salerno* argued that the Fifth Amendment of the U.S. Constitution prohibited the detention of arrestees without bail; however, the Court held that the Act's authorization of pretrial detention on the basis of future danger did not violate due process and was not impermissible punishment before trial.[79] The Court found that as long as the provisions of the Act were not intended to punish dangerous individuals, preventing danger to the community was an adequate reason to justify detention before trial.[80] The rest of this Part deals with your rights under the Bail Reform Act.

(a) Timing of Bail Hearing

If you are a federal pretrial detainee, you are entitled to a detention hearing at your first appearance before a judge to determine whether you are entitled to receive bail. In setting your bail, the judge focuses on whether: (1) there is enough assurance that you will appear for trial; and (2) you will pose a significant threat to the safety of the community.[81] The default rule is that you will be released either on your own recognizance[82] or upon your payment of an amount of bail set by the judge.[83] If the judge does not believe that releasing you on those terms will satisfy the two factors, she may impose a number of conditions on your release.[84] If the judge finds that no condition or combination of conditions will satisfy the two factors, the judge must order detention before trial.[85]

It is important to note that the detention hearing can be postponed for five weekdays at your request, or for three days at the request of the government.[86] At this hearing, you have a right to be represented by counsel or to have counsel appointed if you cannot afford to pay for counsel. You have the right to testify, to

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the interrogation—not what happened at any preliminary hearing.").

75. Black's Law Dictionary 150 (8th ed. 2004).

76. "Excessive bail shall not be required ...." U.S. Const. amend. VIII.

77. Bail Reform Act, 18 U.S.C. §§ 3141–3156 (2006).

78. United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

79. United States v. Salerno, 481 U.S. 739, 748–54, 107 S. Ct. 2095, 2102–05, 95 L. Ed. 2d 697, 709–13 (1987).

80. United States v. Salerno, 481 U.S. 739, 746–47, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697, 708–09 (1987).

81. 18 U.S.C. § 3142(f) (2006).

82. A defendant is released on his "personal recognizance" when he is released after promising to appear for trial at a later date without being required to pay bail. Black's Law Dictionary 1299 (8th ed. 2004).

83. 18 U.S.C. § 3142(b) (2006).

84. 18 U.S.C. § 3142(c)(1) (2006). Some examples of conditions of release that a court may impose include: where you may live or travel; with whom you may associate; that you comply with a specified curfew; that you return to custody for specified hours following release for limited purposes such as employment or schooling; that you remain in the custody of a designated person who agrees to assume your supervision; that you maintain employment, or if unemployed, seek employment; that you maintain or start an educational program; that you avoid the alleged victim or any potential witnesses; that you regularly report to a designated law enforcement agency or other agency; that you not possess a firearm or other dangerous weapon; that you refrain from excessive use of alcohol or use of any non-prescription drug; that you undergo medical, psychological, or psychiatric treatment (including drug and alcohol treatment); or any other condition necessary to assure your appearance and the safety of any other person or the community. 18 U.S.C. § 3142(c)(1)(B) (2006).

85. 18 U.S.C. § 3142(e) (2006).

86. 18 U.S.C. § 3142(f)(2)(B) (2006).

present witnesses, and to cross-examine witnesses that appear at the hearing.[87] Any ruling by the court that you are not entitled to be released prior to trial must be supported by "clear and convincing evidence" that no combination of conditions on your release will reasonably assure the safety of others and your appearance at trial.

A delay in the hearing will not defeat the government's power to seek your detention. The Supreme Court held that the government's failure to comply with the prompt hearing provision of the Act did not require the release of a person otherwise considered likely to flee or cause danger to others.[88] So, improper timing or delay of your detention hearing will not by itself require your release under the statute if you are considered a flight risk or a danger to other persons in the community.

(b) Denial of Bail

The text of Section 3142(f) indicates that, if you are a flight risk or threaten the safety of the community, you must be detained before trial. Most courts of appeal hold that only one of the two conditions needs to be satisfied in order to justify detainment before trial.[89] However, some circuits have held that a showing of dangerousness to the community, without more, is not enough for a judge to order pretrial detention.[90] Regardless of the circuit, if the court finds a risk of flight and wants to keep you detained, it must also find that there are no conditions that could reasonably assure your presence at trial.[91] The court, in making this determination, must look to the nature and circumstances of the offense charged, the weight of evidence against the defendant, the history and characteristics of the defendant, and the danger posed to the community by the defendant's release.[92]

If you are denied bail, the hearing may be reopened at any time before the trial if the judge finds there is information that was unknown at the time of the hearing and which is relevant to whether the two factors above (appearance at trial and safety of the community) can be met.[93] If a judge grants you bail and you cannot afford to pay it, you will be held in a detention facility until your trial date arrives. If you are found guilty, any time that you have already served will be deducted from your sentence.

The judge is prohibited from imposing a bail so high that you are unable to pay and are ultimately detained prior to trial.[94] However, this provision does not automatically require the release of a person who is unable to meet the bail requirement. If you move to reduce the amount of the initial bail, the judge will hold a detention hearing. However, the judge may still determine that without bail there are no conditions that will reasonably assure your presence for trial. In such a situation, the court may decide that the initial amount was necessary and reasonable.

(c) Review and Appeal of Bail Decision

Importantly, you can ask for a review of the hearing officer's decision regarding bail and you can also appeal the decision. If the original decision on bail was made by somebody other than the judge who has jurisdiction over the criminal case (such as a magistrate judge), you or the government may appeal the officer's decision to the judge who has jurisdiction over the case.[95] For example, if you are granted release

87. 18 U.S.C. § 3142(f)(2)(B) (2006).

88. United States v. Montalvo-Murillo, 495 U.S. 711, 717, 110 S. Ct. 2072, 2077, 109 L. Ed. 2d 720, 729–30 (1990).

89. *See* United States v. King, 849 F.2d 485, 488 (11th Cir. 1988) (finding pretrial detention appropriate if defendant is a flight risk *or* a danger to the community); United States v. Ramirez, 843 F.2d 256, 257 (7th Cir. 1988) (*per curiam*) (same); United States v. Sazenski, 806 F.2d 846, 848 (8th Cir. 1986) (*per curiam*) (same); United States v. Coleman, 777 F.2d 888 (3d Cir. 1985) (holding that danger to the community is sufficient under the statute to justify detention).

90. United States v. Ploof, 851 F.2d 7, 11–12 (1st Cir. 1988) (holding that detention based on dangerousness is only proper if the case involves one of the circumstances in 18 U.S.C. § 3142(f)(1)); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (same). *See also* United States v. Sabhnani, 493 F.3d 63, 76 (2d Cir. 2007) (holding that factors which make the defendant more likely to flee such as relative ease and family living in other countries may, combined with dangerousness, support preventative detention).

91. *See* United States v. Berrios-Berrios, 791 F.2d 246, 250–51 (2d Cir. 1986).

92. 18 U.S.C. § 3142(g) (2006); *see* United States v. Jackson, 823 F.2d 4, 6–7 (2d Cir. 1987) (affirming the pretrial detention of a defendant who faced the possibility of a severe sentence, where the crime charged involved narcotic drugs, and where the government had shown extensive criminal history, general lack of ties to the community, hidden assets, and use of false names).

93. 18 U.S.C. § 3142(f) (2006).

94. 18 U.S.C. § 3142(c)(2) (2006)(2)(B).

95. 18 U.S.C. § 3145(a) (2006) (providing for review of a release order); 18 U.S.C. § 3145(b) (2006) (providing for review of a detention order).

but you think the court imposed too many conditions on your release, you could ask for the judge to amend the conditions imposed by the judicial officer.

After the order has been reviewed, both you and the government have the right to appeal the decision to a circuit court.[96] If you do appeal, the appellate circuit court will review both the lower court's finding of facts and its resulting decision to grant or deny bail under the "clearly erroneous" rule,[97] which means that the appellate court must have a "definite and firm conviction" that the lower court made a mistake.[98] This standard of review means that most bail decisions are not overturned on appeal, however it is an option you should consider if you feel that bail was unfairly denied and believe that you can show that you are not a danger to the community nor a flight risk.

2. New York's Bail Statute

In New York, the issue of whether you are eligible to be released on your own recognizance or on bail is governed by Articles 510 and 530 of the New York Criminal Procedure Law. If you were charged in a state other than New York, you should check the relevant state statutes, some of which have been provided as an appendix to this Chapter.

Under Section 510.10, at your initial appearance the court is required to issue a securing order that either releases you on your own recognizance, fixes bail, or commits you to the custody of the sheriff.[99] Section 510.20 provides you with the right to make an application for bail or recognizance, as opposed to commitment to the custody of the sheriff, and to present arguments and evidence in support of your application in court. According to the language of the statute, the application can be made at the time of the original securing order or any time afterward,[100] however, in practice, bail applications are confined to the post arrest arraignment or the arraignment on your indictment unless there is a subsequent change in the circumstances of your detention.

The decision on your application is not left entirely up to the discretion of the judge. If you were charged with an offense less than a felony, the court must order recognizance or bail.[101] If you are charged with a felony, the court may, in its discretion, order recognizance or bail (subject to some restrictions discussed below) or commit you to the custody of the sheriff.[102] Certain local criminal courts (city courts, town courts, and village courts) lack the authority to release you on recognizance or bail if you are charged with certain types of felonies (class A felonies) or if you have been convicted of two prior felonies.[103] No local criminal court may order recognizance or bail if you are charged with a felony until it has received a fingerprint report concerning your prior criminal record, and the district attorney has had an opportunity to be heard on the matter.[104] If a report on your past criminal behavior is unavailable, the district attorney may consent to recognizance or bail without it.[105]

Section 530.30 provides you with an opportunity to apply to a superior court to grant recognizance or bail in felony cases 'where certain local criminal courts have no authority to do so.[106] This section also provides an opportunity for the review of securing orders fixed by criminal courts if you contest that the

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96. 18 U.S.C. § 3145(c) (2006).

97. *See* United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) ("In reviewing a district court's order granting or denying bail, we apply the clearly erroneous rule to the court's predicate factual findings." (citing United States v. Matir, 782 F.2d 1141 (2d Cir. 1986))).

98. United States v. Berrios-Berrios, 791 F.2d 246, 250–51 (2d Cir. 1986) (explaining that in order to reverse a lower court's ruling when applying the clearly erroneous standard, the reviewing court must hold a "definite and firm conviction that a mistake had been committed" (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948))).

99. N.Y. Crim. Proc. Law § 510.10 (McKinney 1995 & Supp. 2008).

100. N.Y. Crim. Proc. Law § 510.20 (McKinney 1995 & Supp. 2008); *See, e.g.*, People ex rel. Rosenthal (Kolman) v. Wolfson, 48 N.Y.2d 230, 233, 397 N.E.2d 745, 746, 422 N.Y.S.2d 55, 56 (1979) (holding that when pertinent new evidence becomes available the trial court should reconsider their initial decision to grant or withhold bail).

101. N.Y. Crim. Proc. Law § 530.20(1) (McKinney 1995 & Supp. 2008). *See also* N.Y. Crim. Proc. Law § 510.40(3) (McKinney 1995 & Supp. 2008) ("If the bail fixed is not posted, or is not approved after being posted, the court must order that the principal be committed to the custody of the sheriff.").

102. N.Y. Crim. Proc. Law § 530.20(2) (McKinney 1995 & Supp. 2008).

103. N.Y. Crim. Proc. Law § 530.20(2)(a) (McKinney 1995 & Supp. 2008).

104. N.Y. Crim. Proc. Law § 530.20(2)(b)(i)–(ii) (McKinney 1995 & Supp. 2008).

105. N.Y. Crim. Proc. Law § 530.20(2)(b)(ii) (McKinney 1995 & Supp. 2008).

106. N.Y. Crim. Proc. Law § 530.30(1)(a) (McKinney 1995 & Supp. 2008).

terms were unlawful or excessively severe.[107] Unlawful or severe, in this context, means that your application for recognizance or bail was denied by the local criminal court or that the court fixed an excessive amount of bail.[108] If you have been charged with a felony, the district attorney must have the opportunity to be heard and the superior court judge must be provided with a copy of your criminal record.[109] Note that under New York's Bail statute, you may appeal your bail to the superior court only once.[110]

If the denial of bail is not required by law, Section 510.30 provides the criteria to be considered by the court when determining the amount of bail to be imposed. Your application for recognizance or bail will be determined after the court has taken into account the following information:

(1) Your character, reputation, habits, and mental condition;
(2) Your employment and financial resources;
(3) Your family ties and length of residency in the community;
(4) Your criminal record;
(5) Your juvenile record;
(6) Your previous record with respect to court appearances and flight to avoid criminal prosecution;
(7) The weight of evidence against you in the pending criminal action; and
(8) The sentence that may be imposed upon conviction.[111]

You should note that under New York's statute, the courts are not allowed to consider your potential threat to the community based on future criminal conduct when considering your application for recognizance or bail. The only matter that the court may consider is whether any bail, or the amount fixed as bail, is necessary to ensure your future court appearance.[112] However, some case law suggests that the goal of assuring the safety of the community can indirectly be taken into consideration.[113] Moreover, as a practical matter, the above factors provide enough room for courts to detain defendants whom they find to be potentially dangerous.[114] Also, because there is no statutory requirement for the court to take the defendant's financial resources into account, a small amount of bail can sometimes be enough to ensure that you are detained until trial.

D. Your Right to a Speedy Trial

1. The Sixth Amendment: Constitutional Right to a Speedy Trial

Your right to a speedy trial is guaranteed by the Sixth Amendment of the U.S. Constitution and applies to trials in both federal and state courts.[115] You have a right to a speedy trial even if you are released on bail

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107. N.Y. Crim. Proc. Law § 530.30(1) (McKinney 1995 & Supp. 2008).

108. N.Y. Crim. Proc. Law § 530.30(1)(b)–(c) (McKinney 1995 & Supp. 2008).

109. N.Y. Crim. Proc. Law § 530.30(2) (McKinney 1995 & Supp. 2008).

110. N.Y. Crim. Proc. Law § 530.30(3) (McKinney 1995 & Supp. 2008).

111. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 1995 & Supp. 2008).

112. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 1995 & Supp. 2008); *see* Sardino v. State Comm'n on Judicial Conduct, 58 N.Y.2d 286, 289–90, 448 N.E.2d 83, 84, 461 N.Y.S.2d 229, 230 (1983) (finding disregard of due process when judge arbitrarily set bail without any regard to the statutory factors); People *ex rel.* Schweizer v. Welch, 40 A.D.2d 621, 622, 336 N.Y.S.2d 556, 557–58 (4th Dept. 1972) (noting that, when the setting of bail is discretionary, the safety of the community may not be properly considered as it "is not one of the listed criteria"); People *ex rel.* Bauer v. McGreevy, 555 N.Y.S.2d 581, 583, 147 Misc. 2d 213, 215–16 (Sup. Ct. Rensselaer County 1990) (holding that county court cannot deny bail application solely to protect the community; ensuring defendant's appearance in court is the only matter of legitimate concern).

113. *See* People v. Torres, 446 N.Y.S.2d 969, 972, 112 Misc. 2d 145, 149 (Sup. Ct. N.Y. County 1981) (holding that the defendant's potential danger to the community cannot be considered in fixing the amount of bail, but may be relevant in court's threshold determination as to whether bail should or should not be set at all); People v. Mohammed, 171 Misc. 2d 130, 136, 653 N.Y.S.2d 492, 497–98 (Sup. Ct. Kings County 1996) (noting that there are several statutes aimed at remedying the abuse caused by the idea that the only reason for "bail is to ensure the defendant's return to court"); People v. Melville, 62 Misc. 2d 366, 373, 308 N.Y.S.2d 671, 677 (N.Y. Crim. Ct. N.Y. County 1970) (stating that bail may be denied because, among other things, he poses a threat to the community if released on bail).

114. *See, e.g.*, People *ex rel.* Hunt v. Warden, Riker's Island Corr. Facility, 161 A.D.2d 475, 476, 555 N.Y.S.2d 742, 743 (1st Dept. 1990) (finding that nature and extent of more than 100 counts of sexual abuse and exploitation of young children, taken together with the criteria spelled out in the statue and "the defendant's general reputation and character" supported denial of bail).

115. U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; *see* Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 8 (1967) (holding that the 6th Amendment is enforceable in state as well as federal actions).

before trial.[116] Note, however, that this right does not apply until you have been formally charged or are arrested.[117] The remedy for the violation of the right to a speedy trial is the dismissal of the indictment.[118]

The courts have not defined a specific number of days after which your federal constitutional right to a speedy trial has been violated. Instead, the Supreme Court has created a balancing test for courts to use in speedy trial cases. The four factors to be considered in determining whether there has been a violation of the detainee's constitutional rights are: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[119] The Supreme Court held that unless there is some delay that is presumptively prejudicial—that is, a delay that appears to have damaged the defendant's case—the other three factors do not need to be considered.[120] Furthermore, the length of delay that will trigger an application of all four factors will depend on the particular circumstances of the case.[121] As a general guideline, note that the Supreme Court observed that delays approaching or exceeding one year usually trigger a full, four-part analysis.[122]

While the Supreme Court has ruled that "[a] showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause,"[123] the government's justification for the delay is also important. A deliberate attempt by the government to delay your trial may help establish your claim to a constitutional violation, but negligence or overcrowded courts will be weighed less heavily against the government.[124] In addition, failing to file a complaint to assert your right will make it difficult to prove that you were denied your constitutional right to a speedy trial.[125]

The federal government[126] and most state governments have enacted speedy trial statutes to guarantee this right. We discuss the federal and New York statutes below. While most speedy trial statutes are similar, if you are accused of a state crime outside of New York, you should locate and read the speedy trial statute of your particular state. See Appendix A of this Chapter for a listing of state speedy trial statutes and for an introduction to legal research, see Chapter 2 of the *JLM*.

2. The Federal Speedy Trial Act[127]

Hoping to implement a quicker procedure for trying cases in the federal courts and ensure that the right to a speedy trial would be respected, Congress passed the Speedy Trial Act. If you are charged with a federal crime, you have a statutory right to have your case tried within the time limits specified in the Act. The Act provides (1) that the indictment charging you with an offense must be filed within thirty days from the date on which you were arrested or served with a summons for the charges;[128] (2) that your trial must start

116. United States v. MacDonald, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502, 71 L. Ed. 2d 696, 704 (1982) (stating that the speedy trial guarantee is designed in part to "reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail").

117. *See* United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 479 (1971) ("[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision…").

118. *See* Strunk v. United States, 412 U.S. 434, 440, 93 S. Ct. 2260, 2264, 37 L. Ed. 2d 56, 62 (1973) (holding that the only remedy available for such violations is reversing the convicting, vacating the sentence and dismissing the indictment).

119. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–17 (1972) (holding that courts must conduct a balancing test when considering speedy trial cases and listing some of the factors that courts should weigh).

120. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–17 (1972) ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.").

121. *See* Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972) ("To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

122. Doggett v. United States, 505 U.S. 647, 652, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520, 528 n.1 (1992).

123. Reed v. Farley, 512 U.S. 339, 353, 114 S. Ct. 2291, 2299, 129 L. Ed. 2d 277, 290 (1994).

124. *See* Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972).

125. *See* Barker v. Wingo, 407 U.S. 514, 531–32, 92 S. Ct. 2182, 2192–93, 33 L. Ed. 2d 101, 117–18 (1972).

126. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2008).

127. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2008). The most important sections are § 3161 which deals with time limits, and § 3162 which specifies the sanctions imposed when the time limits are violated.

128. 18 U.S.C. § 3161(b) (2008). However, the section also provides that if you are charged with a felony in a district in which no grand jury has been in session during this thirty-day period, the period of time for filing of the indictment will be extended for an additional thirty days.

within seventy days of the filing of the indictment or from the date you first appeared in court, whichever date is later;[129] and (3) that your trial must not begin less than thirty days from when you first appear in court through counsel or expressly waive the right to have counsel.[130]

In case the government fails to indict you within the thirty-day time limit explained above, the charges against you that are contained in the complaint will be dismissed.[131] In case the prosecution fails to bring your case to trial within seventy days of filing an indictment,[132] the indictment will be dismissed on your motion.[133] If you fail to move for dismissal prior to trial or if you enter a plea of guilty or *nolo contendere* (no contest),[134] your right to have the charges dismissed under the statute will be waived.[135]

(a) Dismissal With or Without Prejudice

If there is a violation of the time limits set by the Speedy Trial Act, the Court will dismiss the charges either with or without prejudice. If the dismissal is "with prejudice," the government cannot reinstate the case. If the dismissal is "without prejudice," the government can file the same charges again. In determining whether to dismiss with or without prejudice, the court will consider: (1) the seriousness of the offense; (2) the facts and circumstances that led to its dismissal; and (3) the effect of re-prosecution on the administration of the Speedy Trial Act and the administration of justice.[136]

In balancing the considerations listed above, the court will often favor dismissal without prejudice. The Supreme Court has reversed the dismissal of a criminal prosecution with prejudice for violation of the Speedy Trial Act, as an abuse of discretion because the lower court failed to state the reasons for its conclusion that the government's conduct was careless.[137] The Court also stated that the lower court erred in not considering the lack of prejudice to the defendant from the brief delay and the fact that defendant's behavior in failing to appear for trial contributed to the delay. The Supreme Court held that the lower court's desire to send a message to the government—that unexcused delays will not be tolerated—is not enough to bar the reprosecution of the defendant by dismissing with prejudice.[138] Courts also tend to rule for dismissal without prejudice in cases where the offense charged is serious.[139]

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129. 18 U.S.C. § 3161(c)(1) (2008).

130. 18 U.S.C. § 3161(c)(2) (2008).

131. 18 U.S.C. § 3162(a)(1) (2008). *See* United States v. Cortinas, 785 F. Supp 357, 360–62 (E.D.N.Y. 1992), *aff'd mem.*, 999 F.2d 537 (2d Cir. 1993) (holding that a violation of the Speedy Trial Act requires dismissal only of charges alleged in the complaint; prosecution for other conduct arising out of the same criminal incident, even though it was known or reasonably should have been known at the time of the complaint, is not barred).

132. 18 U.S.C. § 3161(c)(1) (2008).

133. 18 U.S.C. § 3162(a)(2) (2008).

134. A plea of no contest means that the defendant, "while not admitting guilt … will not dispute the charge. This plea is often preferable to a guilty plea, which can be used against the defendant in a later lawsuit." Black's Law Dictionary 1074 (8th ed. 2004).

135. 18 U.S.C. § 3162(a)(2) (2008). *See also* United States v. Brown, 498 F.3d 523, 532 (6th Cir. 2007) (observing that the defendant hadn't asserted his right to a speedy trial before this appeal and stating that that fact "weighs heavily toward a conclusion that no Sixth Amendment violation occurred."), *cert. denied*, 128 S. Ct. 674, 169 L. Ed. 2d 528 (2007); United States v. Morgan, 384 F.3d 439, 442 (7th Cir. 2004) (dismissing defendant's appeal based on speedy trial grounds as he did not file a pretrial motion on the issue); United States v. Jackson, 30 F.3d 572, 575 (5th Cir. 1994) (holding that defendant waived right to dismissal by conditionally pleading guilty to one count before moving for dismissal).

136. 18 U.S.C. § 3162(a)(1) (2008). *See* United States v. Taylor, 487 U.S. 326, 336, 108 S. Ct. 2413, 2419, 101 L. Ed. 2d 297, 310 (1988) (holding that district courts must carefully consider the specified statutory factors as applied to the particular case and articulate clearly their effect in rendering its decision).

137. United States v. Taylor, 487 U.S. 326, 343, 108 S. Ct. 2413, 2423, 101 L. Ed. 2d 297, 314 (1988) (holding that the district court abused its discretion because it failed to factor in the seriousness of the crime charged and relied heavily on an unexplained characterization of the government's actions as "lackadaisical").

138. United States v. Taylor, 487 U.S. 326, 338–43, 108 S. Ct. 2413, 2420–23, 101 L. Ed. 2d 297, 311–15 (1988). *See also* New York v. Hill, 528 U.S. 110, 118, 120 S. Ct. 659, 666, 145 L. Ed. 2d 560, 569 (2000) (declining to affirm dismissal with prejudice and holding "objection to a specified delay may be waived" if not raised at trial).

139. *See* United States v. Abdush-Shakur, 465 F.3d 458, 464 (10th Cir. 2006) (holding that dismissal with prejudice is not called for when "the delay caused by the government is unintentional and the district court … share[s] in the blame for the delay"), *cert. denied*, 127 S. Ct. 1321, 167 L. Ed. 2d 130 (2007). The 8th Circuit has one of the most defendant friendly precedents on this topic. *See, e.g.*, United States v. Duranseau, 26 F.3d 804, 809 (8th Cir. 1994) (dismissing of indictment without prejudice is not an abuse of discretion where delay resulted from inadvertent noncompliance with Act and not from desire to gain tactical advantage against defendant, and reprosecution would not prejudice defendant despite his claim that alibi witness had died). *Compare* United States v. Wilson, 11 F.3d 346, 353

(b) "Stop the Clock" Provisions

Upon a motion to dismiss the case, the defendant must prove that the indictment or trial was delayed beyond the time period allowed under the statute.[140] Once the defendant has shown that the government has violated the statutory time limits, the government may attempt to prove that the indictment or trial was still timely. The government will do so under subsection 3161(h)(3) of the Act,[141] which allows the tallying to stop in certain circumstances. There are many provisions in the statute ("stop the clock" provisions) that exclude certain periods of time in determining whether the indictment was filed in a timely or the trial was commenced on time.[142] No delay because of general congestion in court, lack of diligent preparation, or failure to obtain witnesses on the part of the prosecution may be excluded.[143] However, the wide variety of the provisions that "stop the clock" will generally allow a delay longer than the statutorily defined time period without violating your right to a speedy trial. A recent Supreme Court case has held that the prosecutor may not rely on the defendant's promise not to raise a speedy trial claim, when scheduling the trial.[144] In other words, even if you believe that you intentionally "opted out" of your speedy trial rights before the trial, you are not prevented from raising them during trial.[145] Importantly, the fact that there has been no violation of the federal Speedy Trial Act does not prevent the court from finding that you have been denied your Sixth Amendment right to a speedy trial.[146]

3. New York's Speedy Trial Statute

Your right to a speedy trial under New York law is governed by Sections 30.20 and 30.30 of the New York Criminal Procedure Law.[147] Although the New York Constitution does not expressly contain a speedy trial clause, you still have a state constitutional right to a speedy trial under the guarantee of due process.[148] When filing your claim that you have been denied a speedy trial, you should raise the constitutional provisions as well as the statutory ones in order to preserve your right to a speedy trial.

As for the state constitutional right to a speedy trial, the New York courts have articulated the factors to be balanced in determining whether your right has been violated. The factors to be considered in the test are: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4)

(2d Cir. 1993) (finding that lower court did not abuse its discretion in finding that unexcused delays in filing indictments did not justify dismissal of indictments with prejudice where narcotics charges were very serious and where defendants had consented to delays), *and* United States v. Wells, 893 F.2d 535, 538 (2d Cir. 1990) (finding that charge of impersonating federal officer was "serious offense" for purposes of determining whether dismissal should be without prejudice), *with* United States v. Clymer, 25 F.3d 824, 831–32 (9th Cir. 1994) (dismissing indictment with prejudice despite seriousness of drug charge where defendant was detained under cloud of pending indictment for 522 days, at least five months of which was not excludable).

140. 18 U.S.C. § 3162(a)(2) (2008).

141. 18 U.S.C. § 3162(a)(2) (2008).

142. 18 U.S.C. § 3161(h)(1)–(9) (2008). The following are some examples of the periods of delay that are included in this subsection: (1) any period of delay resulting from other proceedings concerning the defendant, including a delay resulting from any proceeding to determine the mental competency or physical capacity of the defendant, from trial with respect to other charges against the defendant, from any pretrial motion (from the filing of the motion through the conclusion of the hearing on the motion), from the removal of the case to another district, or from any delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court; (2) any period of delay during which the prosecution is deferred pursuant to written agreement with the defendant, for the purpose of allowing the defendant to demonstrate his good conduct; (3) any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

143. 18 U.S.C. § 3161(h)(8)(C) (2008).

144. Zedner v. United States, 547 U.S. 489, 509, 126 S. Ct. 1976, 1990, 164 L. Ed. 2d 749, 769 (2008).

145. Zedner v. United States, 547 U.S. 489, 501, 126 S. Ct. 1976, 1985, 164 L. Ed. 2d 749, 764 (2008) (holding that the "public interest cannot be served … if defendants may opt out of the Act").

146. 18 U.S.C. § 3173 (2008) (stating that "[n]o provision of [the Speedy Trial Act] shall be interpreted as a bar to any claim of denial of speedy trial as required by" the 6th Amendment).

147. N.Y. Crim. Proc. Law §§ 30.20–30.30 (McKinney 2003 & Supp 2008).

148. N.Y. Const. art. I, § 6; People v. Singer, 44 N.Y.2d 241, 253, 376 N.E.2d 179, 186, 405 N.Y.S.2d 17, 25 (1978) (holding that unreasonable delay in prosecution violates the defendant's state constitutional right to due process of law and noting that "the State due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute (citation omitted) and the Sixth Amendment."). *But see* People v. Vernace, 96 N.Y.2d 886, 888, 756 N.E.2d 66, 68, 730 N.Y.S.2d 778, 780 (2001) (holding that good faith determinations to delay prosecution with cause, "will not deprive defendant of due process even though there may be some prejudice to defendant.").

whether there has been an extended period of pretrial incarceration; and (5) whether there is any indication that your defense has been impaired by the delay.[149]

Under the state speedy trial statute, the amount of time in which the state must bring you to trial depends on the offense with which you are charged. For each level of offense, there are two time periods. Which of the two time limits the state has violated will determine the remedy that is available to you for the violation.

Type of Offense	Short Period[150]	Long Period[151]
Felony	Ninety days	Six months
Misdemeanor punishable for more than three months	Thirty days	Ninety days
Misdemeanor punishable for less than three months	Fifteen days	Sixty days
Violation	Five days	Thirty days

If the government has violated the short period for the offense for which you are charged, you must be released from detention,[152] unless you are being held for another offense or have previously violated the terms of your release. [153] The short time period begins when you are committed to the custody of the sheriff.

If the government has failed to bring you to trial within the long period, the charges against you must be dismissed.[154] The long time period begins on the day following the commencement of the criminal action, which is the filing of the first accusation.[155] For both the short and long time periods, the elapsed time and the excludable time periods will be related back to the first day the time period began, even when new accusations have been filed to replace the original charges.[156]

Like the federal Speedy Trial Act, the New York statute also provides that certain periods of time before you are brought to trial are not included in determining whether your right to a speedy trial has been violated.[157] There are also statutory limitations on when the relief described above is available to you.[158] For example, no remedies are available if the state was ready for trial before the time period expired, but is now not ready due to an "exceptional fact or circumstance."[159] Additionally, the time limits do not apply if you are

149. People v. Taranovich, 37 N.Y.2d 442, 445, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 82–83 (1975); People v. Vernace, 96 N.Y.2d 886, 887–88, 756 N.E.2d 66, 67, 730 N.Y.S.2d 778, 779 (2001).

150. N.Y. Crim. Proc. Law § 30.30(2)(a)–(d) (McKinney 2003 & Supp 2009).

151. N.Y. Crim. Proc. Law § 30.30(1)(a)–(d) (McKinney 2003 & Supp 2009).

152. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2003 & Supp 2009). Note that even if release is required, the judge can require you to meet bail or impose other conditions on your release. The judge can also order your redetention if you violate those conditions. N.Y. Crim. Proc. Law § 30.30(3)(c)(iii) (McKinney 2003 & Supp 2008). In practice, this may be known as a 30:30 release. For more information about the conditions which can be imposed on your pretrial release, see Part C(2) of this Chapter.

153. N.Y. Crim. Proc. Law § 30.30(3)(c) (McKinney 2003 & Supp 2009).

154. In practice, this may be known as a 30:30 dismissal.

155. N.Y. Crim. Proc. Law § 30.30(1) (McKinney 2003 & Supp 2009).

156. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2003 & Supp 2009).

157. N.Y. Crim. Proc. Law § 30.30(4) (McKinney 2003 & Supp 2009). These exceptions function the same way as the similar federal provisions discussed in Part D(2) of this Chapter. Some examples of "excludable time" under this statute include: (a) certain pretrial procedures; (b) continuances granted at the defendant's request or on his consent; (c) when the defendant cannot be found or has escaped from custody; (d) when the defendant is without counsel through no fault of the court; (e) under exceptional circumstances when the government needs more time to prepare. *See, e.g.*, People v. Reed, 19 A.D.3d 312, 318, 798 N.Y.S.2d 47, 54 (1st Dept. 2005) (holding that the period of time caused by the prosecutor's adjournment could count toward the defendant's speedy trial claim where the defendant did not request or consent to that adjournment).

158. N.Y. Crim. Proc. Law § 30.30(3) (McKinney 2003 & Supp 2008).

159. N.Y. Crim. Proc. Law § 30.30(3)(b) (McKinney 2003 & Supp 2008). For example, a court may decide that the state encountered an "exceptional circumstance" if evidence material to the state's case suddenly became unavailable, despite the district attorney's efforts to obtain the evidence, if it is reasonable to believe that the evidence will become available in a reasonable time. Evidence is material when it has "some logical connection with the facts of consequence or the issues." Black's Law Dictionary 598 (8th ed. 2004).

charged with criminally negligent homicide,[160] first[161] or second-degree[162] manslaughter, or first[163] or second-degree[164] murder.[165]

If you feel that you have been denied access to a speedy trial, you must raise this issue before the trial begins or before you before plead guilty.[166] The claim will not be preserved for appeal if not properly raised in the trial court.[167] Unlike statutory speedy trial claims, however, properly asserted constitutional speedy trial claims are not waived by a guilty plea or by making a plea bargain agreement.[168] Most speedy trial claims are raised in pretrial motions (such as a motion to dismiss) or state habeas corpus petitions.[169] If you are represented by counsel, confer with your attorney as to which procedure best fits your case.

E. Conditions of Pretrial Detention

While you are held in a prison or other detention facility prior to or during trial, you are a pretrial detainee. As a pretrial detainee, you have, at minimum, the same rights as a convicted prisoner.[170] Unlike a post trial prisoner, however, you have not been convicted of any crime—thus in some cases you may be entitled to a higher level of constitutional protection.

The leading case on the rights of pretrial detainees is *Bell v. Wolfish*.[171] *Wolfish* made clear that the most important difference between pretrial detainees and convicted prisoners is that pretrial detainees cannot be punished. Convicted prisoners often contest prison conditions on the basis that they violate the Eighth Amendment prohibition on "cruel and unusual punishment." Pretrial detainees cannot be punished at all because they have not been convicted. To punish a pretrial detainee who has been convicted of no crime would violate the Due Process Clauses of the U.S. Constitution.[172]

Generally, claims brought by prisoners or pretrial detainees about conditions of detention are brought under one of three constitutional amendments. Convicted prisoners are protected by the Eighth Amendment's ban on cruel and unusual punishment. Pretrial detainees in federal facilities are protected by the Due Process Clause of the Fifth Amendment. Pretrial detainees in state facilities are protected by the Due Process Clause of the Fourteenth Amendment. The protections of the Fifth and Fourteenth Amendments against poor detention conditions are otherwise equal. Pretrial detainees have at least the same rights under the Due Process Clause as convicted prisoners do under the Eighth Amendment; thus, as a pretrial detainee you may use cases which involve the Eighth Amendment, as long as you point out that your argument is based on one of the due process clauses.

The right not to be punished without due process of law is one of the constitutional rights that protect you while you are detained. Pretrial detainees are entitled to the same constitutional protections as

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160. N.Y. Penal Law § 125.10 (McKinney 2009).

161. N.Y. Penal Law § 125.20 (McKinney 2009).

162. N.Y. Penal Law § 125.15 (McKinney 2009).

163. N.Y. Penal Law § 125.27 (McKinney 2009).

164. N.Y. Penal Law § 125.25 (McKinney 2009).

165. N.Y. Crim. Proc. Law § 30.30(3)(a) (McKinney 2003 & Supp 2009).

166. N.Y. Crim. Proc. Law § 170.30(2) (McKinney 2007); N.Y. Crim. Proc. Law § 210.20(2) (McKinney 2007); People v. Cintron, 7 A.D.3d 827, 828, 776 N.Y.S.2d 919, 919 (3d Dept. 2004) (holding defendant's guilty plea waived appellate review of his statutory right to speedy trial).

167. *See* People v. Bancroft, 23 A.D.3d 850, 850–51, 803 N.Y.S.2d 824, 825–26 (3d Dept. 2005) (holding that the right to a speedy trial may be waived where a defendant fails to raise the claim in either a pretrial motion "or otherwise register an appropriate objection on this ground throughout the course of his prosecution").

168. *See* People v. Savage, 54 N.Y.2d 697, 698, 426 N.E.2d 468, 468, 442 N.Y.S.2d 974, 975 (1981) (noting that a guilty plea does not waive the constitutional speedy trial right); People v. Blakley, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 460–61 (1974) (dismissing defendant's indictment because plea bargain should not have been made in exchange for withdrawal of claim of speedy trial violation); People v. Thorpe, 160 Misc. 2d 558, 559, 613 N.Y.S.2d 795, 796 (2d Dept. 1994) (holding that "a constitutional speedy trial claim is not waived by a guilty plea").

169. For more information on state habeas corpus petitions, see *JLM*, Chapter 20, "New York Habeas Corpus-New York, Florida and Texas". Note that the New York Court of Appeals has held that habeas corpus petitions asserting a denial of the defendant's right to speedy trial cannot be brought during a pending criminal proceeding. People *ex rel.* McDonald v. Warden, 34 N.Y.2d 554, 555, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974).

170. *See* Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

171. Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

172. *See* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

convicted prisoners.[173] Even if a condition of pretrial confinement cannot be shown to constitute punishment in violation of due process, it may still violate one of your other constitutional rights. If the conditions of your detention would violate the constitutional rights of a convicted inmate, they violate your rights as a pretrial detainee.

To find out what these rights are, you should consult the other chapters of the *JLM*, which explain the rights of convicted inmates. These rights include, among others, freedom of religion and speech under the First and Fourteenth Amendments, the right to be free from unreasonable searches and seizures under the Fourth Amendment, and the right under the Equal Protection Clause not to be discriminated against on the basis of race. A chapter which may be helpful is Chapter 15, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law." Immigrant or foreign pretrial detainees should also consult Chapter II of the *JLM ICA Supplement*.

While the law is unclear whether the Fourteenth and Fifth Amendments give pretrial detainees a higher level of constitutional protection than convicted prisoners, the Supreme Court has repeated that pretrial detainees are entitled to at least the same rights as those enjoyed by convicted prisoners.[174] Some courts have found that pretrial detainees may enjoy greater rights than convicted prisoners. However, most courts have found that the same standards apply to convicted and pretrial detainees alike. These cases are discussed in more detail below.

The rest of Part E focuses only on areas of prison life where there may be a difference between the rights of pretrial detainees and those of convicted prisoners. Section 1 deals with your right not to be punished. Section 2 discusses medical care, protection from violence, and food and housing. Section 3 examines your right not to be subjected to excessive force. Your right of access to counsel is covered in Section 4, and Section 5 examines your right to vote.

1. The Right Not to be Punished

(a) Punishment for Underlying Crime

The purpose of detaining you prior to or during trial is not to punish you, but to ensure your presence at trial.[175] Thus, under *Bell v. Wolfish*, while you are a pretrial detainee, you cannot be punished for the crime of which you are accused.[176] Under *Wolfish*, therefore, the central question is whether the conditions to which you are subject constitute punishment.[177]

(i) Intent to Punish

The most direct way to show that the conditions are punitive is to show that they were intended to punish you. For example, in a case involving a pretrial detainee who was confined in a restraint chair for eight hours after fighting with prison guards, the court held that it was for the jury to determine whether the guards confined the prisoner in the chair for the purpose of maintaining prison order and security or for the purpose of punishment. If the guards' intent was to maintain order, then their actions were constitutional; if their intent was to punish, then their actions violated the Due Process Clause of the Fourteenth Amendment.[178]

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173. Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

174. *See* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983) (holding that the due process rights of a pretrial detainee "are at least as great as the Eighth Amendment protections available to a convicted prisoner.").

175. Bell v. Wolfish, 441 U.S. 520, 536, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447, 467 (1979).

176. Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). You also cannot be treated in a way that is intended to promote the traditional aims of criminal punishment. Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447, 469 n.20 (1979) ("Retribution and deterrence are not legitimate nonpunitive governmental objectives.").

177. *See* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against the deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.").

178. Fuentes v. Wagner, 206 F.3d 335, 342, 346 (3d Cir. 2000) (holding that while the pretrial detainee may have shown that the prison officials overreacted in their use of a restraint chair, he still failed to show that their intentions were punitive, i.e., "maliciously and sadistically to cause harm").

(ii) Not related to Nonpunitive Government Goals

It is often difficult to prove the intent behind a set of conditions imposed by a prison. Without proof of intent, the conditions will amount to punishment if you can show that they are not reasonably related to a legitimate, nonpunitive government goal. This involves a two-part inquiry: (1) is the goal of the conditions legitimate and nonpunitive; and (2) are the conditions an excessive way to achieve that goal.[179] Under this two-part test, it is difficult but not impossible to show that the conditions or restrictions of your pretrial detention amount to punishment.

In applying the first part of the test, the *Wolfish* court found that the maintenance of order and security in a detention facility is a legitimate nonpunitive government goal.[180] Jail officials will generally claim that whatever they did to you was for legitimate purposes of maintaining order and security, not for punishment, but a court may find the conditions impermissible despite these claims.[181] For example, if one prison official makes up a charge against you, and then other guards take measures that they legitimately believe to be non-punitive, you may be able to show that the officer who falsely accused you intended to punish you. If you can trace back the harmful treatment to any prison official who intended to punish you, you may be able to establish unconstitutional pretrial punishment.[182]

In examining whether the measures taken were excessive, the *Wolfish* court stated that courts should grant prison authorities "wide-ranging deference" in their judgments about what practices are needed to maintain order and security in a prison or detention facility.[183] This means that even if the prison's methods for maintaining order and security are unpleasant, the court is unlikely to substitute its judgment for that of the prison officials.[184] That doesn't mean, however, that conditions and restrictions are not violations when they are overly harsh.[185] For example, where a detainee was kept in isolation lockup for nine months for no apparent reason, the court held that on its face such treatment "smacks of punishment."[186] The court remanded the case to determine whether there was a reason to justify the lockup in the isolation wing.[187]

In another case, prisoners were chained and handcuffed for over twelve hours and deprived of access to toilets after a failed escape attempt. The court held that such restraints would violate the Fourteenth Amendment if the jury found that the restraints were not a reasonable method of preventing prisoners from

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179. Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873–74, 60 L. Ed. 2d 447, 468 (1979) (holding that without a showing of an expressed intent to punish, whether conditions or restrictions amount to punishment "generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.") (citations and internal quotation marks omitted).

180. Bell v. Wolfish, 441 U.S. 520, 540, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447, 469 (1979).

181. Bell v. Wolfish, 441 U.S. 520, 538–39, 99 S. Ct. 1861, 1873–74, 60 L. Ed. 2d 447, 468–69 (1979) (the characterization by prison officials of a condition or restriction as "nonpunitive" does not make it so); *see, e.g.*, Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001) (upholding the lower court's ruling that restraints that were characterized as nonpunitive by the city's corrections department caused so much pain to detainees that they had the same effect as punishment).

182. Surprenant v. Rivas, 424 F.3d 5, 16 (1st Cir. 2005) (holding that fabricating a serious charge, knowing that the lie would have serious negative consequences for a pretrial detainee, is an illegal manipulation of legitimate prison regulations and "can constitute arbitrary punishment by a correctional officer, even if the response by other (unwitting) prison officials is legitimate and non-punitive").

183. Bell v. Wolfish, 441 U.S. 520, 540, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 469 n. 23 (1979) ("In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order … courts must heed our warning that such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence … that the officials have exaggerated their response …, courts should ordinarily defer to their expert judgment in such matters.") (citations and internal quotation marks omitted).

184. Bell v. Wolfish, 441 U.S. 520, 542, 99 S. Ct. 1861, 1876, 60 L. Ed. 2d 447, 470 n.25 (1979) ("Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional.").

185. Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447, 469 n.20 (1979) ("[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, … that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.").

186. Covino v. Vt. Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991).

187. Covino v. Vt. Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991); s*ee also* United States v. Gotti, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) (placing detainee in administrative detention because of the crime for which he has been charged rather than his actions while incarcerated constitutes punishment).

escaping again, or if "alternative and less harsh measures" could have been used.[188] Furthermore, "a severe curtailment" of pretrial detainees' out of cell time may be evidence of punitive intent and constitute punishment,[189] even when dealing with prisoners who "are determined to be prone to: escape; assault staff or other inmates … or likely to need protection from other inmates [sic]."[190]

The *Wolfish* case itself involved a wide range of prison practices, all of which the Court upheld as reasonably related to a legitimate need to maintain order and security in a detention facility. Double-bunking of pretrial detainees,[191] random shakedown searches of detainees' cells,[192] a "publishers-only" rule that prohibited detainees from receiving hardcover books unless they were mailed directly from the publisher,[193] and routine body cavity searches after contact visits[194] were all found to be reasonable security measures that did not violate the due process rights of pretrial detainees. This shows how difficult it may be to convince a court that the measures taken by the prison officials were meant to be punitive in violation of your constitutional rights.

(b) Disciplinary Measures for Infractions of Prison Rules

Courts have found that you can be disciplined if you break the prison rules while you are a pretrial detainee or if officials have reason to believe that you need to be restrained for the safety and order of the detention facility. In other words, you can be punished for breaking prison rules as long as you are not being punished for the underlying crime that led to your arrest in the first place.[195] Unfortunately, there is little clear guidance as to what distinguishes "discipline" from "punishment."[196] What is important to understand is that when you break prison rules, you can be subjected to additional restraints on your liberty, including being placed in administrative detention or isolation,[197] having privileges removed,[198] and being held in handcuffs or other restraining devices.[199]

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188. Putman v. Gerloff, 639 F.2d 415, 420 (8th Cir. 1981).

189. Pierce v. County of Orange, 526 F.3d 1190, 1208 (9th Cir. 2008) (holding that pretrial detainees must be give adequate time out of their cells to exercise and observe their religion).

190. Cal. Code Regs. Tit. 15, § 1053.

191. Bell v. Wolfish, 441 U.S. 520, 542, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 470 (1979) (stating that there is no "'one man, one cell' principle lurking in the Due Process Clause …").

192. Bell v. Wolfish, 441 U.S. 520, 556–57, 99 S. Ct. 1861, 1883–84, 60 L. Ed. 2d 447, 480 (1979) (finding that the searches did not violate the 4th Amendment and did not constitute punishment under the Due Process Clause).

193. Bell v. Wolfish, 441 U.S. 520, 550–52, 99 S. Ct. 1861, 1879–81, 60 L. Ed. 2d 447, 475–77 (1979) (finding no 1st Amendment violation, or punishment in violation of the Due Process Clause).

194. Bell v. Wolfish, 441 U.S. 520, 560–61, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979) (finding no 4th Amendment violation, or punishment in violation of the Due Process Clause). *But see* U.S. v. Calhoun, 2002 U.S. Dist. Lexis 23277 (D. Kan. Nov. 13, 2002) (stating that strip searches of people arrested on non-violent misdemeanors must be justified by a reasonable suspicion outside the confinement context).

195. *See* Rapier v. Harris, 172 F.3d 999, 1003 (7th Cir. 1999) (noting that though a pretrial detainee cannot be punished for underlying crime of which he stands accused, he "can be punished for misconduct that occurs while he is awaiting trial."); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) ("[P]retrial detainees are [not] free to violate jail rules with impunity."); Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (holding that reasonable punishment may be imposed to enforce prison requirements, but not to sanction the unproven criminal allegations).

196. *See* Fuentes v. Wagner, 206 F.3d 335, 343 (3d Cir. 2000) (holding that eight hours in restraint chair after disruptive behavior would be unconstitutional if it were found to have been imposed as punishment although defendant in this case was put in the restraint chair "to stop his disruptive and maintain prison order and security."); McFadden v. Solfaro, 1998 U.S. Dist. LEXIS 5765, at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (finding the disciplinary segregation of pretrial detainee for breaking prison regulations acceptable because it was not punitive and instead was "tied to the legitimate objective of maintaining order and impressing the need for discipline").

197. *See* Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (ruling that disciplinary segregation of pretrial detainee for breaking prison rules does not violate the Constitution, as long as a due process hearing is provided); McFadden v. Solfaro, 1998 U.S. Dist. Lexis 5765 at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding constitutionality of pretrial detainee's administrative segregation for acting against prison regulations by "committing ... unhygienic acts" and threatening guards).

198. *See* McFadden v. Solfaro, 1998 U.S. Dist. LEXIS 5765, at *32 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding loss of privileges including commissary, walkman, phone).

199. *See* Fuentes v. Wagner, 206 F.3d 335, 343 (3rd Cir. 2000) (upholding prison authorities' right to restrain prisoner in chair for eight hours after prisoner's disruptive behavior since restraint was not used as a punishment). On the other hand, prison officials are not permitted to go too far with their disciplinary actions and when they do, you may have a valid constitutional claim under the Fourteenth Amendment. *See* Danley v. Allen, 540 F.3d 1298, 1309 (11th Cir. 2008) (holding that when jailers continue using "substantial force against a prisoner who has clearly stopped resisting …

Pretrial detainees, unlike convicted prisoners, are usually entitled to procedural protections when punishments or additional restraints are imposed upon them.[200] When officials decide to subject you to additional restraints ("punishment") for your violation of prison rules, therefore, they must follow certain procedures consistent with due process of law. Some courts have required that pretrial detainees be given due process before the additional restrictions are imposed,[201] while others have allowed the restrictions first, so long as they are followed up in a manner that accords with due process.[202] The due process to which you are entitled when restrained or punished for breaking prison rules is equivalent to that described in *Wolff v. McDonnell*,[203] which defines the due process rights of convicted prisoners at a prison disciplinary hearing.[204] You are entitled, for example, to be given written notice of the charges against you, to be given a hearing on the matter before an impartial officer, and to call witnesses and present evidence at that hearing.[205] State laws may give you even greater due process rights than are laid out in *Wolff*. For a more detailed discussion of what due process in prison disciplinary hearings entails, see *JLM*, Chapter 17, "Your Rights at Disciplinary Proceedings."

2. The Rights of Pretrial Detainees vs. The Rights of Convicted Prisoners: Medical Care, Protection from Violence, and Food and Housing

This Section discusses the state's affirmative obligation to provide for your basic needs while you are detained. It covers your rights to: (1) food and housing; (2) medical care; and (3) protection from assault. Some courts have referred to these rights as "conditions of confinement";[206] others have described them as "basic necessities"[207] or "basic human needs."[208] It remains unclear whether pretrial detainees have the right to higher standards than those provided by law to convicted prisoners.

(a) Introduction: Rights of Convicted Prisoners

Since pretrial detainees are entitled to at least the same standards of food and housing, medical care, and protection from assault as convicted prisoners, you should consult the relevant chapters of the *JLM* to find out more about the law in each of these areas. To learn more about your rights to medical care, see *JLM*, Chapter 22. See *JLM*, Chapter 23 for information on your right to be free from assault. This Section will not repeat the material laid out in those chapters, but will focus instead on the similarities and differences between the rights that pretrial detainees and convicted prisoners have to these basic necessities.

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that use of force is excessive").

200. *See* Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001) (holding that imposition of non-punitive restrictions which nonetheless were significant restraints on detainees' liberty required subsequent due process protections); Rapier v. Harris, 172 F.3d 999, 1004–05 (7th Cir. 1999) (holding that pretrial detainees, unlike convicted prisoners, are entitled to procedural protection before the imposition of punishment for misconduct); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (holding that a due process hearing is required before imposing disciplinary segregation on a pretrial detainee). *But see* Wilson v. Blankenship, 163 F.3d 1284, 1295 (11th Cir. 1998) (finding temporary placement of pretrial detainee in isolation, without bedding, for causing a disturbance was permissible without a hearing). The rule that punishments must be "atypical and significant" to require due process protections applies only to convicted prisoners, not to pre-trial detainees. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995). If you are a convicted prisoner and want a more complete conversation on this topic, see *JLM*, Chapter 17.

201. *See* Rapier v. Harris, 172 F.3d 999, 1005 (7th Cir. 1999) (finding that "punishment can be imposed only after affording the detainee some sort of procedural protection"); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (finding that "a pretrial detainee may not be punished without a due process hearing").

202. *See* Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001).

203. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

204. Benjamin v. Fraser, 264 F.3d 175, 190 n.12 (2d Cir. 2001) (noting that although *Wolff* involved a convicted prisoner, the same standard applied to pretrial detainees); s*ee also* Wolff v. McDonnell, 418 U.S. 539, 564–66, 570–71, 94 S. Ct. 2963, 2979, 2982, 41 L. Ed. 2d 935, 956, 959 (1974).

205. Benjamin v. Fraser, 264 F.3d 175, 190 (2d Cir. 2001); s*ee also* Wolff v. McDonnell, 418 U.S. 539, 564–66, 570–71, 94 S. Ct. 2963, 2979, 2982, 41 L. Ed. 2d 935, 956, 959 (1974).

206. *See, e.g.*, Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996).

207. *See, e.g.*, Boswell v. Sherburne County, 849 F.2d 1117, 1121 n.4 (8th Cir. 1988) (describing circuit split on issue of whether pretrial detainees are entitled to greater rights than convicted prisoners with respect to "such basic necessities as food, living space, and medical care").

208. *See, e.g.*, Hare v. City of Corinth, 135 F.3d 320, 324 (5th Cir. 1998).

(b) Greater Protection for Pretrial Detainees?

As noted, the Eighth Amendment does not apply to unconvicted pretrial detainees since pretrial detainees cannot be punished at all. That suggests that pretrial detainees might be entitled to better treatment than convicted prisoners. For instance, in a detainee medical care case, the Supreme Court stated that the "due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner."[209] In an important case, the Supreme Court left open the possibility that even where a prison official's level of intent in treating the prisoner does not reach "deliberate indifference," the rights of a pretrial detainee may nevertheless be violated.[210]

However, *Revere*, like most of the cases that suggested the possibility of a higher standard for pretrial detainees than for convicted prisoners, did not explain what the difference in standard would be, and did not make a ruling on that basis. Instead it found that on the facts of the case, the state had fulfilled its obligation by taking the injured detainee to the hospital promptly after he was apprehended by the police.[211] In general, when making a claim that your constitutional rights have been violated as a pretrial detainee, you will argue that the same treatment would also violate the rights of a convicted prisoner and acknowledge that you may have even greater rights by citing to the cases in the footnotes of this paragraph.

(c) Retreat from Greater Protection

The Supreme Court has not ruled on whether pretrial detainees are entitled to a higher standard of care than convicted prisoners with respect to food and housing, medical treatment, and protection from assault.[212] Some lower courts have considered the possibility that there is a higher standard for pretrial detainees than for convicted prisoners.[213] However, most of the federal circuits have abandoned trying to describe this difference[214] and have found instead that the same standards for conditions of confinement, medical care, and protection from violence apply to convicted prisoners and pretrial detainees alike.[215]

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209. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983).

210. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243–44, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 610–11 (1983).

211. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983). *See also* Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (noting without deciding that "it is quite possible … that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment"); Davidson v. Cannon, 474 U.S. 344, 348, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677, 683 (1986) ("The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials."); Daniels v. Williams, 474 U.S. 327, 333, 106 S. Ct. 662, 666, 88 L. Ed. 2d 662 (1986) (holding that police officer's alleged negligence in leaving pillow on stairs and causing detainee to trip and injure himself does not constitute a deprivation of due process, and noting that even if the Court established that a state official's actions might constitute a claim of action under tort law, there is not necessarily a deprivation of due process). The question remaining after *Davidson* is whether there is some standard of care for pretrial detainees that falls between the negligence standard (which is not sufficient to establish a due process violation) and the deliberate indifference standard applicable to convicted prisoners (the minimum standard of care to which pretrial detainees entitled).

212. *See* Daniels v. Williams, 474 U.S. 327, 335, 106 S. Ct. 662, 667, 88 L. Ed. 2d 672, 670 n.3 (1986) (declining to decide whether a standard between negligence and intentional conduct violates the due process clause); *see also* City of Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427 (1989) (declining again to decide whether something less than deliberate indifference may suffice to establish a deprivation in violation of due process of a pretrial detainee's right to medical care).

213. For a description of a split in the circuit courts on the issue of whether the Fourteenth Amendment standard applicable to pretrial detainees differs from the 8th Amendment standard applicable to convicted prisoners, see Boswell v. Sherburne County, 849 F.2d 1117, 1121 n.4 (8th Cir. 1988) (declining to resolve which standard applies to medical care claims brought by pretrial detainees in the 8th Circuit). *See also* Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (noting without deciding that "it is quite possible … that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment"). The general consensus among courts on this point currently appears to be that, as regards medical care, pretrial detainees have no greater rights than convicted prisoners.

214. *See, e.g.,* Davis v. Hall, 992 F.2d 151, 152–53 (8th Cir. 1993) (holding that, due to the lack of a different, established standard for reviewing pretrial detainees' claims, the court will "apply the deliberate indifference standard.").

215. *See* Caiozzo v. Koreman, 581 F.3d 63 , 69–72 (2d Cir. 2009), Ford v. County of Grand Traverse, 535 F.3d 483, 494–95 (6th Cir. 2008) (holding that pretrial detainees are guaranteed the "right to adequate medical treatment by the Due Process Clause of the Fourteenth Amendment, and are subject to the same deliberate-indifference standard of care" as are convicted prisoners); Liscio v. Warren, 901 F.2d 274 (2d Cir. 1990) (finding deliberate indifference standard

3. The Right Not to be Subjected to Excessive Force

An official who uses excessive physical force against you while you are a pretrial detainee violates your due process rights under the Fifth or Fourteenth Amendment. Convicted prisoners also have a right to be free from excessive physical force. That right, however, stems from the Eighth Amendment prohibition on cruel and unusual punishment.

There are two components to a claim that an official acted with excessive physical force: (1) a subjective component, which looks at the official's state of mind; and (2) an objective component, which looks at the amount of harm caused. See *JLM*, Chapters 24 and 25, "Your Right to be Free from Assault," and "Your Right to be Free from Illegal Searches," for a more detailed discussion of excessive force claims.

The different circuits of the federal courts disagree about how, if at all, the excessive force standard differs for pretrial detainees and convicted prisoners. Most but not all courts have held that when it comes to excessive force claims, pretrial detainees do have greater rights than convicted prisoners.[216]

Three separate constitutional provisions govern claims of excessive force. The Supreme Court discussed these provisions in *Graham v. Connor*[217] and held that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from excessive force.[218] The Court held that the Fourteenth Amendment, at a minimum, prohibits "force that amounts to punishment"[219] but left open the possibility that the Fourth Amendment protections of arrestees may extend additional protection to pretrial detainees.[220]

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applicable to pretrial detainee's claim of failure to provide medical care for drug and alcohol withdrawal). Often courts retain the language that pretrial detainees are *at least* afforded the 8th Amendment protections granted to convicted prisoners but other courts, in coming to this conclusion, have stated that when it comes to "basic necessities" or "basic human needs" the same standard applies to convicted prisoners and pretrial detainees. *See, e.g.*, Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding that with regard to providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard required by the due process clause is the same as that required by the 8th Amendment for convicted prisoners); s*ee also* Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996) (applying the deliberate indifference standard to a section 1983 claim involving the failure of state officials to prevent a suicide by a pretrial detainee, and holding that when a state official's acts or omissions are at issue, the deliberate indifference standard applies to claims involving the basic human needs of pretrial detainees); Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994) (applying 8th Amendment standard to unsanitary prison conditions, and citing *Hamm* for the proposition that when it comes to providing pretrial detainees with "such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that allowed by the eight amendment for convicted persons.").

216. *See, e.g.*, Lanman v. Hinson, 529 F.3d 673, 680 (6th Cir. 2008) (noting that the circuit has held that different standards apply, depending on if the plaintiff is a free citizen, a convicted prisoner, or something in between); Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996) ("[P]retrial detainees must arguably be afforded a higher standard than that provided by the 8th Amendment. ... This is so at least for claims that deal with things other than conditions of confinement."). *But see*, Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (holding that in excessive force claims, "it makes no difference whether [the plaintiff] was a pretrial detainee or a convicted prisoner because the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving ... pretrial detainees") (internal quotation marks and citation omitted).

217. Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The 4th Amendment protects against excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen." Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 454 (1989) (noting that some factors for determining whether excessive force under the 4th Amendment include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight") (citing Tenn. v. Garner, 471 U.S. 1, 8–9, 105 S. Ct. 1694, 1700, 85 L. Ed. 2d 1, 8 (1985)). The 8th Amendment protects convicted prisoners from excessive force that amounts to "cruel and unusual punishment." U.S. Const. amend. VIII; Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 454 (1989). *See also* Whitley v. Albers, 475 U.S. 312, 320–21, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251, 261 (1986) (noting that the circumstances in which the force is used must be taken into account and holding that force will only be found excessive if it was inflicted "maliciously and sadistically.")

218. Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 n.10 (1989).

219. Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 n.10 (1989).

220. Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 n.10 (1989) (noting that the 4th Amendment standard might continue to apply beyond "the point at which arrest ends and pretrial detention begins."). The lower federal courts are not all in agreement on this issue. *Compare*, Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (holding that an arrestee is still entitled to 4th Amendment protection while in the custody of the arresting officers after the act of arrest) *with* Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (*en banc*) (holding that the 4th amendment "does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody").

Once you have decided to bring an excessive force claim under the Fourteenth Amendment, it is still unclear exactly what standard of review the court will use. In the absence of a ruling by the Supreme Court, some lower courts have created an intermediate standard of review for excessive force claims of pretrial detainees. Under the intermediate standard that some courts have created, pretrial detainees who claim excessive force in violation of the Fourteenth Amendment Due Process Clause need to show that the person who exerted the force either had "actual intent" to use excessive force or was at least "reckless" in doing so.[221] This is standard is, therefore more difficult to meet than the "unreasonableness" standard of the Fourth Amendment.

Other courts have held that the excessive force standard for pretrial detainees is the same as that for convicted prisoners under the Eighth Amendment, so that pretrial detainees must show that a person acted not only with intent, but "inflicted unnecessary and wanton pain and suffering."[222] As a general rule, if you are a pretrial detainee and you can show that you were treated with excessive force for the purpose of punishment, then you can establish that your due process rights have been violated under the *Graham* standard. For example, where a pretrial detainee in the process of trying to escape was assaulted by an officer who caught him in the act, the court held that if the officer's purpose was to punish, injure, or discipline the inmate, then it constituted impermissible punishment.[223]

4. Right of Access to Counsel

Under the Sixth Amendment of the U.S. Constitution, you have a right to counsel in the preparation of your defense. (See Part B of this Chapter for a broader discussion of your right to counsel.) This right includes the right to meet with and communicate with your attorney while you are detained awaiting trial. If the conditions of your detention interfere with your ability to meet with your attorney, or to communicate in private to discuss your case, then they may violate your Sixth Amendment right to counsel. [224]

Pretrial detainees may have a greater right of access to counsel than convicted prisoners. The Supreme Court recognized in *Maine v. Moulton* that the right to counsel is especially important during the period before trial.[225] *Moulton* did not involve a pretrial detainee,[226] but it has been cited by some lower courts as

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221. *See* Wilson v. Williams, 83 F.3d 870, 875–76 (7th Cir. 1996) (holding that officials exert excessive force on a pretrial detainee if they act with "actual intent" to violate the detainee's rights or with "reckless disregard" of those rights; the court explained that the standard to be applied to excessive force claims of pretrial detainees is neither wholly subjective nor wholly objective). *See also* Telfair v. Gilberg, 868 F. Supp. 1396, 1410–12 (S.D. Ga. 1994) (holding unique intermediate standard applies to excessive force claims of pretrial detainees, requiring a lesser showing of intent than the 8th Amendment standard applied to convicted prisoners), *aff'd*, 87 F.3d 1330 (11th Cir. 1996). Under *Telfair*, a pretrial detainee does not need to establish malicious intent to make out a claim of excessive force, but rather, needs only to establish either that the official acted with an intent to punish the detainee (which would be impermissible under the Fourteenth Amendment) or, in the absence of such intent, that the official's actions were not reasonably related to a legitimate government objective. *C.f.* Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (stating that the court has not decided "whether there are instances in which pretrial detainees, as opposed to convicted prisoners, may establish a constitutional violation without meeting the [8th Amendment] deliberate indifference standard").

222. *See, e.g.,* Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (holding that in excessive force claims, "it makes no difference whether [the plaintiff] was a pretrial detainee or a convicted prisoner") (citation omitted); Taylor v. McDuffie, 155 F.3d 479, 483–84 (4th Cir. 1998) (applying the 8th Amendment subjective test to excessive force claim brought by detainee due to officers' alleged actions shortly after arrest). Remember that under the 8th Amendment test, in some circumstances (such as when maintaining order in a detention facility) courts will require that the state official have acted "maliciously and sadistically" for there to be a violation of your rights. Whitley v. Albers, 475 U.S. 312, 320–21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986).

223. Putman v. Gerloff, 639 F.2d 415, 420–21 (8th Cir. 1981). *See also* Collazo-Leon v. United States Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (noting that an otherwise legitimate restriction or condition may be viewed as punitive and therefore be in violation of the detainees constitutional rights if the condition is "excessive in light of the seriousness of the violation").

224. You should also look at the chapters of the *JLM* describing the rights of access to counsel of convicted prisoners, because these rights certainly apply to pretrial detainees as well. See *JLM*, Chapter 3, "Your Right to Learn the Law and Go to Court," on your right of access to a law library, and Chapter 18, "Your Right to Communicate with the Outside World," on your right to correspond with and visit with your attorney.

225. Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.").

226. *Maine v. Moulton* involved a defendant who was released on bail pending trial, during which time the police arranged for his co-defendant to wiretap a conversation between the two. During that conversation, the defendant made incriminating statements. The Court deemed these statements inadmissible, on the basis that the police used the wiretap to evade the defendant's right not to be interrogated without an attorney present. Maine v. Moulton, 474 U.S.

support for the proposition that courts should be especially protective of your right to counsel while you are a pretrial detainee.[227] As one court stated, when pretrial detainees are kept from effectively communicating with their attorneys, "the ultimate fairness of their eventual trial can be compromised."[228]

Prison regulations that make it difficult for your attorney to meet and communicate with you, may violate with your Sixth Amendment right to counsel. Regulations and conditions found to interfere with this right include limits on detainees' telephone conversations with attorneys,[229] inadequate privacy during such telephone discussions,[230] inadequate or inadequately private space in which to meet with your attorneys,[231] and prison regulations that create substantial and unpredictable delays when your attorneys come to meet with you.[232] A transfer from one detention facility to another may also violate your right to counsel, if the transfer is to a place so distant that your access to counsel is impaired.[233]

The Sixth Amendment right to counsel guarantees you the right to have access to your attorney, it may also provide you with a right to access a law library.[234] In particular, prisoners who wish to proceed pro-se under *Faretta v. California*[235] may have a right to a law library, however, not every circuit recognizes that right.[236] At least one court has held that inadequate access to a law library during pretrial detention can worsen the infringement on your Sixth Amendment right to counsel where the rules already make it hard for you to communicate with your lawyer.[237] For a more detailed discussion of this right, see Chapter 3 of the *JLM,* "Your Right to Learn the Law and Go To Court."

As explained in *JLM*, Chapter 3, under *Lewis v. Casey*, if you claim that your right of access to the courts has been interfered with, you must show that the denial of this right has caused "actual injury" to your case. But, in *Benjamin v. Fraser,* the Second Circuit distinguished the right of access to the courts from the right to counsel for pre-trial detainees. If you assert that there were barriers to your accessing counsel, in violation of the Sixth Amendment, then you do not need to show actual injury.[238]

159, 180, 106 S. Ct. 477, 489, 88 L. Ed. 2d 481, 498–99 (1985).

227. *See, e.g.,* Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001).

228. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989).

229. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–52 (8th Cir. 1989) (noting that, if proven, restrictions on access to counsel were "inadequately justified" where detainees were effectively permitted one attempt at a 20-minute phone call with attorneys during office hours every other week).

230. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–53 (8th Cir. 1989) (finding inadequate privacy where phones were brought to a noisy public space and conversations could be overheard by guards and other prisoners).

231. *See, e.g.,* Benjamin v. Fraser, 264 F.3d 175, 187–88 (2d Cir. 2001) (holding that detention facility must provide attorneys with an adequate number of visitation rooms in which to meet with their clients prior to and during trial, and these rooms must provide adequate privacy).

232. Benjamin v. Fraser, 264 F.3d 175, 179 (finding a 6th Amendment violation where attorneys "routinely face[d] unpredictable, substantial delays in meeting with clients" from 45 minutes to two hours, that were caused by a combination of factors, including a limited number of counsel rooms, a rule requiring that prisoners not be moved to counsel rooms without escorts, and a rule prohibiting prisoners from being brought to counsel rooms during prisoner counts).

233. *See* Covino v. Vt. Dept. of Corr., 933 F.2d 128 (2d Cir. 1991) (*per curiam*); s*ee also* Cobb v. Aytch, 643 F.2d 946, 960 (3d Cir. 1981) (affirming injunctive relief limiting transfers of detainees to distant facilities on the basis that these substantially interfere with detainees' right to counsel).

234. Walton v. Toney, 44 Fed. Appx. 49, 51 (8th Cir. 2002) (*per curiam*) ("To prevail on an access-to-courts claim, an inmate must … demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim") (internal quotation and citation omitted). *But see* United States v. Wilson, 690 F.2d 1267, 1271–72 (9th Cir. 1982) (asserting that where a defendant chooses not to represent himself and where adequate legal assistance is provided, no constitutional right to access a law library exists).

235. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1974)

236. *Compare* Taylor v. List, 880 F.2d 1040, 1047 (9th Cir. 1989) ("the Sixth Amendment right to self-representation … includes a right of access to law books, witnesses, and other tools necessary to prepare a defense." (citing Milton v. Morris, 767 F.2d 1443, 1446 (9th Cir. 1985)) *with* U.S. v. Cooper, 375 F.3d 1041, 1051–52 (10th Cir. 2004) ("[P]retrial detainees are not entitled to law library usage if other available means of access to court exist. … When a prisoner voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding, he is not entitled to access to a law library.") (citations omitted).

237. Johnson-El v. Schoemehl, 878 F.2d 1043, 1053 (8th Cir. 1989) (holding that in a case where jail rules already violated detainee's right to counsel by making it hard for detainees to communicate with their lawyers, the fact that detainees were only allowed to use law library for two hours a week and library was inadequate for most legal research made violation of detainees' rights worse).

238. Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001).

5. Voting Rights

Even though you are a pretrial detainee, you still have the right to vote.[239] Disenfranchisement, or denial of the right to vote, violates your rights under the Equal Protection Clause of the Fourteenth Amendment. However, the case law concerning by what methods you may vote is somewhat confusing.

In *McDonald v. Board of Election Commissioners* the Supreme Court affirmed a district court's ruling that a law excluding unsentenced inmates who could not get out on bail from obtaining absentee ballots did not violate the Equal Protection Clause of the Constitution.[240] The Court reasoned that, although the pretrial detainees were denied the right to vote by absentee ballot, there had been no showing that the state had failed to provide other access to the polls for pretrial detainees.[241]

In reversing a dismissal of a class action lawsuit brought on behalf of pretrial detainees in *Goosby v. Osser*,[242] the Supreme Court noted that: (1) a state statute prohibited pretrial detainees from voting by absentee ballot, coupled with; (2) allegations that election officials had denied pretrial detainees' requests to vote in person or by proxy at public polling places, at special prison polling places, or by any other means, presented a different case than *McDonald v. Board of Election Comm'rs*.

Finally, in *O'Brien v. Skinner*, a similar fact pattern came before the Court. State officials refused to allow pretrial detainees who were being detained in their home counties to vote by absentee ballot. The New York Court of Appeals (the highest court in the State) had held that no alternative way of voting had to be provided to the plaintiffs.[243] Since the state law allowed non-incarcerated persons who were unable to be physically present on election day to vote, the U.S. Supreme Court ruled that the statute discriminated against pretrial detainees in an arbitrary manner in violation of the Fourteenth Amendment's Equal Protection Clause.[244]

Thus, as a pretrial detainee you have the right to vote. You do not have an absolute right to vote by absentee ballot. However, if state officials deny you the opportunity to vote by absentee ballot, they must provide you an alternative way to cast your ballot.

F. Conclusion

As a pretrial detainee, you have constitutional and statutory rights that are protected under national and state laws. It is important to remember that you have not been convicted of a crime, and you are innocent until proven guilty. You have rights concerning body searches, visitation, medical treatment, voting, speedy trial, bail, assault, and self-incrimination. Most importantly, you have the right to an attorney and should request one as soon as you are detained or taken into custody. If you are a state prisoner, read the cases and laws of your state to learn about your specific rights.

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239. *See, e.g.*, Murphree v. Winter, 589 F. Supp. 374, 380 (S.D. Miss. 1984) (holding that a state statute that denies pretrial detainees the right to vote must be interpreted to allow pretrial detainees to vote, or it becomes unconstitutional).

240. McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969).

241. McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408–09, 22 L. Ed. 2d 739, 745–46, n.6 (1969) ("[T]he record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own."). Therefore, the Court said, "it is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 807, 89 S. Ct. 1404, 1408, 22 L. Ed. 2d 739, 745 (1969).

242. Goosby v. Osser, 409 U.S. 512, 521–22, 93 S. Ct. 854, 860–61, 35 L. Ed. 2d 36, 44 (1973).

243. O'Brien v. Skinner, 414 U.S. 524, 533, 94 S. Ct. 740, 745, 38 L. Ed. 2d 702, 709 n.1 (1974) (Marshall, J., concurring) ("The [New York] Court of Appeals stated: 'We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions [or] would threaten like hazards embraced by such schema.'") (internal citations omitted).

244. O'Brien v. Skinner, 414 U.S. 524, 530, 94 S. Ct. 740, 743, 38 L. Ed. 2d 702, 707 (1974).

APPENDIX A: STATE SPEEDY TRIAL STATUTES

This list covers state speedy trial provisions, either in statutes or court rules. If no statute is listed for a state that state likely has a constitutional speedy trial guarantee.

Alabama
None

Alaska
Alaska R. Crim. Proc. 45 (2006-2007).

Arizona
Ariz. Rev. Stat. §§ 13–114 (2001 & Supp. 2008).

Arkansas
Ark. R. Crim. Proc. §§ 27–30 (2009).

California
Cal. Penal Code §§ 1381-82 (West 2000 & Supp. 2009).

Colorado
Colo. Rev. Stat. Ann. § 18-1-405 (West 2004 & Supp. 2009).

Connecticut
Conn. Gen. Stat. Ann. § 54-82(m) (West 2009).

Delaware
None

District of Columbia
D.C. Code Ann. § 23-1322 (LexisNexis 2001 & Supp. 2009).

Florida
Fla. R. Crim. P. Ann. 3.191 (West 2007 & Supp. 2009).

Georgia
Ga. Code Ann. § 17-7-170 (2008 & Supp. 2009).

Hawaii
Haw. R. Penal Proc. Ann. 48(b) (Michie 2009).

Idaho
Idaho Code § 19-3501 (Michie 2004 & 2008).

Illinois
725 Ill. Comp. Stat. 5/103-5 (2006 & Supp. 2009).

Indiana
Ind. R. Crim. P. 4 (2009).

Iowa
Iowa R. Crim. P. 2.33 (2002 Supp. & 2009).

Kansas
Kan. Crim. Proc. Code Ann. § 22-3402 (2007).

Kentucky
Ky. Rev. Stat. Ann. § 500.110 (Michie 2008).

Louisiana
La. Code Crim. Proc. Ann. art. 701 (West 2004 & Supp. 2009).

Maine
Maine R. Crim. P. 48(b) (2009).

Maryland
Md. Crim. Proc. Code Ann. § 6-103 (Michie 2008).

Massachusetts
Mass. R. Crim. P. 36 (2009-2010).

Michigan
Mich. Comp. Laws Ann. § 768.1 (West 2000 & Supp. 2009).

Minnesota
None

Mississippi
Miss. Code Ann. § 99-17-1 (2007 & Supp. 2008).

Missouri
Mo. Rev. Stat. Ann. § 545.780 (Vernon 2002 & 2009).

Montana
None

Nebraska
Neb. Rev. Stat. Ann. § 29-1207 (2008).

Nevada
Nev. Rev. Stat. § 178.556 (Michie 2006 & Supp. 2007).

New Hampshire
N.H. Super. Ct. R. App. 1 (2004).

New Jersey
None

New Mexico
District Courts: N.M. Dist. Ct. R. Crim. Proc. 5-604 (2004).
Magistrate Courts: N.M. Magistrate Ct. R.Cr.P. 6-506 (2004).
Metropolitan Courts: N.M. Metro Ct. R.Cr.P. 7-506 (2004).

New York[245]
N.Y. Crim. Proc. Law §§ 30.10-30 (McKinney 2003 & Supp. 2009).

North Carolina
N.C. Gen. Stat. Ann. § 15-10 (LexisNexis 2007).

North Dakota
N.D. Cent. Code Ann. § 29-19-02 (LexisNexis 2006 & Supp. 2009).

Ohio
Ohio Rev. Code Ann. § 2945.71 (Baldwin 2006 & Supp. 2008).

Oklahoma
Okla. Stat. tit. 22, § 812.1 (West 2003 & Supp. 2009).

Oregon
Or. Rev. Stat. § 135.747 (2007).

Pennsylvania
Pa. R. Crim. Proc. 600 (2009).

Rhode Island
R.I. Gen. Laws § 12-13-7 (2002 & Supp. 2008).

South Carolina
None

South Dakota
S.D. Codified Laws § 23A-44-5.1 (2004 & Supp. 2009).

Tennessee
Tenn. Code Ann. § 40-14-101 (Lexis 2006 & Supp. 2008).

Texas
Tex. Code Crim. Proc. art. 32A (Vernon 2006 & Supp. 2008).

Utah
Utah Code Ann. § 77-1-6 (Lexis 2008 & Supp. 2009).

Vermont
Vt. Stat. Ann. tit. 13, § 7553b (1998 & Supp. 2008).

Virginia
Va. Code Ann. § 19.2-243 (Lexis 2008 & Supp. 2009).

Washington
Super. Ct. Crim. R. 3.3 (2004).

West Virginia
W. Va. Code Ann. § 62-3-21 (Michie 2005 & Supp. 2009).

Wisconsin
Wis. Stat. Ann. § 971.10 (West 2007 & Supp. 2009).

Wyoming
Wyo. R. Crim. Proc. 48 (Lexis 2009).

245. See Part D(3) of this Chapter for in-depth information about New York's statute.

A JAILHOUSE LAWYER'S MANUAL

Chapter 35: Getting Out Early: Conditional & Early Release

Columbia Human Rights Law Review

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CHAPTER 35

GETTING OUT EARLY: CONDITIONAL AND EARLY RELEASE*

A. Introduction

This Chapter explains the different ways you can be released from prison before serving your maximum (full) sentence. Part B of this Chapter discusses New York State law, which only applies to state prisoners in New York State. If you are a state prisoner in another state, look at your state's appropriate statutes and regulations. Part C discusses federal law, which applies to federal prisoners imprisoned for federal crimes.

B. New York State

There are four main ways that you can be released from state prison in New York before serving your full or maximum sentence: parole, conditional release, early release, and presumptive release. This Part of the Chapter will provide you with information about the last three categories: Section 3 explains conditional release, Section 4 discusses early release, and Section 5 discusses presumptive release. This Chapter does not, however, discuss parole. If you are looking for information about parole, see *JLM*, Chapter 32.

To determine if you are eligible for these release programs, you first need to figure out which type of sentence you are serving and how much good-time credit you have earned, if any. Sections 1 and 2 will help you make this determination: Section 1 explains the different types of sentences in New York and how they relate to conditional, early, and presumptive release; Section 2 explains good-time credit.

There are other ways you can be released from state prison before serving your full sentence, including clemency and compassionate release. Clemency and compassionate release are harder to obtain than conditional, early, and presumptive release. If pursuing these options interests you, see Section 6, which explains clemency, with a focus on battered women, and Section 7, which discusses compassionate release.

C. Sentencing Structure in New York

1. Definite, Determinate, and Indeterminate Sentences

There are three kinds of sentences in New York: (1) definite sentences, (2) determinate sentences, and (3) indeterminate sentences. Knowing which kind of sentence you have is important because it will affect your eligibility for good-time credit, early release, conditional release, and presumptive release.

A definite sentence is the type of sentence given to someone who is convicted of a misdemeanor or violation.[1] A definite sentence is fixed. For example, if you were convicted of a violation and you received a sentence of ten days, then your sentence is a definite sentence.[2] A definite sentence is served in a county or regional jail, unless you also received an additional sentence that was either determinate or indeterminate.[3]

Persons convicted of most violent felonies,[4] drug felonies,[5] and felony sex offenses,[6] must reveive a determinate sentence. Like a definite sentence, a determinate sentence's term is fixed. For example, if you were convicted of a violent felony and received a two-year sentence, your sentence is determinate. But,

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* This Chapter was revised by Holly Chen, based in part on previous versions by Natasha Korgaonkar, Joe McFadden, Margo Eakin, Emily O'Connor, and Bartram S. Brown. Special thanks to Professor Philip Genty and Steve Statsinger for their comments.

1. N.Y. Penal Law § 70.15 (McKinney 2004).

2. N.Y. Penal Law § 70.15 (McKinney 2004). For example, a Class A misdemeanor has a maximum definite sentence of one year, and a Class B misdemeanor has a maximum definite sentence of three months.

3. N.Y. Penal Law § 70.20(2) (McKinney 2004 & Supp. 2007).

4. N.Y. Penal Law § 70.02(2)(a)–(c) (McKinney 2004 & Supp. 2007); N.Y. Penal Law § 70.04(2) (McKinney 2004 & Supp. 2007). However, starting September 1, 2009, if you are convicted of a Class B or Class C violent felony offense, your sentence must be indeterminate. N.Y. Penal Law §§ 70.02(2)(a), 70.04(2) (McKinney 2004 & Supp. 2007).

5. N.Y. Penal Law § 70.70(2) (McKinney 2004 & Supp. 2008).

6. N.Y. Penal Law § 70.80(3) (McKinney 2004 & Supp. 2007).

unlike a definite sentence, the shortest determinate sentence is one and a half years,[7] while a definite sentence cannot exceed one year. You usually serve a determinate sentence in state prison.[8]

An indeterminate sentence is the type of sentence given to someone convicted of a felony not requiring a determinate sentence.[9] An indeterminate sentence is not a fixed period of time. Instead, an indeterminate sentence is a range of time that includes (1) a minimum term, and (2) a maximum term. For example, a sentence of "five to ten years" is an indeterminate sentence for which the minimum term is five years and the maximum term is ten years. The minimum term must be at least one year. The maximum term in an indeterminate sentence must be at least three years, although it can be as much as life imprisonment.[10] If you have an indeterminate sentence, and there are no reductions to your sentence and you are not paroled, then you must serve the maximum term. An indeterminate sentence is generally served in a state prison.[11]

As mentioned above, it is important to determine what type of sentence or sentences you are serving because the rules for when and how you can become eligible for release are different for each of the three types of sentences. Although the rest of this Part will discuss these release programs in more detail, here is a brief overview of good-time credit, conditional, early, and presumptive release.

2. Good-Time credit

A good-time credit is a credit that you can earn in prison for good behavior.[12] If you are serving a definite sentence, and you earn good-time credit, you can use this credit to shorten your sentence. You cannot, however, use it to obtain conditional release.

On the other hand, if you are serving a determinate or indeterminate sentence, and you earn good-time credit, you can use this credit to obtain conditional release. Note, however, that if you are serving an indeterminate sentence with a maximum term of life imprisonment or an *intermittent sentence* (a sentence only requiring that you be in jail on certain days of the week or at certain hours of the day), you are ineligible for good-time credit.[13] Part B(2) of this Chapter discusses good-time credit.

3. Conditional Release

Conditional release is a way that you can be released from prison before you serve your full or maximum sentence. Your rights and responsibilities while on conditional release will be very similar to those of someone on parole. If you get out on conditional release, you will sign the same agreement signed by parolees. You will have to follow rules set by the parole or probation department, or you will risk losing your conditional release. For more information, see *JLM*, Chapter 32, "Parole."

Although New York State law uses the same word to refer to conditional release from a definite sentence and conditional release from determinate and indeterminate sentences, they are not actually the same thing. Conditional release is discussed in Part B(3) of this Chapter.

4. Early Release and Presumptive Release

Early release and presumptive release are other ways you can be released from prison before serving a full sentence. Early release is discussed in Part B(4) of this Chapter. Presumptive release is available to non-violent prisoners who are serving one or more indeterminate sentences, have not committed any serious disciplinary violations, and have not filed or continued frivolous (not serious) legal claims. Presumptive release functions like parole and conditional release. But, unlike these programs, it allows you to leave prison without appearing before the parole board. Presumptive release is discussed in Part B(5) of this Chapter.

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7. N.Y. Penal Law § 70.02(3)(d) (McKinney 2004 & Supp. 2007).
8. N.Y. Penal Law § 70.20(1)(a) (McKinney 2004 & Supp. 2007).
9. N.Y. Penal Law § 70.00(1) (McKinney 2004 & Supp. 2007).
10. N.Y. Penal Law § 70.00(2) (McKinney 2004 & Supp. 2007).
11. N.Y. Penal Law § 70.20(1)(a) (McKinney 2004 & Supp. 2007).
12. N.Y. Correct. Law §§ 804(1), 803(1) (McKinney 2003 & Supp. 2007).
13. N.Y. Correct. Law § 803(1) (McKinney 2003 & Supp. 2007); N.Y. Penal Law § 85.00(3) (McKinney 2004); *see also* Ferrara v. Jackson, 99 A.D.2d 545, 546, 471 N.Y.S.2d 629, 630 (2d Dept. 1984) (holding that individuals serving intermittent sentences in accordance with Article 85 of the New York Penal Law are ineligible for good behavior allowances pursuant to § 804 of the New York Correction Law).

D. Good-Time Credit

1. How to Earn Good-Time Credit

You can earn good-time credit for "good behavior and efficient and willing performance of duties" assigned to you in prison, or for "progress and achievement in an assigned treatment program."[14] On the other hand, you can lose good time for "bad behavior, violation of institutional rules or failure to perform properly" any duties or programs assigned to you in prison.[15] Keep in mind: though the statute only refers to "assigned" programs, if you fail to complete a "recommended" program, officials may withhold good time.[16]

Prison officials do not have to give you good-time credits, and it is not something you can demand as a right.[17] But, if officials think your behavior in prison is acceptable, they will probably grant you good time.

You can earn good-time credit only while you are in prison and not while you are on parole, conditional release, or supervised release. In most jurisdictions, prisons do not have to, and will not, accept credits that you earned from a different state prison or a federal prison.[18]

Depending on the type of sentence you are serving, you can use good-time credit to shorten your sentence, earn unconditional early release, or, in the case of determinate and indeterminate sentences, earn conditional release.

(a) Good-Time Credit in Definite Sentences

If you are serving a definite sentence and earn good-time credit, prison officials will use the credit to shorten your sentence and determine if and when you are eligible for unconditional early release. The process by which prison officials decide whether to grant you credit depends on the type of facility where you are imprisoned. If you are serving your definite sentence in a county or regional jail, the sheriff, warden, or other person in charge of the facility will decide whether to give you good-time credit.[19] If you are serving your definite sentence in a state prison, the prison's Time Allowance Committee ("TAC") will recommend to the superintendent the amount of good-time credit it thinks you should receive.[20] The prison superintendent will review the TAC's recommendation and may add comments to it. He will then forward the recommendation to the Commissioner of Correctional Services, who will make the final decision.[21]

(b) Good-Time Credit in Determinate and Indeterminate Sentences

If you are serving a determinate or indeterminate sentence and you earn good-time credit, prison officials will use the credit to decide if you are eligible for *conditional* release. Unlike definite sentences, if you are serving a determinate or indeterminate sentence, you cannot use good-time credit to shorten your sentence or earn *unconditional* early release.

Four months before you would be entitled to conditional release, if you were to receive the maximum good-time credit allowed, the TAC will review your entire file to determine whether you should in fact receive the maximum good-time credit.[22] In deciding whether to grant the maximum good-time credit, the committee will look for good behavior, efficient and willing performance of assigned duties, and progress and achievement in an assigned treatment program, in light of (1) your attitude, (2) your capacity, and (3) the

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14. N.Y. Correct. Law §§ 803(1), 804(1) (McKinney 2003 & Supp. 2007).

15. N.Y. Correct. Law §§ 803(1), 804(1) (McKinney 2003 & Supp. 2007).

16. *See* Ferry v. Goord, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (3d Dept. 2000) (finding good-time credit withheld where prisoner refused to enroll in recommended sex offender counseling); Burke v. Goord, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000) (same); Lamberty v. Schriver, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (3d Dept. 2000) (holding that the fact that treatment program was "recommended" instead of "assigned" did not prevent time allowance committee from withholding good-time credit).

17. *See* Bradley v. Ward, 81 Misc. 2d 713, 716, 366 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 1975) (finding no statutory right to good behavior time under N.Y. Correct. Law §§ 803(4), 804(3)); N.Y. Correct Law §§ 803(4), 804(3) (McKinney 2003).

18. *See* Thomas v. Brewer, 923 F.2d 1361, 1368 (9th Cir. 1991) (refusing to give credit toward reduction in federal sentence for time spent in state prison); Holtzinger v. Estelle, 488 F.2d 517, 518 (5th Cir. 1974) (holding that based on Texas statutes, Texas prisoner was not entitled to good-time credit earned for time spent in California).

19. N.Y. Correct. Law § 804(3) (McKinney 2003).

20. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.2 (2007).

21. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(b) (2007).

22. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(a) (2007).

efforts you made within your capacity.[23] Although the committee will review your entire file, it is not required to interview you at this stage.[24]

After it reviews your file, the TAC will either: (1) recommend to the superintendent that you receive the maximum good-time credit allowance, or (2) delay making a recommendation because it believes that there might be a sufficient reason not to grant you the maximum good-time credit allowance.

If the TAC decides that there is sufficient reason not to grant you the maximum good-time credit allowance, a time allowance hearing will be held.[25] You will be notified at least forty-eight hours before the hearing.[26] After you receive formal notice, you will be given the opportunity to raise any factual matter that you believe the TAC should consider in making its decision. You will also be given the opportunity to have the matter investigated. At the hearing, the TAC will reconsider your entire file and consider any factual matter you or your designated assistant brought to its attention. It can also hear witnesses at its discretion.[27] After the hearing, the TAC will make its recommendation to the superintendent.[28]

The superintendent will review the committee's recommendation, add any comments he or she has, and then forward the report to the Commissioner.[29] The Commissioner can (1) accept the recommendation, (2) change the amount of time granted, or (3) send the report back to the committee for reevaluation.[30] Once the Commissioner decides, you will receive a copy of the determination.[31]

If the Commissioner does not grant the maximum amount of good-time credit, you can file suit in state court under Article 78. For more information about bringing an action in court, you should read *JLM*, Chapter 22, "How to Challenge Administrative Provisions Using Article 78 of the New York Civil Practice Law and Rules," and *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

If you decide to pursue a claim in federal court because you believe you unlawfully lost good-time credits, you *must* read *JLM*, Chapter 14, which discusses the Prison Litigation Reform Act ("PLRA"). If you do not follow the requirements in the PLRA, you may lose your good-time credit, become unable to receive presumptive release (see Part B(5) of this Chapter), or lose your right to bring future claims in federal court without paying the full filing fee at the time you file your claim.

2. How Much Good-Time Credit You Can Earn

The amount of good-time credit you can earn is based on statutes, which vary widely across state jurisdictions. In New York State, the amount of good time you can earn depends on your type of sentence.

(a) Good-Time Credit for Definite Sentences

If you are serving a definite sentence, the most good-time credit that you can earn is equal to one-third of the length of your sentence. If you are serving consecutive definite sentences (one after the other), you can earn one-third of the total of the terms.[32]

(b) Good-Time Credit for a Single Determinate or Indeterminate Sentence

If you are serving a single determinate or indeterminate sentence, you can receive good-time credit, as long as your maximum term is not life imprisonment.[33] If you are serving a determinate sentence, the most good-time credit that you can earn is one-seventh of your sentence.[34] For example, if you are serving a

23. N.Y. Comp. Codes R. & Regs. tit. 7, § 260.3(b)(1)–(3) (2007).

24. TAC is required to interview you if you have had a recommended loss of good behavior time from a prior superintendent's hearing. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(b) (2007).

25. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.4(a) (2007). This hearing will not be held if the only good time you lost was from a superintendent's disciplinary hearing, since you already appeared before the committee to respond to this recommendation as required by § 261.3(b). *See also* People *ex rel.* Moore v. Jones, 77 A.D.2d 679, 679, 430 N.Y.S.2d 16, 18 (3d Dept. 1980) (holding a hearing is not required if the only time lost was from superintendent hearing).

26. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.4(b) (2007).

27. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.4(f) (2001).

28. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(a) (2001).

29. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(b) (2001).

30. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(c) (2001).

31. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(d) (2001).

32. N.Y. Correct. Law § 804(2) (McKinney 2003 & Supp. 2008).

33. N.Y. Correct. Law § 803(1)(a) (McKinney 2003 & Supp. 2008).

34. N.Y. Correct. Law § 803(1)(c) (McKinney 2003 & Supp. 2008).

determinate sentence of twenty-one years, the most good-time credit that you can earn is three years (one-seventh of twenty-one).

If you are serving an indeterminate sentence, the most good-time credit you can earn is one-third of your maximum sentence.[35] For example, if you are serving an indeterminate sentence of fifteen to thirty years, the most good-time credit that you can earn is ten years (one-third of thirty years).

The calculation is more complicated if you are serving more than one sentence, as shown below.

(c) Good-Time Credit for Concurrent Determinate Sentences

If you are serving more than one determinate sentence *concurrently* (at the same time), the most good-time credit that you can earn is one-seventh of the determinate sentence that ends last.[36] For example, if you are serving one determinate sentence of seven years and another of fourteen years, the most good-time credit you can receive is two years—one-seventh of the longer sentence. If you received the maximum credit of two years, you would be entitled to conditional release after serving twelve years of your sentence (because, at that point, your two-year credit would be equal to the amount of time you had left to serve).

(d) Good-Time Credit for Consecutive Determinate Sentences

If you are serving more than one determinate sentence *consecutively* (one after the other), the maximum good-time credit that you can earn is one-seventh of the combined sentences.[37] For example, if you are serving a seven-year sentence and a fourteen-year sentence consecutively, you can earn three years of good-time credit (one-seventh of twenty-one, the total of your two sentences). If you received the maximum credit, you would be entitled to conditional release after eighteen years (the total time of your sentences minus the maximum credit).

(e) Good-Time Credit for Concurrent Indeterminate Sentences

If you are serving more than one indeterminate sentence *concurrently* (at the same time), the most good-time credit that you can earn is one-third of the total term of the *latest ending* indeterminate sentence.[38] For example, if you are serving a sentence of one to three years and another sentence of three to six years, you can earn up to two years of good-time credit—one-third of the longest maximum sentence of six years. If you received the maximum credit, you would be entitled to conditional release after four years (the longest maximum sentence minus the maximum credit).

(f) Good-Time Credit for Consecutive Indeterminate Sentences

If you are serving more than one indeterminate sentence *consecutively* (one after the other), the most good time you can earn is one-third of the combined maximum terms.[39] For example, if you are serving two consecutive indeterminate sentences, one sentence for one to three years and another for three to six years, you could earn up to three years of good-time credit—one-third of the total maximum sentence of nine years (one-third of three plus six years). If you received the maximum credit you would be entitled to release after six years (the total of the maximum sentences minus the maximum credit).

(g) Good-Time Credit for Combined Concurrent Determinate and Indeterminate Sentences

If you are serving one or more determinate and one or more indeterminate sentences *concurrently* (at the same time), the most good-time credit that you can earn is *either* one-seventh of the latest ending determinate sentence, *or* one-third of the maximum term of the latest ending indeterminate sentence—whichever allowance is larger.[40] For example, suppose you are serving a determinate sentence of fourteen years at the same time as an indeterminate sentence of six to nine years. You could earn either one-seventh of the determinate sentence (one-seventh of fourteen years, which is two years) or one-third of the indeterminate sentence (one-third of nine years, which is three years). Since the allowance for the

35. N.Y. Correct. Law § 803(1)(b) (McKinney 2003 & Supp. 2008).
36. N.Y. Correct. Law § 803(2)(c) (McKinney 2003 & Supp. 2008).
37. N.Y. Correct. Law § 803(2)(d) (McKinney 2003 & Supp. 2008).
38. N.Y. Correct. Law § 803(2)(a) (McKinney 2003 & Supp. 2008).
39. N.Y. Correct. Law § 803(2)(b) (McKinney 2003 & Supp. 2008).
40. N.Y. Correct. Law § 803(2)(e) (McKinney 2003 & Supp. 2008).

indeterminate sentence (three years) is larger than the allowance for the determinate sentence (two years), you could earn a total of three years of good-time credit. If you received the maximum credit, you would receive conditional release after eleven years—three years less than your maximum sentence of fourteen years (the maximum indeterminate sentence minus the maximum credit).

(h) Good-Time Credit for Combined Consecutive Determinate and Indeterminate Sentences

If you are serving one or more determinate sentences and one or more indeterminate sentences *consecutively* (one after the other), the most good-time credit that you can earn is one-third of the maximum terms of the indeterminate sentences added together, plus one-seventh of the terms of the determinate sentences added together.[41] For example, suppose you are serving a determinate sentence of fourteen years consecutively with an indeterminate sentence of six to nine years. You could receive up to two years of good-time credit from the determinate sentence (one-seventh of fourteen years) *and* up to three years of good-time credit for the indeterminate sentence (one-third of nine years). You could receive a *total* of five years of good-time credit, and could be entitled to conditional release after eighteen years (the total of your maximum sentences—twenty-three years—minus the total of your good-time credit—five years).

Suppose your state legislature passes a new law to reduce the good-time credit that you could have received under an older law. If your offense occurred before the enactment of the new law, then the new law cannot apply to you because it would violate *ex post facto* principles. *Ex post facto* principles mean that you can only be punished under a law that was in effect at the time when you committed the offense, and your punishment cannot be increased if stricter laws are passed after you committed the offense.[42] If you received a harsher punishment based on a law that was passed after the commission of your offense, you may have a valid constitutional claim.[43]

3. Loss of Good-Time Credit

You can lose good-time credit in two ways. First, TAC may decide not to grant you the maximum good-time credit. TAC is not required to recommend that you receive the maximum credit allowed by the law.[44] Second, officials can file a formal charge against you and then hold a disciplinary hearing.[45] *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings," explains some of your rights in these proceedings. These proceedings are usually only held in cases of serious misconduct.

Even if you lose some good-time credit in a disciplinary hearing, you may regain it later: the loss is not permanent until it actually affects your consideration for parole, conditional release, or other release.[46] When TAC reviews your file for the last time before your earliest possible parole or conditional release date, it may decide that you should get back the time you had lost. A record of good behavior since the time you lost your good-time credit increases the chance of regaining good-time credit.

Note: if you are released early on conditional release or parole, and you later violate the terms of your release or parole and return to prison, you cannot use the good time you earned before release: if you are sent back to prison for a violation, you must start earning good-time credits all over again.[47]

4. Challenging the Loss of Good-Time Credit

In *Wolff v. McDonnell*, the Supreme Court ruled that because good-time credits lead to a shorter time in prison, procedures to take away good-time credit must meet the requirements of the U.S. Constitution's Due

41. N.Y. Correct. Law § 803(2)(f) (McKinney 2003 & Supp. 2008).

42. *See* Weaver v. Graham, 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 22 (1981) (applying new requirements for good-time credit to a prisoner whose crime occurred before the date of the statute is a violation of the *Ex Post Facto* Clause). *But see In re* Ramirez, 39 Cal. 3d 931, 936, 705 P.2d 897, 901, 218 Cal. Rptr. 324, 328 (Cal. 1985) (finding that a law is not a violation of the *ex post facto* principle when applied to prison misconduct that occurred after the new law's enactment, even if the original crime occurred before the enactment of the law).

43. For more information, see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," and *JLM*, Chapter 20, "Using Article 440 of the NY Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence."

44. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(c) (2008).

45. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(vii) (2008).

46. N.Y. Comp. Codes R. & Regs. tit. 7, § 260.4(b) (2008).

47. N.Y. Correct. Law § 803(5) (McKinney 2003 & Supp. 2008).

Process Clause.[48] This means if prison officials have not followed the appropriate procedures, then you have the right to challenge their decision under Article 78, state habeas proceedings, or federal habeas proceedings. To determine how to do this, see *JLM*, Chapter 22, "How to Challenge Administrative Proceedings Using Article 78 of the New York Civil Practice Law and Rules," *JLM*, Chapter 21, "State Habeas Corpus," and *JLM*, Chapter 13, "Federal Habeas Corpus." *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings," also explains your right to good time.

As noted above, if you decide to pursue any claim in federal court, you *must* first read *JLM*, Chapter 14, which discusses the Prison Litigation Reform Act ("PLRA"). If you do not follow the requirements in the PLRA, you may lose your good-time credit, you may become unable to receive presumptive release (see Part B(5) of this Chapter), or you may lose your right to bring future claims in federal court without paying the full filing fee at the time you file your claim.

E. Conditional Release

1. Conditional Release from a Definite Sentence

For a definite sentence, you are eligible for conditional release after you have served sixty days of your sentence.[49] Conditional release is at the discretion of the Board of Parole. The Board can also impose certain conditions for your release.[50]

Conditional release from a definite sentence lasts for one year no matter how much time you had remaining in your sentence when you were released. Also, if you violate the terms of your conditional release at any time during that year, you may be returned to prison and must finish out your full sentence as if you were never released.[51]

2. Conditional Release from a Determinate or Indeterminate Sentence

Based on the type of determinate or indeterminate sentence or sentences you are serving, you may be eligible for conditional release from prison as soon as the good-time credit you have earned in prison is equal to the amount of time that you have left to serve on your maximum sentence or sentences.[52] For example, if you are serving an indeterminate sentence of three to six years and you have two years of good-time credit, you cannot be released until you have served four years of your sentence.

Note that if you are serving one or more determinate sentences, along with one or more indeterminate sentences at the same time, you cannot be granted conditional release until you have served six-sevenths of the determinate sentence with the longest time to run.[53] For example, if you are serving a determinate sentence of twenty-one years at the same time as an indeterminate sentence of ten to twenty-one years, you cannot be released until you have served eighteen years (six-sevenths of your determinate sentence), even if you have earned more than three years of good-time credit against your indeterminate sentence.

If you satisfy these conditions specific to your type of sentence, you should submit a request for release, and you *must* be released.[54]

If you are requesting to be released from an indeterminate sentence, you should submit your request to the New York State Division of Parole.[55] The forms necessary for making this request are available through the Division of Parole. You can also obtain these forms from a parole representative at your facility.[56] If you are requesting to be released from a determinate sentence, you will need to read Part B(3)(d) of this Chapter on Jenna's Law.

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48. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974); *see also* Sandin v. Conner, 515 U.S. 472, 478, 115 S. Ct. 2293, 2297, 132 L. Ed. 2d 418, 426 (1995) (holding that neither the Due Process Clause nor the Hawaii regulations created a liberty interest in avoiding disciplinary confinement for 30 days; restating the holding in *Wolff v. McDonnell* that good-time credits could not be revoked without adequate procedures because the statute had created a "liberty interest").

49. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

50. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

51. N.Y. Penal Law § 70.40(3)(b) (McKinney 2004 & Supp. 2008).

52. N.Y. Penal Law § 70.40(1)(b) (McKinney 2004 & Supp. 2008).

53. N.Y. Penal Law § 70.40(1)(b) (McKinney 2004 & Supp. 2008).

54. N.Y. Penal Law § 70.40(1)(b) (McKinney 2004 & Supp. 2008).

55. N.Y. Exec. Law § 259-g(1) (McKinney 2005 & Supp. 2008).

56. N.Y. Exec. Law § 259-g(1) (McKinney 2005 & Supp. 2008).

Unlike conditional release from a definite sentence, for which release is at the Board of Parole's discretion, you do not need permission to get conditional release from a determinate or indeterminate sentence. If the Department of Correctional Services (DOCS) refuses to release you, you can file an Article 78 petition in New York Supreme Court. See *JLM*, Chapter 22 to learn how to use Article 78 actions to force an agency or official to perform a legally required act, such as releasing you from prison.

3. The Release Agreement

Before you can leave prison on conditional release, you will have to sign a release agreement. This agreement explains the conditions of your release. The agreement will also explain the consequences of violating any of these conditions.[57] By signing the agreement, you promise to obey all of the listed rules.

If you are conditionally released from a definite sentence, the Board of Parole will determine the terms of the release agreement.[58] If you are conditionally released from an indeterminate sentence, the terms of your release will be the same as those imposed on prisoners on parole.[59] This agreement requires a parole officer to supervise you. Note: the conditions of the conditional release may change any time before your sentence has ended. Also, a parole officer may add special conditions, such as a curfew or attendance at an alcohol abuse treatment program. A possible condition may require you to find housing before release.[60] See *JLM*, Chapter 32, "Parole," for an explanation of parole in New York.

If you are conditionally released from a determinate sentence as a violent felony offender or a drug offender serving a sentence other than life in prison, you will be required to sign a post-release supervision agreement that will extend your supervision for three to five years.

4. Jenna's Law and Post-Release Supervision for All Determinate Sentences and Drug Offenses

In 1998, the New York State legislature passed Jenna's Law.[61] This law imposes a period of mandatory post-release supervision for all prisoners sentenced to determinate sentences. The Drug Law Reform Act of 2004 created new sentencing provisions for felony drug offenses that mandated determinate sentences, which must also include a period of post-release supervision.[62] Unlike prisoners serving definite sentences, who are conditionally released to one year's supervision, and unlike prisoners serving indeterminate sentences, who are conditionally released on terms very similar to parole, those serving determinate sentences are subject to mandatory post-release supervision.[63]

Previously, not everyone who had a conditional release from a determinate sentence was subject to post-release supervision. The law on this has changed—now, everyone serving a determinate sentence *must* complete post-release supervision. If you receive a determinate sentence for a crime committed on or after September 1, 1998, you will be subject to post-release supervision. For felony offenses that are not sex offenses, the period of post-release supervision for determinate sentences is five years, except for the drug offenses and first-time violent felony offenses listed below that may have shorter periods of supervision.[64] Unless the court specifies otherwise, you will most likely be subject to the maximum possible post-release supervision time available for the particular crime of which you were convicted. However, the court does have the power to set your post-release supervision period anywhere between the minimum and the maximum possible periods under the law.

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57. N.Y. Exec. Law § 259-g(2) (McKinney 2005 & Supp. 2008).

58. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

59. N.Y. Exec. Law § 259-g(1) (McKinney 2005 & Supp. 2006).

60. People *ex rel.* Travis v. Coombe, 219 A.D.2d 881, 881–82, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (conditions of release included requirement that parolee find housing, and when potential parolee failed to do so, he was not released); People *ex rel.* DeFlumer v. Strack, 212 A.D.2d 555, 555, 623 N.Y.S.2d 1, 1 (2d Dept. 1995) (conditions of release included that parolee must live in approved housing, which here was the home of parolee's sister).

61. Jenna's Law is named after Jenna Griebshaber, who was murdered by an individual who had been convicted of a violent felony and had been released early from prison after serving two-thirds of his indeterminate sentence. The purpose of Jenna's Law was to ensure that violent offenders are appropriately monitored upon their reintroduction into society. Barry Kamins, New Criminal Law and Procedure Legislation, 81-FEB N.Y. St. B.J. 28, 28 (2009).

62. *See* N.Y. Penal Law §§ 70.70(2)(a), (3)(b), (4)(b) (McKinney 2004 & Supp. 2007); N.Y. Penal Law §§ 70.71(2)(b), (3)(b), (4)(b) (McKinney 2004 & Supp. 2007).

63. N.Y. Penal Law § 70.45(5) (McKinney 2004 & Supp. 2007).

64. N.Y. Penal Law § 70.45(2) (McKinney 2004 & Supp. 2007).

(a) Length of Post-Release Supervision

Three groups of offenses have different lengths of post-release supervision: felony drug offenses, first-time violent felony offenses, and felony sex offenses committed after April 13, 2007. For more information on felony sex offenses see *JLM*, Chapter 36, "Special Considerations for Sex Offenders" (available online at http://www.hrlr.org/jlm/toc or by writing to the *JLM*). The tables below show possible post-release supervision time, depending on your sentence's type and class.

Drug Offenses

	First Time	Non-first Time
Class D or E	1 year[65]	1–2 years[66]
Class B or C	1–2 years[67]	1 ½–3 years[68]

First-Time Violent Felony Offenses

	First Time
Class D or E	1 ½–3 years[69]
Class B or C	2 ½–5 years[70]

Felony Sex Offenses

	First Time	Non-first Time
Class D or E	3–10 years[71]	5–15 years[72]
Class C	5–15 years[73]	7–20 years[74]
Class B	5–20 years[75]	10–25 years[76]
Child Sexual Assault		10–20 years[77]

(b) Results of Violating a Condition of Post-Release Supervision

If you violate any of the terms of your post-release supervision, you will receive a revocation hearing. The rules for revocation hearings for post-release supervision are the same as the rules for parole revocation.[78] See *JLM*, Chapter 32, "Parole," for an explanation of parole revocation hearings in New York. If your post-release supervision is revoked at the hearing, and you are not a felony sex-offender, then you may be sent back to prison for more time. This time is no longer than the amount of post-release supervision remaining to be served and can never be longer than five years.[79]

If you were convicted of a felony sex offense, the maximum amount of time that you can be sent back to prison is the remainder of time on your period of post-release supervision, even if longer than five years.[80] If you have less than three years remaining of post-release supervision, you will be released after you serve the additional three year sentence. If you have three or more years of supervised release left when you are given an additional term of imprisonment for violating the terms of your supervised release, you will not be automatically released after serving three years. Instead, after serving three years, your case will be reviewed by the board of parole. The board will determine whether you can be released to post-release

65. N.Y. Penal Law § 70.45(2)(a) (McKinney 2004 & Supp. 2007).
66. N.Y. Penal Law § 70.45(2)(c) (McKinney 2004 & Supp. 2007).
67. N.Y. Penal Law § 70.45(2)(b) (McKinney 2004 & Supp. 2007).
68. N.Y. Penal Law § 70.45(2)(d) (McKinney 2004 & Supp. 2007).
69. N.Y. Penal Law § 70.45(2)(e) (McKinney 2004 & Supp. 2007).
70. N.Y. Penal Law § 70.45(2)(f) (McKinney 2004 & Supp. 2007).
71. N.Y. Penal Law § 70.45(2-a)(a), (d) (McKinney 2004 & Supp. 2007).
72. N.Y. Penal Law § 70.45(2-a)(g) (McKinney 2004 & Supp. 2007).
73. N.Y. Penal Law § 70.45(2-a)(b), (e) (McKinney 2004 & Supp. 2007).
74. N.Y. Penal Law § 70.45(2-a)(h) (McKinney 2004 & Supp. 2007).
75. N.Y. Penal Law § 70.45(2-a)(c), (f) (McKinney 2004 & Supp. 2007).
76. N.Y. Penal Law § 70.45(2-a)(i) (McKinney 2004 & Supp. 2007).
77. N.Y. Penal Law § 70.45(2-a)(j) (McKinney 2004 & Supp. 2007).
78. N.Y. Exec. Law § 259-i(3) (McKinney 2005 & Supp. 2007).
79. N.Y. Penal Law § 70.45(1) (McKinney 2004 & Supp. 2007).
80. N.Y. Penal Law § 70.45(1) (McKinney 2004 & Supp. 2007).

supervision or whether you should stay in prison and have your case reviewed a second time at a date not more than twenty-four months away.[81]

If your post-release supervision is revoked, you may be sentenced for a period longer than the maximum times listed above if you were given both determinate *and* indeterminate sentences.[82] If you had more time left on the combined amount of your indeterminate and determinate sentences when you left prison on supervised release, you may be sentenced to serve that remaining amount of time instead of the shorter period of supervised release.

Your post-release supervision time will not count if the board of parole declares you "delinquent" for having violated a condition of your release.[83] The clock will remain stopped until you are released back to supervision or incarcerated for a new criminal conviction or for violating a release condition. The time you spend in custody while awaiting the decision of whether or not your post-release supervision is revoked will be credited towards your maximum or aggregate maximum sentence or sentences for which you were released. If that is zero, it will then be credited against your remaining period of post-release supervision.[84] If you are sentenced to a new determinate or indeterminate sentence, your remaining period of post-release supervision will be on hold until you are re-released from prison, at which time you will begin serving that period of post-release supervision again.[85]

(c) Other Ways of Challenging Post-Release Supervision

If you have received a term of post-release supervision, you should read this section carefully to ensure that your sentence is valid, as there have been a number of important changes in New York law that will affect many prisoners.

One way to challenge your term of post-release supervision is if you are serving a determinate sentence, and your sentencing judge failed to impose or state a term of post-release supervision at sentencing. In the past, in some cases DOCS (not the sentencing judge) imposed a mandatory period of post-release supervision for prisoners at the time of release. But in 2008, the New York Court of Appeals held that DOCS may not do this—only a *judge* can impose post-release supervision.[86] In addition, the judge must have imposed or stated the term of post-release supervision *at sentencing*.[87] Because the law has changed, if you were given post-release supervision, you should check to be sure that this was given to you by your sentencing judge and *not* by DOCS. If your post-release supervision was imposed by DOCS at the time of release and not your sentencing judge at the time of your sentencing, you may be able to challenge the post-release supervision.

This change in the law affects thousands of prisoners in New York State. In order to help deal with these cases in which the judge failed to impose or state post-release supervision at sentencing, the New York legislature passed N.Y. Penal Law § 70.85, effective as of July 9, 2008.[88] This statute applies only to cases in which a determinate sentence requiring post-release supervision was imposed between September 1, 1998 and June 30, 2008, and the court failed to impose or state the term of post-release supervision at sentencing. If this statute applies to your case, the court may (with the consent of the district attorney) resentence you and re-impose your original determinate sentence without any post-release supervision. In the resentencing process, you have certain rights. DOCS or the Division of Parole must notify you, as well as the sentencing judge, that resentencing must take place.[89] Within ten days of receiving the notice, the sentencing judge must appoint counsel for you.[90] Within forty days after the notice, the judge must make a decision and

81. N.Y. Penal Law § 70.45(1-a) (McKinney 2004 & Supp. 2007).
82. N.Y. Penal Law § 70.45(1) (McKinney 2004 & Supp. 2007).
83. N.Y. Penal Law § 70.45(5)(d)(i) (McKinney 2004 & Supp. 2007).
84. N.Y. Penal Law § 70.45(5)(d) (McKinney 2004 & Supp. 2007).
85. N.Y. Penal Law §§ 70.45(5)(e), (f) (McKinney 2004 & Supp. 2007).
86. People v. Sparber, 10 N.Y.3d 457, 468, 889 N.E.2d 459, 463, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (Apr. 29, 2008) (finding the procedure through which post-release supervision was imposed did not comply with the statutory mandate and remanding to trial court for re-sentencing).
87. N.Y. Penal Law § 70.85 (McKinney 2009).
88. N.Y. Penal Law § 70.85 (McKinney 2009).
89. McKinney's Correction Law § 601-d (2009).
90. McKinney's Correction Law § 601-d (2009); McKinney's County Law § 722.

resentence you. Note that you may waive these deadlines.[91] In this instance, you would not be entitled to have your plea of guilty set aside.

In the resentencing, the judge may impose the original determinate sentence of imprisonment without requiring the term of post-release supervision.[92] However, the district attorney must approve the new sentence that no longer requires post-release supervision.[93] Even if DOCS imposed post-release supervision, a judge may re-sentence you and still impose a term of post-release supervision.[94] Additionally, if you were placed on post-release supervision, and the terms of that post-release supervision were imposed by DOCS and not a judge, *and* you are then charged with violating the terms of your post-release supervision, you then *cannot* be re-incarcerated for violating those terms.[95] If you are incarcerated for these reasons, you are entitled to immediate release.

There is another way that you can challenge your term of post-release supervision. If you pleaded guilty and received a sentence that included a mandatory term of post-release supervision, you may be able to vacate (take back) your guilty plea if you were not informed that your sentence would include post-release supervision during the plea colloquy. In *New York v. Catu*, the New York State Court of Appeals (the highest court in New York) held that a defendant who pleaded guilty without being informed that he would be subject to post-release supervision could vacate his guilty plea, because the plea was not a "voluntary and intelligent choice."[96] In *People v.* Rucker, the New York Appellate Division, Third Department held that where the defendant pleaded guilty, and the sentencing judge did not advise the defendant of the post-release supervision during the plea colloquy, but did impose post-release supervision at sentencing, N.Y. Penal Law § 70.85 does not apply, and the plea had to be vacated.[97]

Note that if you were not informed of the post-release supervision, although you can vacate your plea, you will not be able to vacate the guilty judgment against you.[98] This means that you will either be given a new trial or re-sentencing. However, if you are re-sentenced, you will likely get the same sentence, so only use *Catu* if you want to go to trial instead of keeping your plea. Even if you do not wish to vacate your plea or have already served your sentence, however, you may be able to use *Catu* to challenge your post-release supervision without setting aside your sentence.

5. Length of Your Conditional Release

If you are conditionally released from a definite sentence, you will be on conditional release for one year—no matter how little time you have left on your sentence.[99] During this time, you must continue to follow the terms of your conditional release agreement and the Board of Parole will supervise you.[100]

If you are conditionally released from an indeterminate sentence, your conditional release will last for the maximum amount of time left on your sentence.[101] For example, if you gain conditional release after serving nineteen years of a twenty-one-year determinate sentence, you will be on conditional release for two years. If you get out on conditional release after twenty years of an indeterminate sentence of fifteen to thirty years, you will be on conditional release for ten years. For the rest of your conditional release, you will be in the legal custody of the Board of Parole. You will have to obey the conditions of your release, and you

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91. McKinney's Correction Law § 601-d (2009).

92. N.Y. Penal Law § 70.85 (McKinney 2009).

93. N.Y. Penal Law § 70.85 (McKinney 2009).

94. People v. Sparber, 10 N.Y.3d 457, 470, 889 N.E.2d 459, 464, 859 N.Y.S.2d 590, No. 53, slip op. at 7 (Apr. 29, 2008) (finding the procedure through which post-release supervision was imposed did not comply with the statutory mandate and remanding to trial court for re-sentencing).

95. People *ex rel.* Lucas Foote v. Piscotti, 51 A.D.3d 1407, 1408, 857 N.Y.S.2d 515, 515, No. 925 KAH 07-00912, slip op. at 1 (4th Dept. May 23, 2008); People *ex rel.* Gerard v. Kralik, 51 A.D.3d 1045, 1046, 858 N.Y.S.2d 771, 772, No. 2008-02692, slip op. at 1–2 (2nd Dept. May 27, 2008); *see also* Prendergast v. N.Y. State Dept. of Corr. Servs., 51 A.D.3d 1133, 1133–34, 856 N.Y.S.2d 725, 726, No. 503884, slip op. at 1–2 (3d Dept. May 1, 2008) (holding that only a court may impose post-release supervision).

96. New York v. Catu, 4 N.Y.3d 242, 245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005).

97. People v. Rucker, 2009 NY Slip Op 8087, *2, 67 A.D.3d 1126, 1128, 888 N.Y.S.2d 313, 316 (N.Y. App. Div. Nov. 12,2009).

98. People v. Louree, 8 N.Y.3d 541, 546, 869 N.E.2d 18, 21–22, 838 N.Y.S.2d 18 (2007).

99. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2007).

100. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2007).

101. N.Y. Penal Law § 70.40(1)(b) (McKinney 2004 & Supp. 2007).

will have to report regularly to a parole officer, just like a person on parole.[102] For more information about parole, see Chapter 32 of the *JLM*.

If you are granted conditional release from a determinate sentence, you will be under supervision for six months to five years. For more information about Jenna's Law, see Part B(3)(d) above.

If you are granted conditional release from a determinate or indeterminate sentence, you may be able to get an early discharge from conditional release supervision. The Board of Parole has the power to grant an absolute discharge to some people on conditional release, unless the person was convicted of certain specific charges, including violent felony offenses, sex offenses,[103] some murder charges, hate crimes, terrorism, and some crimes involving youths.[104] This relief is not available for anyone required to register as a sex offender. This kind of merit termination satisfies all remaining time on your sentence, as if you had served it all in prison.

The Board of Parole has the discretion to grant or withhold merit terminations. The date that you become eligible for a merit termination is determined by the type of crime for which you were convicted. If your conviction was for a Class A felony controlled substance offense, the Board of Parole may grant you a merit termination after two years of uninterrupted conditional release. If you were convicted of any other eligible offense, the Board of Parole has discretion to grant you a merit termination from conditional release after one year of continuous release. The Board of Parole also has discretion to grant you an absolute discharge from the remainder of your conditional release after you have served three straight years of conditional release.[105] Like a merit termination, an absolute discharge satisfies the remainder of your sentence. After three straight years of conditional release, ask your parole officer about early discharge. This option is unavailable if you are on conditional release from a definite sentence, a sentence with a maximum term of life imprisonment, or a controlled substances felony.

6. Revocation of Conditional Release

Conditional release can be revoked in the same way that parole can be revoked. Both the Conditional Release Commission and the Board of Parole have broad discretion to revoke conditional release.[106] If an officer of the Conditional Release Commission (applicable if your conditional release is from a definite sentence) or a parole officer (applicable if your conditional release is from a determinate or indeterminate sentence) has reasonable cause to believe that you have violated the conditions of release in an important respect, your conditional release may be revoked.[107] Examples of such violations include failure to appear for a scheduled meeting with your parole officer or participation in criminal activities. However, before your conditional release can be revoked, your parole officer must report your actions to a member of the board, who may then issue a warrant for temporary detention.

The government must notify you within three days of the execution of the warrant issued for the alleged violation, and the written notice must state the date, place, and purpose of the hearing.[108] The notice must also inform you of which conditions you are alleged to have violated, your right to appear and speak on your own behalf, your right to present evidence, and your right to confront the witnesses who testify against you.[109] The government will hold a preliminary revocation hearing, which you are required to attend, within fifteen days of the execution of the warrant.[110] At this hearing, the government will determine whether there is probable cause to believe that you violated the conditions of your release.[111] If probable cause is not found, the case will be dismissed, and you will be released again.[112] However, if probable cause is found, the

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102. *See* N.Y. Penal Law § 70.40(1) (McKinney 2004 & Supp. 2007).

103. *But see* N.Y. Exec. Law § 259-j(4) (McKinney 2005 & Supp. 2007) (allowing for a discharge of post-release supervision after three years if certain conditions are met).

104. N.Y. Exec. Law § 259-j (McKinney 2005 & Supp. 2007). For a complete list of offenses, see N.Y. Exec. Law § 259-j(1) (McKinney 2005 & Supp. 2007).

105. N.Y. Exec. Law § 259-j(4) (McKinney 2005 & Supp. 2007).

106. *See* Hyser v. Reed, 318 F.2d 225, 234, 115 U.S. App. D.C. 254, 254 (D.C. Cir. 1963) (*en banc*) (finding statute gives Board of Parole broad discretion to both grant and revoke parole, without requiring adversarial hearings).

107. N.Y. Exec. Law § 259-i(3)(a)(i) (McKinney 2005 & Supp. 2007).

108. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2005 & Supp. 2007).

109. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2005 & Supp. 2007).

110. *See* N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney 2005 & Supp. 2007).

111. N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney 2005 & Supp. 2007).

112. N.Y. Exec. Law § 259-i(3)(c)(vii) (McKinney 2005 & Supp. 2007).

government must hold a revocation hearing within ninety days.[113] The government must notify you in writing at least fourteen days before the revocation hearing of the date, place, and time of the hearing.[114]

The Conditional Release Commission or the Board of Parole must provide you with due process before permanently revoking your conditional release.[115] In order to satisfy the requirements of the Constitution's Due Process Clause, there must be a finding by a "preponderance of the evidence" (meaning that it must be "more likely than not") that you violated a term of your conditional release, and you must be given an opportunity to be heard.[116] You are also entitled to a lawyer at the hearing.[117] At the hearing, you will be given the opportunity to make a statement.[118] You also have the right to present evidence on your own behalf and to confront and cross-examine witnesses testifying against you.[119] If it cannot be determined by a "preponderance of the evidence" that a violation occurred, the case will be dismissed, and you will again be released on parole.[120] However, if it is determined that you violated one or more conditions of your release in an important respect (such as failing to appear for a scheduled meeting with your parole officer), your conditional release may be revoked, and you will again be detained or your release may be modified.[121] If you are released again, the time you spent in detention will be credited against the time you must serve.[122]

7. Disadvantages of Conditional Release for Prisoners Serving Definite Sentences

Although getting out of prison before the expiration of your maximum sentence seems like the best possible outcome, under some circumstances, you may want to stay in prison instead. If you are a definite-sentence prisoner, and you are conditionally released, you will have to remain under the supervision of the Conditional Release Commission for a full year, no matter how little time was left on your original sentence.[123] When you are near the end of a definite sentence (which could even be shortened by good-time credit), you might have to choose between conditional release *now* (followed by a year of supervision) or another month or so in prison (followed by complete freedom from supervision). The local Conditional Release Commission may grant conditional release near the end of your sentence just to keep you under supervision for a year. Prisoners will often apply for conditional release when they first become eligible for it, but will find that their requests are denied until shortly before their sentence ends. If you are serving a definite sentence and the Commission agrees to grant you conditional release, be sure you know exactly how much time you would have to serve in order to finish your sentence in prison. Think about whether you would rather serve your short additional time in prison, or spend what might be a longer time (one year) under parole supervision. There are different reasons to make either of these choices, so neither is a wrong decision. However, it is important to be aware of your options, and to realize how much of your life you are

113. N.Y. Exec. Law §§ 259-i(3)(d), (f)(i) (McKinney 2005 & Supp. 2007).

114. N.Y. Exec. Law § 259-i(3)(f)(iii) (McKinney 2005 & Supp. 2007).

115. *See* Morrissey v. Brewer, 408 U.S. 471, 484, 92 S. Ct. 2593, 2601–02, 33 L. Ed. 2d 484, 495 (1972) (holding that because a parolee faces a severe loss of liberty if his parole is revoked, due process is required before parole can be revoked). Although this ruling dealt with parole revocation, one can argue the reasoning should apply equally to the conditional release revocation. *See* Kroemer v. Joy, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates County 2003) (finding prisoners in temporary release status have a due process right to a hearing before their status is revoked since it would be a loss of liberty.); Friedl v. City of New York, 210 F.3d 79, 84 (2d Cir. 2000) (finding that prisoner on work release is entitled to procedural due process before his status can be denied to prevent a deprivation of his liberty); Anderson v. Recore, 446 F.3d 324, 333–34 (2d Cir. 2006) (prisoners have a protected liberty interest in continuation in a temporary release program that affords them due process rights including notice and a hearing before its revocation).

116. N.Y. Crim. Proc. Law §§ 410.70(1)(b), (3) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(v)–(vi) (entitlement to hearing), (viii)–(ix) (requiring preponderance of evidence) (McKinney 2005 & Supp. 2007).

117. N.Y. Crim. Proc. Law § 410.70(4) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(v) (McKinney 2005 & Supp. 2007).

118. N.Y. Crim. Proc. Law § 410.70(2) (McKinney 2005).

119. N.Y. Crim. Proc. Law § 410.70(3) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(iv)-(vi) (McKinney 2005 & Supp. 2007).

120. N.Y. Crim. Proc. Law § 410.70(5) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(ix) (McKinney 2005 & Supp. 2007).

121. N.Y. Crim. Proc. Law § 410.70(5) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(x) (McKinney 2005 & Supp. 2007).

122. N.Y. Exec. Law § 259-i(3)(h) (McKinney 2005 & Supp. 2008).

123. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

committing to supervision (either by being incarcerated or by being under post-release supervision). You are in the best position to decide which option makes the most sense for you.

F. Early Release From a Definite Sentence

If you are serving a definite sentence but do not get out on conditional release, you can still get out before the end of your sentence if you have earned good-time credit. Remember, good-time credit is not used to determine eligibility for conditional release from a definite sentence.

As soon as the amount of good-time credit that you have earned equals the time remaining on your definite sentence, you should request to be unconditionally released. Because you cannot earn good-time credit for more than one-third of your definite sentence, you will have to serve at least two-thirds of your definite sentence before being eligible for this automatic early release.[124] For example, if you were sentenced to nine months and earned three months of good-time credit, your sentence can be reduced by three months, making it a six month sentence.

As soon as you are eligible and request to be released, your sentence will be over—there is no post-release supervision. Accordingly, unlike prisoners released on parole or on conditional release, you will not have to sign a release agreement or worry about supervision or parole officers. Although both conditional and early release allow you to leave prison before serving your entire sentence, only early release also frees you from post-release supervision.

G. Presumptive Release

In 2003, the New York State legislature enacted a new kind of release program called presumptive release.[125] In some ways, presumptive release is a lot like parole. The one major difference, however, is that presumptive release is designed to encourage the early release of model, good-behaving prisoners. That is, presumptive release is intended to be readily available for prisoners who have followed prison rules, participated in their assigned work and participated in their treatment programs. In addition, unlike parole, you do not have to appear before the Board of Parole to be released.

Although you do not have a right to demand presumptive release,[126] you may be eligible if you meet certain requirements. First, the presumptive release program is only available to those prisoners serving one or more indeterminate sentences. Second, the presumptive release program is only available to prisoners serving sentences for non-violent crimes,[127] who have not committed any serious disciplinary infractions,[128] and who have not been deemed to have filed or continued frivolous (not serious) legal complaints.[129]

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124. N.Y. Correct. Law § 804(a)(1) (McKinney 2003 & Supp. 2008).

125. N.Y. Correct. Law § 806 (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until Sept. 1, 2011). This law is set to expire on September 1, 2011. After this date, check for presumptive release program updates, likely available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

126. N.Y. Correct. Law § 806(5) (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until September 1, 2011). Because you cannot earn good-time credit for more than one-third of your definite sentence, you will have to serve at least two-thirds of your definite sentence before being eligible for this automatic early release. For example, if you were sentenced to nine months and earned three months of good-time credit, your sentence can be reduced by three months, making it a six-month sentence.

127. Under New York State law, a prisoner is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under § 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law ("relating to sex offenses"), (7) incest, or (8) an offense defined in Article 263 of the New York Penal Law ("relating to the use of a child in a sexual performance"). N.Y. Correct. Law § 806(1)(i) (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until Sept. 1, 2011). This law is scheduled to expire on September 1, 2011. After this date, you should check for updates about the presumptive release program. Updates may be available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

128. N.Y. Correct. Law § 806(1)(ii) (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until Sept. 1, 2011). This law is scheduled to expire on September 1, 2011. After this date, you should check for updates about the presumptive release program. Updates may be available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

129. N.Y. Correct. Law § 806(1)(iii) (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until Sept. 1, 2011). This law is scheduled to expire on September 1, 2011. After this date, you should check for updates about the presumptive release program. Updates may be available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

1. Earned Eligibility Program

To be eligible for presumptive release, you must first receive a "certificate of earned eligibility." Whether you are serving an indeterminate or a determinate sentence, you should have been assigned a work and treatment program. Two months before your earliest possible parole date, or at some point after that, the commissioner will review your record to determine if you have complied with this program.[130] If the commissioner decides you have successfully participated in your program, he or she may issue you a certificate of earned eligibility. This certificate will factor into your parole hearing and also play a key role in getting presumptive release.

2. Merit Time for Presumptive Release

Merit time shortens the length of your sentence by reducing the *minimum* length of an indeterminate sentence, unlike good-time credits, which reduce the *maximum* length of an indeterminate sentence. If you are serving an indeterminate sentence for a non-violent crime,[131] you may now receive merit-time allowances of up to one-sixth of the minimum period of your sentence. For example, if you are serving a sentence of two to five years, you may receive a merit-time allowance of up to four months, which is one-sixth of the minimum period of two years. If you received this credit, you would first be eligible for presumptive release after serving five-sixths of the minimum period of your sentence. In this example, you would be eligible for presumptive release after one year and eight months.

If you are serving an indeterminate or determinate sentence for a felony drug offense under New York Penal Law §§ 70.70 and 70.71, you are eligible to earn an additional merit-time allowance of up to one-seventh of the minimum term imposed by the court.[132] This means that you can earn this one-seventh of merit time on top of the one-sixth of merit time discussed above. You gain merit-time allowances in the same way you receive good-behavior credit, which is discussed above. In addition, your merit-time credit can be withheld, forfeited, or canceled for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned."[133]

3. Requesting Presumptive Release

To get presumptive release, you must (1) have a certificate of earned eligibility,[134] (2) not have been convicted of a violent offense,[135] (3) not have committed any serious disciplinary violations while in prison, and (4) not have filed any frivolous lawsuits. One other requirement is that if you received merit time, you must have already served at least five-sixths of your minimum sentence (or total minimum sentences); but, if you have not received merit-time credit, you must have already served your entire minimum sentence (or total minimum sentences).

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130. N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2007). This law is scheduled to expire on Sept. 1, 2011. After this date, you should check for updates about the presumptive release program. Updates may be available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

131. Under New York State law, a prisoner is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under Section 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law ("relating to sex offenses"), (7) incest, or (8) an offense defined in Article 263 of the New York Penal Law ("relating to the use of a child in a sexual performance"). N.Y. Correct. Law § 806(1)(i) (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until Sept. 1, 2011). This law is scheduled to expire on September 1, 2011. After this date, you should check for updates about the presumptive release program. Updates may be available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

132. N.Y. Correct. Law § 803(d)(i) (McKinney 2003 & Supp. 2008).

133. N.Y. Correct. Law § 803(1) (McKinney 2003 & Supp. 2008).

134. *See* N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2008).

135. Under New York State law, a prisoner is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under § 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law ("relating to sex offenses"), (7) incest, or (8) an offense defined in Article 263 of the Penal Law ("relating to the use of a child in a sexual performance"). N.Y. Correct. Law § 806(1)(i) (McKinney 2003 & Supp. 2008) (scheduled repeal postponed until Sept. 1, 2011). This law is scheduled to expire on September 1, 2011. After this date, you should check for updates about the presumptive release program. Updates may be available online at: http://www.docs.state.ny.us/ProgramServices/guidance.html#earn.

If you meet those criteria, you can apply for presumptive release by filling out the form provided by the Division of Parole.[136] You will not have to appear before the Board of Parole. Once you have applied for presumptive release and met the criteria, you will be released unless the commissioner determines that you are a threat to the community or release would not be good for your own welfare.

The conditions of presumptive release will be very similar to the conditions of parole or conditional release.[137] You will be subject to the supervision of the Board of Parole for the rest of your unserved sentence. For example, if you were serving a sentence of two to five years, the first possible time for you to receive presumptive release would be after one year and eight months (five-sixths of your minimum sentence). You would then be subject to parole-like conditions for the rest of your five-year maximum sentence—in this case, that would be three years and four months.

H. Clemency and Commutation in New York

"Clemency" is a general term for the power of an executive officer (the Governor of New York, for example) to change the sentence of a criminal defendant to prevent injustice from occurring.[138]

There are several different types of clemency, including amnesty, a reprieve, a pardon, and a commutation. Amnesty applies to a group of people who have committed political offenses. A reprieve postpones a scheduled execution. A pardon attempts to clear a person's name of a crime and restore their reputation, while a commutation just substitutes a milder sentence for the current sentence being served.[139] Most battered women seeking clemency request a commutation of sentence.

In most cases, all these forms of clemency are difficult to obtain. If you are a non-violent offender, or a woman who is in jail for killing an abusive partner, however, you might have a stronger chance of getting clemency. Accordingly, this Section focuses on clemency for battered women. If you are not a battered woman and are still seeking clemency, the outlined procedures will still be helpful to you in preparing your petition.[140] This is because the basic procedures for filing a good petition apply to all types of clemency petitions, even those that are not based on domestic abuse.

If you are currently seeking clemency for a death sentence, you should read *Harbison v. Bell*,[141] a case in which the Supreme Court held that a a prisoner is entitled to a lawyer when petitioning for clemency in capital offenses. Finally, for more information on clemency in the state of New York, see "Guidelines for Review of Executive Clemency Applications," which is on file in the law library of each correctional facility in New York.[142]

1. Pardons

Pardons are different from commutations. A pardon is most commonly available if there is (1) overwhelming and convincing proof of your innocence that was not available at the time of your conviction, (2) a disability imposed on the judgment of conviction, or (3) a chance that you will be deported from the

136. N.Y. Exec. Law § 259-g(1) (McKinney 2005 & Supp. 2008).

137. N.Y. Penal Law § 70.40(1)(c) (McKinney 2004 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

138. Albany Law School, Post-Conviction Remedies Clinic Clemency Manual 13 (1996). In thirty-five states, including New York, the governor grants clemency. In other states either the governor and an advisory board, or an advisory board alone, makes the decision. The Mich. Women's Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. II-A, *available at* http://www.umich.edu/~clemency/clemency_manual.html (last visited Mar. 16, 2011). For more information about the rules of clemency and commutation in other states, see Margaret Colgate Love, The Sentencing Project, Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide (2008), *available at* http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486.

139. The Mich. Women's Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. II-A, *available at* http://www.umich.edu/~clemency/clemency_manual.html (last visited Mar. 16, 2011).

140. For further information on clemency for battered women nationwide, contact the National Clearinghouse for the Defense of Battered Women, 125 S. 9th Street, Suite 302, Philadelphia, PA 19107, (215) 351-0010 or (800) 903-0111 extension 3. The Clearinghouse accepts collect calls from incarcerated battered women.

141. Harbison v. Bell, 554 U.S. 917, 128 S. Ct. 2959, 171 L. Ed. 2d 884 (2008).

142. N.Y. State Div. of Parole, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision 45 (2010), *available at* https://parole.state.ny.us/intro_handbook.html (last visited Mar. 16, 2011).

United States.[143] Usually a pardon is not available if you have any other administrative or legal remedy available to you.[144]

2. Commutations

A commutation of your sentence allows you to appear before the Board of Parole for consideration of release on parole earlier than your sentence would otherwise allow. A commutation of sentence, when exceptional and compelling circumstances are not present, requires all of the following:

(1) your minimum sentence is more than one year;
(2) you have already served at least half of your minimum sentence;
(3) you are ineligible for release on parole within one year of the date you apply for clemency; and
(4) you are ineligible for release on parole at the discretion of the Board of Parole.[145]

In addition, you must be able to prove, by clear and convincing evidence, that one of the following three circumstances applies:

(1) You have made "exceptional strides in self-development and improvement;" you have "made responsible use of available rehabilitative programs and [have] addressed identified treatment needs" (for example, by completing a drug program); and commutation of your sentence is "in the interest of justice, consistent with public safety and [with your] rehabilitation;"
(2) You have a terminal illness or a "severe and chronic disability which would be substantially mitigated by release from prison and such release is in the interest of justice and consistent with public safety" (illnesses such as cancer and multiple sclerosis may qualify); or
(3) "[F]urther incarceration would constitute gross unfairness because of the basic inequities involved."[146]

3. How to Request a Pardon or Commutation

To be considered for clemency in New York, send a written petition requesting clemency to either of the following addresses:

The Governor of the State of New York
Executive Chamber
State Capitol
Albany, NY 12224

Director, Executive Clemency Bureau
N.Y. State Division of Parole
97 Central Avenue
Albany, NY 12206

After the Governor receives a petition requesting clemency, he or she then compiles the necessary information. The Governor only grants formal hearing to those seeking commutation of a death sentence. The Governor will review the information and make a decision.[147] The petitioner should send all supporting application materials within thirty days of sending the petition. Petitions are typically considered in the order in which they are received.[148]

(a) Organization of Petition

To organize your petition, you should first explain the strongest part of your petition in an introductory paragraph or section. For example, you could include special circumstances pertaining to your case or

143. N.Y. Exec. Law § 15 (McKinney 2002 & Supp. 2008).

144. N.Y. Exec. Law § 15 (McKinney 2002 & Supp. 2008). Examples of administrative remedies include a certificate of relief from disabilities or a certificate of good conduct. Information concerning these certificates may be obtained by calling the New York State Board of Parole at (518) 473-9400.

145. N.Y. Exec. Law § 15 (McKinney 2002 & Supp. 2008).

146. N.Y. Exec. Law § 15 (McKinney 2002 & Supp. 2008).

147. N.Y. Exec. Law § 15 (McKinney 2002 & Supp. 2008).

148. Criminal Justice Policy Foundation, New York: Applicable Form of Executive Clemency, *available at* http://www.cjpf.org/clemency/NewYork.html (last visited Mar. 16, 2011).

significant things you have accomplished in prison.[149] Make the petition as brief as possible, but make sure not to leave out any important information. Use headings to separate your points. Emphasize how you have spent your time in prison. Write out in detail your post-release plans (be sure to include how you will be moving into a stable environment, how you will support yourself, and who is included in your support network).

If you were the victim of domestic violence and the domestic violence is related to your conviction, consider making a table that includes the date of each incident of abuse, the nature of the abuse, and a description of any evidence that exists to prove the incident(s).[150]

(b) Exhibits

In order to show strong character and good behavior, you can include evidence, such as letters of support from prison administrators, work supervisors, religious leaders, educators, and social workers. You should include this evidence as exhibits to your petition. If you were a victim of abuse, you should also include police and hospital records documenting the abuse.

To obtain police records, you should call or write to the records office in the county where the event happened. Different police departments have different policies and you may have to fill out a Freedom of Information Act (FOIA) request.[151] To obtain hospital records, call or write to the patient records office at the hospital where you went for treatment. A written request should include your name, date of birth, Social Security Number, the specific date or general time range of your hospitalization, and the specific information you are requesting.[152]

If you were a victim of domestic violence abuse, and you were evaluated by an expert regarding battered women's syndrome, you should include that evaluation or testimony, as well as evidence of any violent criminal history of your abuser. Include any orders of protection and photographs showing physical injury from the abuse. You also want to attach affidavits or letters from friends, family members, and domestic violence workers who had first-hand knowledge of the abuse.[153] You should refer to these exhibits in your petition, labeling and attaching them to the end of the petition.

(c) Obtaining Documents

Getting documents related to your case and your prison term will help you write your petition. Because you may have difficulty getting all of these documents while incarcerated, you should try to have a close friend or family member assist you in gathering this information and in developing your petition. For information on the Federal Freedom of Information Act (FOIA), the Federal Privacy Act (PA), and New York's Freedom of Information Law (FOIL), see *JLM*, Chapter 7, "Freedom of Information." *JLM*, Chapter 7 also includes a list of FOIA statutes in other states. You will want to obtain your DOCS records (records pertaining to the time you have spent in prison), your parole file, your case file, documentation of battering (if applicable), and affidavits or letters of support.

(i) Your DOCS records

Your DOCS records include:

(1) All reports of misbehavior and supplemental sheets;
(2) Physical force and unusual incident sheets;
(3) Adjustment committee reports and dispositions;
(4) Copy of legal dates;
(5) Crimes of commitment;
(6) Personal history record;
(7) Disciplinary record;
(8) Correctional supervision history;
(9) Certificates of program completion; and

149. Albany Law School, Post-Conviction Remedies Clinic Clemency Manual 16 (1996).

150. The Mich. Women's Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. VII, *available at* http://www.umich.edu/~clemency/clemency_manual.html (last visited Mar. 16, 2011).

151. For more information, see *JLM*, Chapter 7, "Freedom of Information."

152. Albany Law School, Post-Conviction Remedies Clinic Clemency Manual 7 (1996).

153. Albany Law School, Post-Conviction Remedies Clinic Clemency Manual 14 (1996).

(10)Recognition letters

You have a right to this information under FOIA and New York's Personal Privacy Protection Law (PPPL),[154] but you must authorize release of these records if they are being sent to someone other than you. In order to obtain these documents, you should write to the prisoner records coordinator of your facility with your name, DOCS number, where you would like the records sent, and a list of the documents you want to receive. If the documents are being sent to someone other than you, you must state that you authorize that person to receive the documents you are requesting.

(ii) Your parole records

You also have a right to your case record and parole file under FOIL/PPPL. The case record is the most complete set of records maintained by the Board of Parole and can be obtained by writing to the senior parole officer of your facility with your name, ID number, and release interview date, revocation hearing date, or appeal pending date, whichever applies. State that you want to review all the information in the file that will be considered by the Board of Parole to prepare for the upcoming date.

The parole file is a less complete record in the central office, and it can be obtained by writing to the following address:

Chairman of the Board of Parole
97 Central Avenue
Albany, NY 12206.

Be sure to state that you are requesting these records pursuant to FOIA and PPPL.

(iii) Your Case file

The case file includes:

(1) Police reports;
(2) Grand jury minutes;
(3) Indictment;
(4) Pretrial hearings and motions;
(5) Trial transcripts;
(6) Summation;
(7) Jury charge;
(8) Jury requests/read backs;
(9) Verdict;
(10) Sentencing;
(11) Plea allocutions of co-defendants;
(12) Direct appeal appellate and response briefs;
(13) Reply/supplemental brief;
(14) Decision on appeal; and
(15) Anything else of interest in the court file.

Ask your attorney for copies of these documents and transcripts. If your attorney does not have complete transcripts, you may need to call the criminal courthouse to obtain copies.

For your rap sheet, send a request to:

Record Review Unit
New York State Division of Criminal Justice Services Civil Identification Bureau
4 Tower Place
Albany, NY 12203.

In your request, you should include your name, date of birth, Social Security Number, and D.I.N. number. You can also ask them to rush processing of your file if you need the information quickly. Otherwise, it can take eight weeks or longer to receive your rap sheet. You should send the request in a facility envelope, if possible.

You also have a right to obtain pre-sentencing reports, though you may be asked to show a factual need for the reports.[155] To get them, send a written request addressed "To Whom It May Concern" to the Record

154. N.Y. Pub. Off. Law §§ 94–95 (McKinney 2008).
155. N.Y. Crim. Proc. Law § 390.50 (McKinney 2005).

Review Unit (see above address), with your name, birth date, indictment number, sentencing court, the address where you would like the information to be sent, and a signed release authorizing another person to receive the information, if necessary.

(iv) Documentation of battering

Documentation of battering should include:

(1) Medical records of injuries from abuse;
(2) Mental health records showing your diminished capacity at the time of the crime and/or the stress, fear and anxiety caused by living in a violent relationship;
(3) Orders of protection;
(4) Police reports related to the abuse; and
(5) Photographs showing physical injury.

Try to obtain copies of any relevant records from hospitals, clinics, private doctors, or mental health clinicians, as well as police reports of incidents of domestic violence.

(v) Affidavits or letters of support

You should also include affidavits and letters of support in your petition. An affidavit is a written statement that the author signs and swears to be true in front of someone who is authorized to administer an oath, such as a notary public. You can ask family members, friends, co-workers, doctors, neighbors, therapists, and other people involved in your life to submit an affidavit. You can also ask them to submit letters of support. The affidavit or letter of support should explain that you were battered and/or describe the crime. When you submit the affidavits or letters in your petition, you should state whether these people testified at your criminal trial.[156]

I. Compassionate Release for Persons with Terminal Diseases

Thirty-six states have programs that allow for the release of dying or seriously ill prisoners.[157] For example, California has a compassionate release procedure that allows the court to re-sentence or recall the sentence.[158] You must have an incurable illness that will produce death within six months or be permanently medically incapacitated (as determined by a physician employed by the Department of Corrections), and you must not pose a threat to public safety. This does not apply if you are sentenced to death or to a term of life without the possibility of parole. If you are incarcerated in California and are interested in receiving a compassionate release, you or someone you designate should contact the chief medical officer of the prison or the Director of Corrections.[159]

Every state's rules are different, and many states have recently implemented new programs or are considering new legislation on this issue. For example, in 2008, Alabama, North Carolina, and Wyoming introduced new compassionate release programs.[160] If you have a serious or terminal illness or are elderly, you should check to see if your state has a compassionate release program.

New York State prisons also release some prisoners through medical parole.[161] To be eligible, you must have a terminal health condition.[162] You must also be so incapacitated or debilitated that you cannot care for yourself.[163] To prove this, you must have a physician's certification that you are "severely restricted in [your]

156. Albany Law School, Post-Conviction Remedies Clinic Clemency Manual 6–7 (1996).

157. Marty Roney, 36 States Release Ill or Dying Inmates, USA Today, Aug. 14, 2008 (listing states with a medical release program).

158. *See* Cal. Penal Code § 1170(e)(2) (West 2004 & Supp. 2008).

159. Cal. Penal Code § 1170(e)(3) (Deering 2009).

160. *See* Ala. Code § 14-8-80 (2008); N.C. Gen. Stat. § 15A-1369 (2008); Wyo. Stat. § 7-13-424 (iv) (Supp. 2008).

161. N.Y. Exec. Law § 259-r (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law. *See also* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (as revised Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf; N.Y. State Div. of Parole, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision 8–9 (2010), *available at* https://parole.state.ny.us/intro_handbook.html (providing additional procedures and guidelines).

162. *See* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (as revised Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf (last visited Mar. 16, 2011).

163. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (as

ability to self-ambulate [move around] and to care for [yourself]."[164] Not only must you have a doctor's certification, but the Commissioner of DOCS (or someone authorized by the Commissioner) must also certify both the doctor's diagnosis and your incapacity. Officials will consider the length of and reason for your incarceration, as well as your rap sheet. You are not eligible if you are serving a sentence for first or second degree murder, first degree manslaughter, or any sex offense (defined by Article 130 of the New York Penal Law), or an attempt to commit any of these crimes.[165] Even if you are not eligible for medical parole because your initial parole eligibility date is past, you may be eligible for a full review by the Board of Parole of your case for medical reasons.[166]

The New York medical parole process has three steps.[167] First, if you want to begin the process, you have a few options.[168] If you are currently in prison and you think you might be eligible, you need a physician's certification to start the process. To get this, you or someone acting on your behalf must make a request to the Commissioner of DOCS or the Division of Health Services that you be considered for medical parole.[169] If you are eligible, the Commissioner has discretion to order a medical evaluation and discharge plan. A physician employed by DOCS, or by a medical facility used by DOCS, can perform the evaluation. During the evaluation, the physician will make observations on the following: the disease, syndrome, or terminal condition you suffer from; the likelihood of your recovery; the extent of your debilitation or physical incapacity and its possible duration; the medications and dosages you are currently taking; and your ability to administer them to yourself.[170]

The second step begins when the medical evaluation report plan is sent to the Associate Commissioner, who will advise the Commissioner whether you meet the criteria for medical parole. The Associate Commissioner will determine whether you are "so debilitated or incapacitated as to create a reasonable probability that [you are] physically incapable of presenting any danger to society."[171] If the Commissioner decides that you meet the criteria for medical parole, the matter is referred to the Board of Parole for consideration. At that time, the Central Health Services staff and the correctional facility will begin to prepare a medical discharge plan. The medical discharge plan includes information on the level of care you will need, a description of special equipment or transportation needs, a description of your participation in the discharge plan, home-care plans if applicable, a description of any support needed by you or your care-giver, a report on the status of applications for Public Assistance or Medicaid, and a report on the status of applications for institutional placement. If it appears that you are in need of Public Assistance, an application will be sent to the Department of Social Services.[172]

If you can get both the physician's certification and the Commissioner's certification, and there is no other reason you would be ineligible, you may receive compassionate release, also called medical parole.[173]

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revised Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf.

164. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf.

165. *See* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf; N.Y. Exec. Law § 259-r(1)(a) (McKinney 2005 & Supp. 2008). Note that New York Executive Law § 259-r is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

166. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf.

167. For an explanation of the process and problems with compassionate release in New York, see John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. Med. & Ethics 216 (1999).

168. Physicians in the prison system can also initiate the request for you. *See* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf (stating that someone acting on the prisoner's behalf or a department employee may also make the request).

169. *See* State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf.

170. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf; N.Y. Exec. Law § 259-r(2)(a) (McKinney 2005 & Supp. 2008).

171. N.Y. Exec. Law § 259-r(2)(b) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

172. State of New York, Department of Correctional Services, Directive No.4304, Medical Parole (1997) (*as revised* Feb. 1, 2000), *available at* http://www.docs.state.ny.us/Directives/4304.pdf.

173. N.Y. State Div. of Parole, New York State Parole Handbook: Questions and Answers Concerning Parole

However, getting through the third phase of formal review by the Board of Parole can be very difficult. The process has many steps and can take a long time.[174] Before the Board of Parole releases you, there are a few other things that must happen. The judge who sentenced you, the District Attorney, and the attorney who represented you will all be notified that you might receive parole, and they can each submit comments within fifteen days.[175] Additionally, DOCS must provide "an appropriate medical discharge plan" to the Board of Parole.[176] The Board must assess whether, considering your medical condition, it is reasonably possible you will live outside of prison without breaking the law. It must also consider whether letting you out on such a release might be harmful to society, or will go against society's idea of fairness, taking into account the seriousness of your crime. Another consideration the Board will make is whether your release will "undermine respect for the law."[177] The process can take months, so it is very important to start it as soon as you become eligible.

If parole is ultimately granted, the health services staff will send copies of all appropriate medical records to the physician or facility that will care for you. Once you are released, you must get medical care as appropriate and remain under the care of a physician.[178] Every six months after your release, the Board will review your case, deciding whether to let you stay out of prison by renewing the grant of parole.[179] Each time, you will need to submit to a medical examination.[180]

J. Federal Sentences

This Part explains the different ways that you can be released early from your federal sentence. In general, there are four main ways that you can get out before your full sentence is served.

First, you can earn credit for time you served in prison prior to beginning your sentence. To learn more about what types of time previously served can be used to shorten your sentence, see Part C(1) of this Chapter, which describes this option in more detail.

Second, you may be able reduce your sentence by helping the government investigate or prosecute other people. There is no guarantee, though, that your sentence will be reduced if you provide such assistance. Even if your sentence is reduced, it is up to the court to decide by how much it will reduce your sentence. To determine if you are eligible for this type of reduction, see Part C(2) of this Chapter, which explains this option in more detail.

Third, the Bureau of Prisons (BOP) can shorten your sentence by (1) awarding you "good conduct time credits," (2) granting you early release for participation in a Residential Drug Abuse Program (RDAP), (3) granting you release under the Second Chance Act, or (4) granting you compassionate relief. To determine if you are eligible for these programs, learn how to apply for these programs, and understand their potential effect on your sentence, see Part C(3) of this Chapter.

Finally, in very rare cases, the President of the United States can grant you executive clemency, which releases you from your prison sentence and/or your term of supervised release. The President can also forgive your crime after you have finished serving your sentence and shown your remorse and rehabilitation. Federal executive clemency is discussed in Part C(5) of this Chapter.

This Part also explains federal supervised release. Federal supervised release is an additional sentence that a judge can impose that you must serve after you complete your prison sentence. During a period of federal supervised release your conduct will be monitored by a probation officer to make sure that you do not violate any of the conditions of your supervised release. Federal supervised release and its conditions can be

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Release and Supervision 8 (2007), *available at* http://parole.state.ny.us/handbook.pdf.

174. *See generally* John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. Med. & Ethics 216 (1999) (highlighting inefficiencies in New York medical parole and suggesting changes).

175. N.Y. Exec. Law § 259-r(1)(c) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

176. N.Y. Exec. Law § 259-r(2)(c) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

177. N.Y. Exec. Law § 259-r(1)(b) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

178. N.Y. Exec. Law § 259-r(4)(b) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

179. N.Y. Exec. Law § 259-r(4)(a), (e) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

180. N.Y. Exec. Law § 259-r(4)(d) (McKinney 2005 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2011, and after this date, you must check for the new, updated version of this law.

revoked, terminated, or modified, which could result in your being sentenced to an additional term of imprisonment. Part C(4) of this Chapter explains federal supervised release in more detail.

K. Credit for Time Served

In addition to the time you spend serving your current federal sentence you can receive credit for time that you already served in prison after the date you committed your current federal offense but before you began serving your current sentence. The amount of time that is credited towards your sentence for "time served" is determined by the Attorney General or the BOP after the district court announces your sentence.[181] District courts cannot directly order that time previously served be credited to reduce the length of your current sentence. You can challenge the amount of time credited towards your sentence only after exhausting the administrative remedies available with the BOP.[182]

You can only receive credit for time spent in official detention. The Supreme Court in *Reno v. Koray* found "official detention" to mean time spent under federal detention.[183] This does not include time on release, like on bail or under house arrest. The BOP interprets *Reno v. Koray* to mean that you are "not entitled to any time credit off the subsequent sentence, regardless of the severity or degree of restrictions, if such release was a condition of bond or release on own recognizance, or as a condition of parole, probation or supervised release."[184] However, you still can receive credit for time spent in a community treatment center or lower security placement if it is ordered as a condition of your presentence detention or because of overcrowding in federal facilities.[185]

There are three types of credit that can count against your sentence as "time served":

(1) time actually spent serving a federal sentence;
(2) time previously served; and
(3) time in non-federal pre-detention custody when you are denied bail under a federal detainer.[186]

The first category—time actually spent serving a federal sentence—refers to the time spent serving your current federal sentence. Your federal sentence does not begin until the date you are "received in custody awaiting transportation to" *or* until you arrive voluntarily to begin serving your sentence at the official facility where you will be serving your federal sentence.[187] The time you serve can be reduced even further if you obtain good conduct time credits[188] and/or early release under the RDAP.[189]

The second category—time previously served—allows credit to be applied for time previously served in official detention (state, foreign, or federal) before the date when your federal sentence began. In general, credit can apply from time that you spent in detention for (1) your current offense prior to sentencing, or (2) any other offense for which you were arrested after you committed the current offense, provided that the time has not been credited against another sentence.[190] For example, you can include the time you spent in federal custody after arrest on your federal charge.[191] This includes the time spent in federal custody before sentencing, including time spent in state proceedings.[192]

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181. United States v. Wilson, 503 U.S. 329, 333, 112 S. Ct. 1351, 1353, 117 L. Ed. 2d 593, 599 (1992).

182. United States v. Whaley, 148 F.3d 205, 207 (2d Cir. 1998) (holding that a district court does not have jurisdiction to hear an prisoner's appeal to a sentencing determination until the prisoner has requested review with the BOP and exhausted all of his administrative remedies).

183. Reno v. Koray, 515 U.S. 50, 61, 115 S. Ct. 2021, 2027, 132 L. Ed. 2d 46, 57 (1995) (holding that the time spent by the plaintiff in a community treatment center while on bail would not be credited against his federal sentence, as he was on release and thus not in official detention).

184. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-14G (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Mar. 16, 2011).

185. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-14F (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

186. Stackpole v. Williamson, No. 3:CV-07-0396, 2007 U.S. Dist. LEXIS 54992, at *6–7 (M.D. Penn. July 30, 2007).

187. 18 U.S.C. § 3585(a) (2006).

188. 18 U.S.C. § 3624(b) (2006).

189. 18 U.S.C. § 3621(e) (2006).

190. 18 U.S.C. § 3585(b) (2006).

191. In *Jonah R. v. Carmona*, the Ninth Circuit applied these provisions to grant juveniles credit for time spent in pre-detention custody. 446 F.3d 1000, 1010 (9th Cir. 2006).

192. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-16 to 1-16A (1997); *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

You may also be able to receive credit for the time (after your federal offense) that you spent in custody serving another sentence that was not and will not be counted towards any sentence. For example, if you were serving time in official detention for a state or foreign sentence that was later vacated and you were not re-sentenced, you can include this time. Likewise, if you were serving a federal, state, or foreign sentence that was vacated and you were re-sentenced to a period shorter than that which you already served, the extra time beyond time already served on that sentence can be applied to your federal sentence.[193]

If you were arrested for a different offense *after* you committed the offense for which you were sentenced, and you spent time in official detention for that different offense, you can receive credit for that time you spent in detention prior to receiving the sentence you are now serving.[194] You can also receive credit for time in a state facility when a federal court has ordered that your federal and state sentences run concurrently (at the same time). While a state court decision may recommend that your state and federal sentences run concurrently, many courts have held that federal authorities do not need to follow the state's recommendation. Therefore, any time spent serving the state sentence in a state facility while waiting for transport or transfer to the federal facility will *not* be credited against your sentence as time already served.[195] However, if you are first convicted in state court and later convicted in federal court, the federal court can order that your sentences run concurrently, starting on the date that the federal sentence is announced or imposed by the court.[196] If your federal sentence is decided before or after your state sentence, it must state specifically that it is to run concurrently with your state sentence or it will automatically run consecutively.[197] Only the time that you remained in state prison after the federal sentence was pronounced can be credited towards your federal sentence.

Note that you cannot "double count" credit for any previous time served in state or federal prison that has already been counted against your state sentence or a different federal sentence.[198] This rule includes time spent on detainer related to your trial and prosecution for unrelated federal charges,[199] as well as time served in federal pre-sentence custody that has been credited to your state sentence.[200] A district court cannot apply credits for time previously served to your federal sentence; only the Attorney General of the United States can do this.[201]

The third category covers time served in non-federal pre-detention custody when you were denied bail because you were being detained on separate charges by the federal government. These are called "Willis

193. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-17 (1997); *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

194. 18 U.S.C. § 3585(b)(2) (2006) (authorizing a defendant to receive credit for any time spent in official detention *prior* to the date the sentence commences, when that detention time was the result of any other charge for which the defendant was arrested *after* the commission of the offense for which the defendant was sentenced).

195. Leal v. Tombone, 341 F.3d 427, 429 (5th Cir. 2003) (holding that federal authorities are not required to follow state recommendations for state and federal sentences to run concurrently and therefore are under no obligation to credit time served in state prison that could have been served in federal prison if authorities had chosen to commence transfer earlier (citing Taylor v. Sawyer, 284 F.3d 1143 (9th Cir. 2002) and Bloomgren v. Belaski, 948 F.2d 688, 690–91 (10th Cir. 1991)).

196. 18 U.S.C. § 3584(a) (2006); Johnson v. Wrigley, No. CV F 07-00714 OWW SMS HC, 2007 U.S. Dist. LEXIS 77145, at * 7–8 (E.D. Cal. Oct. 17, 2007) (holding that the time a plaintiff served in state prison before being given his federal sentence could not be credited against the federal sentence).

197. 18 U.S.C. § 3584(a) (2006).

198. United States v. Wilson, 503 U.S. 329, 337, 112 S. Ct. 1351, 1356, 117 L. Ed. 2d 593, 602 (1992); Johnson v. Wrigley, No. CV F 07-00714 OWW SMS HC, 2007 U.S. Dist. LEXIS 77145, at *10 (E.D. Cal. Oct. 17, 2007).

199. United States v. Mills, 501 F.3d 9, 11–12 (1st Cir. 2007) (holding that the 365 days that plaintiff served in state prison that had been credited against his state sentence could not also be credited against his federal sentence where the federal detainer was completely unrelated to the reason he was in state custody).

200. United States v. Storm, 2007 U.S. Dist. LEXIS 57019, at *4 (D. Utah Aug. 2, 2007) (finding plaintiff not entitled to credit for time served in official detention prior commencing his federal sentence when this same pre-custody time was already counted towards his state sentence), *vacated*, 2008 U.S. App. LEXIS 13024 (10th Cir. June 16, 2008).

201. In *United States v. Wilson*, the Supreme Court held that credit for time already served under 18 U.S.C. § 3585(b) cannot be granted by the court, but only by the U.S. Attorney General (or the BOP, acting pursuant to the Attorney General's orders) and only after the prisoner has begun serving his sentence. 503 U.S. 329, 334–35, 112 S. Ct. 1351, 1354–55, 117 L. Ed. 2d 593, 599–601 (1992); *see also* United States v. Peters, 470 F.3d 907, 909 (9th Cir. 2006) (reaffirming *Wilson*'s holding that only the Attorney General, and not the district court, has the authority to grant prisoners credit for time served).

time credits."[202] You may be eligible for Willis time credits if you are sentenced to concurrent federal and state sentences, and your estimated federal release date is the same or later than your estimated state release date, without any reduction credits applied. Willis time credits are earned for the time you were held in non-federal pre-sentence custody from the date that the federal offense occurred to the date that your first sentence began (either the federal or the state sentence, whichever started earlier).[203] You cannot obtain any Willis time credits if you are released from your state sentence before your federal sentence begins and the presentence time was credited against your state sentence.[204] If your estimated federal release date, without any reduction credits applied, is earlier than your state estimated release date, then you may still be eligible for a reduction.[205]

L. Substantial Assistance Prosecuting Others

A second way that you may be released early from prison is by providing substantial help to the government to investigate or prosecute other people. Depending on how much help you provide, the judge can significantly reduce your sentence—the judge can even reduce your sentence below the statutory minimum.[206] Keep in mind, however, that there is no guarantee that your sentence will be reduced: the court may decide to keep your original sentence.[207]

If you think you might be able to help the government in this way and want to try to reduce your sentence, you should talk to the government about this as soon as possible after your sentencing. If you wait more than a year after sentencing before you help the government, it will be harder to get your sentence reduced and you might not be eligible anymore.

For you to be eligible for this reduction, the government must first file a motion with your sentencing judge, asking the judge to reduce your sentence.[208] If the government files this motion within a year of your sentencing,[209] the judge will just consider whether you gave "substantial assistance in investigating or prosecuting another person."[210] However, if the government files the motion more than one year after your sentencing, the judge can only reduce your sentence if you also meet one of the following three requirements:[211]

(1) You did not know about the information until a year or more after your sentencing;
(2) You told the government the information within one year of your sentencing but the information was not useful to the government until more than a year after your sentencing; or
(3) You had the information but did not realize it would be useful to the government until more than one year after your sentencing. As soon as you realized it was useful, you told the government the information.

You should be aware that even if you help the government, you are not guaranteed a reduced sentence. It is entirely up to the government whether you are eligible for this reduction. Unless the government files a motion asking the judge to reduce your sentence, the judge cannot reduce your sentence.[212] In addition, you should speak directly with a federal prosecutor about the possibility of obtaining a sentence reduction in

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202. These credits are named after a case, Willis v. United States, 438 F.2d 923, 925 (5th Cir. 1971) (holding that defendant was entitled to credit for time served in state pre-sentence custody because this time was related to his federal offense where defendant was denied release on bail because of the federal detainer lodged against him).

203. Fed. Bureau of Prisons, Program Statement 5880.23, at 1-22 (1997); *available at* http://www.bop.gov/policy/progstat/5880_023.pdf.

204. Fed. Bureau of Prisons, Program Statement 5880.23, at 1-22 (1997); *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

205. Kayfez v. Gazele, 993 F.2d 1288, 1290 (7th Cir. 1993) (finding unreasonable the BOP's decision to only apply credits for pre-sentence time to the longer non-federal sentence even where the amount of time in the credit was longer than the amount of time separating the federal and non-federal sentences and instead ordering the pre-sentence time be applied against the non-federal sentence and then applied to reduce the federal sentence to match the length of the newly calculated non-federal sentence); *see also* Fed. Bureau of Prisons, Program Statement 5880.23, at 1-22C (1997).

206. Fed. R. Crim. P. 35(b)(4).

207. Fed. R. Crim. P. 35(b).

208. Fed. R. Crim. P. 35(b)(1) & (2).

209. As used in this rule, "sentencing" means the oral announcement of the sentence. *See* Fed. R. Crim. P. 35(c).

210. Fed. R. Crim. P. 35(b)(1).

211. Fed. R. Crim. P. 35(b)(2)(A)–(C).

212. United States v. Mulero-Algarin, 535 F.3d 34, 38 (1st Cir. 2008) (holding that only the government—not a judge—has the power to make a prisoner eligible for a sentencing reduction for substantial assistance).

exchange for information. Prison wardens and other BOP officials are not government officials and cannot file a motion with the court asking for a sentence reduction.[213]

M. Additional Ways the BOP Can Shorten a Federal Sentence

In addition to earning credit for time served and substantially helping the government prosecute others, you may receive early release through one of four BOP programs. First, you can earn good conduct time credits that can be used to reduce your sentence. Second, you may be eligible for early release after participation in a Residential Drug Abuse Program (RDAP). Third, you may be eligible for early release under the Second Chance Act. Finally, you may be eligible for compassionate relief. Keep in mind, however, that it is difficult to obtain compassionate relief, which is only awarded in the most extraordinary of circumstances. Each of the next subsections discusses these programs in more detail.

1. Good Conduct Time Credits

Federal good conduct time is similar to the state good-time credit discussed above in Part B(2) of this Chapter. If you are serving a sentence of more than one year, but less than life imprisonment, you can earn up to fifty-four days of good conduct time credits for each year served of your sentence, to be subtracted from your total sentence.[214] This means that for every year served in prison, you can shorten the total amount of time on your sentence by up to fifty-four days.[215]

(a) How to Earn Good Conduct Time Credit

Good conduct time credits are awarded for "exemplary compliance with institutional disciplinary regulations," or successfully following prison rules.[216] Credits are awarded at the BOP's discretion at the end of each year.[217] If you have not followed prison rules, you may receive fewer credits or no credits at all in any given year.[218]

(b) Amount of Good Conduct Time Credit You Can Earn

The amount of good conduct time you can earn depends on the date you committed your offense. If you committed your offense on or after November 1, 1987, but before September 13, 1994, you can earn up to fifty-four days credit towards serving your sentence for each year of your sentence served.[219] If you committed your offense on or after September 13, 1994, but before April 26, 1996, your good-conduct time will be credited towards your sentence if you have a high school diploma, a General Educational Development (GED) credential or are making satisfactory progress toward your GED.[220]

If you are serving a sentence for an offense you committed on or after April 26, 1996, and you do not have a high school diploma or a GED, the amount of days of credit you can earn in a year depends on whether you are making satisfactory progress towards receiving a GED. The education department at your prison will decide whether you are making satisfactory or unsatisfactory progress towards obtaining your GED.[221] If you have a GED or are making satisfactory progress towards obtaining one, then you can earn up to fifty-four credits for each year served.[222] If you do not have a GED and are not making satisfactory progress towards obtaining one, then you can only receive up to forty-two days of credit for each year

213. United States v. Ellis, 527 F.3d 203, 207–09 (1st Cir. 2008) (holding that a warden within the BOP was unauthorized to make the motion as the "government" under Rule 35(b)).

214. 18 U.S.C. § 3624(b)(1) (2006).

215. There has been debate about whether prisoners are entitled to more than 54 days of good conduct time credit per year. Recent court decisions suggest acceptance of the BOP's interpretation for computing good conduct time credits. *See, e.g.*, Yi v. Fed. Bureau of Prisons, 412 F.3d 526, 534 (4th Cir. 2005) (upholding as reasonable the BOP's interpretation of 18 U.S.C. § 3624(b)(1) to mean credits can only be earned for years served and not years sentenced); Moreland v. Fed. Bureau of Prisons, 547 U.S. 1906, 1907 (2006) (denying *certiorari* on whether "term of imprisonment" meant sentence imposed or time served, but noting ten courts of appeals have accepted the BOP's interpretation).

216. 18 U.S.C. § 3624(b)(1) (2006).

217. 18 U.S.C. § 3624(b)(1) (2006).

218. 18 U.S.C. § 3624(b)(1) (2006).

219. 28 C.F.R. § 523.20(a) (2006).

220. 28 C.F.R. § 523.20(b) (2006).

221. Fed. Bureau of Prisons, Program Statement 5884.03(7)(a), at 3 (2006), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf.

222. 28 C.F.R. § 523.20(c)(1) (2006).

served.[223] You can change your progress status during the year from unsatisfactory to satisfactory in order to become eligible for the full fifty-four credits.[224]

If you are serving a sentence longer than 366 days, then after 366 days in prison the BOP will decide how many of the fifty-four possible credits you have earned for that year.[225] Any of the possible credits that you did not earn that year are lost and cannot be earned back by you in the following year(s).[226] One year later, the BOP will review your case again to determine how many credits you have earned for the 365 days you served since the last assessment for good conduct time credits. This process will repeat every year until you have less than 365 days left to serve on your sentence. When you are a year away from your estimated release date, after taking into account the amount of good conduct time credits that you have earned, the amount of credits you can earn begins to be prorated (set into proportion for the amount of days you have left to serve in that year by applying the "GTC formula"[227]).[228] Your good conduct time credits are not secure until you are actually released from prison.[229] Therefore, you can lose your good-time credits for the current year and all previous years up until your actual release from prison,[230] as described in the next Section of this Chapter. If you do, your estimated release date will be recalculated and you will lose the benefit of your good conduct time credits.[231] During the last year of your sentence, the amount of credits you can earn is prorated (set in proportion to the amount of time served for that year) and should be credited to you within the last six weeks of your sentence.[232] Because you do not actually receive your credits until you are released from custody,[233] you can lose credits that you have earned, as described in the next section of this Chapter.

(c) Loss of Good Conduct Time Credit

If you violate prison regulations or bring an unfounded (or "frivolous") lawsuit,[234] you may lose unvested good conduct time credit as punishment.[235] This Chapter does not discuss the consequences of bringing a frivolous lawsuit, so you *must* read *JLM*, Chapter 14, "The Prison Litigation Reform Act," for more information about this possibility.

Note, though, that you cannot lose your good-time credits if your credits have already vested, that is, if your offense was committed on or after November 1, 1987 but before September 13, 1994, *or* your offense

223. 28 C.F.R. § 523.20(c)(2) (2006).

224. Fed. Bureau of Prisons, Program Statement 5884.03(7)(d), at 3 (2006), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf.

225. Fed. Bureau of Prisons, Program Statement 5880.28(3)(k), at 1-78R (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

226. Fed. Bureau of Prisons, Program Statement 5880.28(3)(k), at 1-78R (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

227. Fed. Bureau of Prisons, Program Statement 5880.28(3)(g), at 1-44–1-47 (1992), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf. The GCT formula is used to ensure that the amount of time served plus the amount of GCT time granted exactly equals the number of days in your total sentence. The GCT formula is applied by multiplying the number of days in your sentence by 0.148. For example, if your sentence is one year and one day (the minimum length to be eligible for good conduct time credits), you cannot earn 54 days for that year, because after subtracting 54 GCT days from your sentence, you will not have served 365 days, and therefore could not have earned the full 54 days allowed per year of time served. Instead, the maximum amount of good conduct time days you can earn for a sentence of one year and one day using the GCT formula is 47 days. Fed. Bureau of Prisons, Program Statement 5880.28(3)(g), at 1-47 (1992), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf. To determine how many days of good conduct time you could earn based on how many days are left to be served on your sentence, see Fed. Bureau of Prisons, Program Statement 5880.28(3)(g), at 4-1–4-6, (1992), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

228. 18 U.S.C. § 3624(b)(1) (2006).

229. Fed. Bureau of Prisons, Program Statement 5880.28(3)(k), at 1-78S (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

230. Fed. Bureau of Prisons, Program Statement 5880.28(3)(k), at 1-78S (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf.

231. *See* Prison Litigation Reform Act § 809, 28 U.S.C.S. § 1932 (1996); Fed. Bureau of Prisons, Program Statement 5270.07 ch. 4, app. at 1 (2003), *available at* http://www.bop.gov/policy/progstat/5270_007.pdf.

232. 18 U.S.C. § 3624(b)(1) (2006).

233. 18 U.S.C. § 3624(b)(2) (2006).

234. Fed. Bureau of Prisons, Program Statement 5270.07(1)(a) ch. 5, at 1 (2003), *available at* http://www.bop.gov/policy/progstat/5270_007.pdf.

235. Fed. Bureau of Prisons, Program Statement 5270.07(1)(a) ch. 5, at 1 (2003), *available at* http://www.bop.gov/policy/progstat/5270_007.pdf.

was committed on or after September 13, 1994, but before April 26, 1996 and you have made satisfactory progress in obtaining your GED. If your offense occurred on or after April 26, 1996, your credits have not already vested (been credited and applied against your sentence) and will not vest until your release. Therefore, you can lose good-time credits as a result of committing a prohibited act.[236]

Before the BOP can take away your good conduct time credits for alleged misconduct, there are several steps that the staff at your institution must take. First, a staff member who believes that you have violated prison regulations must file an Incident Report with the Lieutenant at your facility.[237] A staff member will then investigate the incident.[238] At the beginning of the investigation, you should be given a copy of the Incident Report, unless there is good cause for delivery at a later date.[239] The investigator will tell you what you are being charged with, provide you with a written copy of the charges, and ask for your statement on the incident. You can choose to give or not give a statement. Your silence can be used as evidence to show that you broke the rule, but it is not enough alone to prove that you broke the rule.[240]

The third step is an initial hearing by the Unit Discipline Committee (UDC). The UDC hearing will normally occur within three business days of the BOP becoming aware of your involvement in the incident.[241] Based on "some evidence"[242] that you either did or did not break the rule, the UDC can: (1) resolve the matter informally by imposing minor dispositions or sanctions; or (2) send it on for a full hearing before the Disciplinary Hearing Officer (DHO), if the charges are severe.[243] You should receive a written copy of the UDC decision before the end of the next business day.[244]

Only a DHO can take away your good-time credits.[245] At least twenty-four hours before your hearing in front of the DHO, you will receive written notice of the charges against you.[246] If your case is referred to the DHO, you have the option of selecting a staff member to represent you at the DHO hearing.[247] The staff member can not have been involved in the incident and must not have a relationship to you that would cause a conflict of interest. If the staff member you select is unable or unwilling to represent you, you can request a different staff member. However, if several staff members cannot or will not represent you, then the Warden will appoint a staff member to be your representative if you want one or if you are not able to represent yourself (for example, if you cannot read and write).[248] You will be asked to provide a list of any witnesses you want to call and what they will talk about at the hearing.[249] You and your witnesses can present documents and make statements to prove that you did not break the rules.[250] Based on at least some facts, the DHO will then decide whether or not you committed the prohibited act.[251] If the DHO finds that you did

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236. *See* 28 C.F.R. § 541.13 (2007) (listing prohibited actions). Examples of actions that can result in the loss of GTC include: assaulting another person, escape from an escort or institution, fighting with another person, possession of a weapon, use of illegal drugs, engaging in sexual acts, stealing, refusing to take a drug or alcohol test, refusing to work or obey an order, gambling, being unsanitary or unclean, and using obscene language. 28 C.F.R. § 541.13 (2007).

237. 28 C.F.R. § 541.14(a) (2007). If the charge against you is categorized as less serious and the Lieutenant thinks that he or she can informally come up with a solution to the incident with you, then the charge will be dropped and the incident will not be listed in your file. 28 C.F.R. § 541.14(a) (2006).

238. 28 C.F.R. § 541.14(b) (2007).

239. 28 C.F.R. § 541.14(b)(2) (2007).

240. 28 C.F.R. § 541.14(b)(2) (2007).

241. 28 C.F.R. § 541.15(b) (2007).

242. Luna v. Pico, 356 F.3d 481, 487–88 (2d Cir. 2004) (citing Superintendent, Mass. Correct. Inst. v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985) (holding that at least some evidence is required before good conduct time credits can be taken away in a prison disciplinary hearing)).

243. 28 C.F.R. § 541.15 (2007).

244. Fed. Bureau of Prisons, Program Statement 5270.07(1)(f)(3), ch. 6, at 3 (1994), *available at* http://www.bop.gov/policy/progstat/5270_007.pdf.

245. 28 C.F.R. § 541.16(c) (2007); 28 C.F.R. § 541.13, tbl. 4(1)(b.1) (2007).

246. 28 C.F.R. § 541.17(a) (2007).

247. 28 C.F.R. § 541.17(b) (2007).

248. 28 C.F.R. § 541.17(b) (2007).

249. 28 C.F.R. § 541.15(i) (2007).

250. 28 C.F.R. § 541.17(c) (2007).

251. 28 C.F.R. § 541.17(f) (2007).

not commit the act, then the incident will be taken off your record.[252] If the DHO finds that you did commit the act, then he or she can punish you, including taking away your good conduct time credits.[253]

When the DHO makes a decision on how much good conduct time credit to take away as punishment for your act, he will look at the repetition and severity of your violation (how bad it was and how often you committed the violation within a recent period of time).[254] There are four categories of offenses based on the seriousness of the violation: (1) Greatest, (2) High, (3) Moderate, and (4) Low Moderate.[255] The amount of good conduct time credits that you can lose increases with the level of your offense. The DHO can follow these guidelines, or can take away more or less credits based on aggravating (bad) or mitigating (good) factors in your case.[256]

If you were sentenced for an offense committed on or after April 26, 1996, or you were classified as "violent" under the Violent Crime Control and Law Enforcement Act of 1994 *and* you committed a crime of violence on or after September 13, 1994, then the amount of good conduct time credits you can lose in a disciplinary hearing is described below.[257]

For a Greatest category offense the DHO can deduct at least forty days of credit, or if there is less than fifty-four days available for the prorated period, at least 75% of available good time for each act committed. For a High category offense, you can lose at least twenty-seven days of credit or at least 50% of the available good conduct time for each act committed if less than fifty-four days are in the period. For a Moderate category offense, the DHO does not have to deduct time unless you have been found to have committed two or more offenses at this level within the current anniversary period, in which case the minimum deduction is thirteen days or 25% of the available good conduct time if less than fifty-four days are available for the period. For a Low Moderate category offense, the DHO does not have to deduct time unless you committed three or more Low Moderate category offenses during the current anniversary period, in which case the minimum deduction is six days or 12.5% of available good time for a period less than fifty-four days.

(d) Challenging the Loss of Good-Time Credits

You can challenge the loss of good-time credit. Under the Fourteenth Amendment's Due Process Clause, you have a protected liberty interest in your good conduct time credits.[258] The BOP must follow certain procedures in order to take your credits without violating your due process rights.[259] You should read *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings," which explains your due process rights and how to raise defenses and challenges to your treatment at disciplinary hearings.

The proper way to bring a lawsuit to challenge the loss of good-time credits is through a petition for a writ of habeas corpus under 28 USC §2241.[260] Before filing, you *must* read *JLM*, Chapter 13, "Federal Habeas Corpus," to learn how to file a federal habeas corpus petition. Before you can bring a lawsuit in court

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252. 28 C.F.R. § 541.18(a) (2007).

253. 28 C.F.R. § 541.18(b) (2007). If you were sentenced under the Sentencing Reform Act (convicted for an offense that happened on or after November 1, 1987, but before April 26, 1996) and have non-vested credits, the amount of credits you can lose is: (1) for a Greatest category case, between 24 and 41 days of GCT for that year; (2) for a High category offense, between 14 and 27 days of good-time credit: (3) for a Moderate offense, between one and 14 days GCT; (4) for a second Low category offense in six months, between one and seven days; (5) for a third Low category offense in six months, between one and 14 days. 28 C.F.R. § 541.13, tbl. 3 (2006). To restore your credits that are taken away (disallowed), you must request an immediate review or appeal the action. 28 C.F.R. § 541.13, tbl. 4(1)(b.1) (2007).

254. 28 C.F.R. § 541.13, tbl. 4(1)(b.1) (2007).

255. 28 C.F.R. § 541.13(a) (2007). See Table 3 for a list of offenses by category.

256. 28 C.F.R. § 541.13, tbl. 4(1)(b.1), (1)(b.1)(II) (2007).

257. *See* 28 C.F.R. § 541.13, tbl. 4(1)(b.1)(II) (2007).

258. Henson v. U.S. Bureau of Prisons, 213 F.3d 897, 898 (5th Cir. 2000) (recognizing federal prisoner's due process right to a hearing before removal of good-time credits, but noting not all the rights due in a criminal trial apply).

259. Wolff v. McDonnell, 418 U.S. 539, 556, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974). For a full discussion of this case and these issues, see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

260. Thomas v. Marberry, No. 06-CV-13282, 2007 U.S. Dist. LEXIS 25408, at *4 (E.D. Mich. April 5, 2007) (holding that a habeas corpus petition is a proper means of challenging the loss of good-time credits in a disciplinary proceeding because it affects the way in which the sentence is being executed); *see also* Edwards v. Clarke, No. C07-5057RJB, 2007 U.S. Dist. LEXIS 24271, at *3 (W.D. Wash. April 2, 2007) (dismissing a federal prisoner's 42 U.S.C. § 1983 claim to recover his lost good conduct time credits because such a claim is challenging the length of confinement and finding that the correct claim for relief is a habeas corpus petition (citing Edwards v. Basilok, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997)).

to challenge the loss of good-time credits, you *must* exhaust your administrative remedies[261] as required under the Prison Litigation Reform Act (PLRA). To avoid these consequences, you should also read *JLM*, Chapter 14, "The Prison Litigation Reform Act," to learn about PLRA requirements.

This Section includes only a brief description of the federal administrative remedy procedures you will need to follow to challenge the loss of your good-time credits. You have twenty calendar days from when you receive the DHO Report to file an appeal.[262] Your appeal should be sent directly to the Regional Director for your region[263] and should include a separate completed, signed, and dated form BP-10 for each incident that is being appealed along with a copy of the DHO report.[264] If you cannot get a copy of the DHO report, include the date of your hearing and the charges brought against you.[265] The Regional Director should respond to your appeal within thirty days of receiving it.[266]

If the Regional Director does not remove the charges against you, the final administrative appeal step is to send an appeal to the General Counsel within thirty days of receiving the Regional Director's response.[267] Your appeal to the General Counsel should include a completed, signed, and dated form BP-11, a copy of the DHO report, a copy of your appeal to the Regional Director, and a copy of the Regional Director's response, along with the reason that you are appealing.[268] The General Counsel should provide you with a response to your appeal within 40 days of receiving it.[269]

The Regional Director or the General Counsel can reject your appeal if your forms contain obscene or abusive words or if there is something that needs to be corrected.[270] If your appeal was rejected because you need to fix information on the forms or provide additional information, your rejection letter will contain instructions about how to correct it and will give you a new deadline for resubmitting the form.[271] If the Regional Director rejects your appeal for reasons that cannot be corrected, you can appeal the rejection of your appeal to the General Counsel and request that the General Counsel order the Regional Director to decide your appeal.[272] After you have used *all* of these administrative remedies, you can file a habeas corpus case in federal court to challenge the loss of your good conduct time credits. However, if it would be futile (pointless) to exhaust your administrative remedies, then you may be able to seek a writ of habeas corpus before you have fully exhausted your remedies.[273]

2. Early Release under the Residential Drug Abuse Program

There are conditions you must meet in order to be able to participate in the Residential Drug Abuse Program (RDAP). There are also several additional requirements to be eligible for early release for successful completion of RDAP. If at any stage of application, admission, removal, or denial of early release status you do not agree with the decision in your case, you can appeal by using the same procedures

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261. "Administrative remedies" are the internal procedures used within the BOP system to resolve your complaint. A federal court will not accept your case unless you have "exhausted" (used up) all the appeals and procedures within the BOP system. See *JLM*, Chapter 13, "Federal Habeas Corpus," for more information.

262. 28 C.F.R. § 542.14(a) (2007).

263. 28 C.F.R. § 542.14(d)(2) (2007); Fed. Bureau of Prisons, Program Statement 1330.13(d)(2), at 7 (2002), *available at* http://www.bop.gov/policy/progstat/1330_013.pdf.

264. 28 C.F.R. § 541.19 (2007).

265. 28 C.F.R. § 541.19 (2007).

266. 28 C.F.R. § 542.18 (2007); Fed. Bureau of Prisons, Program Statement 1330.13(12), at 10 (2002), *available at* http://www.bop.gov/policy/progstat/1330_013.pdf.

267. 28 C.F.R. § 542.15(a) (2007); Fed. Bureau of Prisons, Program Statement 1330.13(9)(a) at 7 (2002), *available at* http://www.bop.gov/policy/progstat/1330_013.pdf.

268. 28 C.F.R. § 542.15(b)(1) (2007).

269. 28 C.F.R. § 542.18 (2007); Fed. Bureau of Prisons, Program Statement 1330.13(12), at 10 (2002), *available at* http://www.bop.gov/policy/progstat/1330_013.pdf.

270. 28 C.F.R. § 542.17(a) (2007).

271. 28 C.F.R. § 542.17(b) (2007); Fed. Bureau of Prisons, Program Statement 1330.13(11)(b), at 9 (2002), *available at* http://www.bop.gov/policy/progstat/1330_013.pdf.

272. 28 C.F.R. § 542.17(c) (2006); Fed. Bureau of Prisons, Program Statement 1330.13, at 10 (2002), *available at* http://www.bop.gov/policy/progstat/1330_013.pdf.

273. Vargas-Crispin v. Zenk, 376 F. Supp. 2d 301, 303 (E.D.N.Y 2005) (holding that a federal prisoner was allowed to seek a writ of habeas corpus before exhausting his administrative remedies where administrative appeals would have been futile because the BOP's interpretation of "term of imprisonment" was rigid and the time for the appeal would have gone on beyond the date for his release, making his claim moot).

described in the good conduct time section above.[274] Just like good conduct time, you must exhaust your administrative remedies before you can bring a lawsuit to challenge the BOP's decision.

(a) What is RDAP?

The Residential Drug Abuse Program (RDAP) is a federal program offered in some federal facilities[275] for prisoners with substance abuse problems. In RDAP, you participate in individual and group activities to learn to overcome your substance abuse problems.[276] RDAP is a 500-hour program that takes place over six to twelve months in a separate housing facility for RDAP participants.[277]

(b) How do You Get into RDAP?

Entry into RDAP is voluntary, and is determined by the drug abuse treatment coordinator through staff referrals and/or prisoner applications. If you want admission to a RDAP, you can receive a referral from or make a request to a staff member in your housing unit or on the drug treatment team for admission to RDAP.[278] If you request admission into a RDAP, the BOP will decide if you are eligible to participate in the residential portion. The BOP will also decide if you are eligible for early release under RDAP and will notify you of its decision.[279]

(c) Who is Eligible to Participate in RDAP?

Before you can participate in RDAP, the BOP must decide that you have a substance abuse problem, and you must be willing to participate in a residential substance abuse treatment program.[280] To be eligibile, you must also sign an agreement form stating that you understand your responsibilities in joining the RDAP.[281] Some of your responsibilities include not disrupting the staff, other group members, or activities of RDAP; completing all RDAP activities, including homework and group assignments; and not sharing information about other prisoners in the program.[282] To be admitted to RDAP, your security level needs to be within the range that can be handled at the RDAP facility.[283] In general, you can only be admitted to RDAP when you are thirty-six months from your release date.[284] Prisoners with serious mental impairments that would not allow them to fully participate in the program will not be allowed into RDAP.[285]

If you have a physical or medical disability that prevents you from living in a RDAP housing unit, you may still be eligible for early release if you meet all of the eligibility requirements for RDAP and have completed all of the program components of RDAP, including community-based treatment.[286]

Even if you cannot participate in RDAP, there are other substance abuse programs you may be able to join. However, these programs do not have the same early release benefits as RDAP. These other programs include drug abuse education classes,[287] non-residential drug abuse treatment,[288] and community transitional drug treatment. [289]

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274. 28 C.F.R. § 550.60 (2007).

275. For an online list of facilities that have RDAP, follow the link "RDAP Locations" at http://www.bop.gov/inmate_programs/substance.jsp (last visited Mar. 16, 2011).

276. 18 U.S.C. § 3621(e)(5)(a) (2000 & Supp. 2008).

277. 18 U.S.C. § 3621(e)(5)(a) (2000 & Supp. 2008); 28 C.F.R. § 550.56 (2007).

278. 28 C.F.R. § 550.56(b) (2007).

279. Fed. Bureau of Prisons, Program Statement 5330.10(2.3.1) ch. 2, at 2 (1997), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf; Fed. Bureau of Prisons, Form BP-A761.055, Residential Drug Abuse Program Notice to Inmate (2004), *available at* http://www.bop.gov/policy/forms/Bp_a761.pdf.

280. 18 U.S.C. § 3621(e)(5)(B)(i) and (ii) (2000).

281. 28 C.F.R. § 550.56(a)(3) (2007).

282. Fed. Bureau of Prisons, Form BP-A749.053, Agreement to Participate in a BOP Residential Drug Abuse Treatment Program (2002), *available at* http://www.bop.gov/policy/forms/Bp_a749.pdf.

283. 28 C.F.R. § 550.56(a)(5) (2007).

284. 28 C.F.R. § 550.56(a)(4) (2007).

285. 28 C.F.R. § 550.56(a)(2) (2007).

286. Fed Fed. Bureau of Prisons, Program Statement 5331.02(4) (2009), *available at* http://www.bop.gov/policy/progstat/5331_002.pdf.

287. 28 C.F.R. § 550.54 (2007).

288. 28 C.F.R. § 550.55 (2007).

289. *See* Bureau of Prisons' Substance Abuse Treatment Frequently Asked Questions, *available at* http://www.bop.gov/inmate_programs/substanceabuse_faqs.jsp# (last visited Mar. 16, 2011).

(d) Who May be Eligible for Early Release under RDAP?

To be eligible for early release under RDAP you must meet all four of the following requirements:

(1) You were convicted and sentenced for either
   a. federal offense that occurred on or after November 1, 1987;[290] or
   b. Washington D.C. offense on or after August 5, 2000; [291]
(2) You were sentenced for committing a non-violent offense;[292]
(3) The BOP categorizes you as having a "substance use disorder";[293]
(4) You successfully completed all stages of a RDAP;[294] and
(5) You are Financial Responsibility Program compliant.[295]

The second requirement prevents you from receiving early release under RDAP if you were sentenced for committing a violent offense.[296] The BOP can look at both the actual crime for which you were sentenced as well as the circumstances surrounding that crime. You can also be ineligible if you committed other offenses identified at the Director's discretion.[297] These other offenses that can make you ineligible for early release include the following: a felony that had actual or threatened physical force against a person or someone else's property as an element or that would likely involve the use of force against a person or property; a crime involving a firearm, explosive or other dangerous weapon; a crime involving sexual abuse of children; a crime with an enhanced base offense level because of the threat of or use of force; or a crime with a specific offense enhancement for threat of or use of force.[298]

The third requirement for early release under RDAP is that you have a substance abuse problem. You can meet this requirement if a drug abuse coordinator finds that you have a "drug use disorder," which is a "substance abuse or dependence," as defined in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM). Any written documentation in your Pre-Sentence Investigation (PSI) report or central file showing that you previously used the same substance can also be used to verify your substance abuse problem.[299] Specifically, the following three criteria are used to demonstrate a substance abuse problem:

(1) the PSI report shows that alcohol or other drug use contributed to your committing the offense for which you are currently serving a sentence;
(2) you are serving a sentence for violating your probation, parole, or supervised release, because of alcohol or drug use; or
(3) your sentencing judge recommended that you receive substance abuse treatment.[300]

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290. Fed. Bureau of Prisons, Program Statement 5331.02(4)(a)(2)(i) (2009).

291. Fed. Bureau of Prisons, Program Statement 5331.02(4)(a)(2)(ii) (2009).

292. Fed. Bureau of Prisons, Program Statement 5331.02(4)(a)(2)(i)-(ii) (2009).

293. Fed. Bureau of Prisons, Program Statement 5331.02(4)(a)(1) (2009).

294. Fed. Bureau of Prisons, Program Statement 5331.02(4)(a)(3) (2009). If you already completed a RDAP before October 1, 1989, you may still be eligible for early release under 18 U.S.C. § 3621(e). In order to be eligible, BOP staff must determine that the program you completed met all of the current RDAP treatment criteria, you must sign an agreement that you understand your program responsibilities, complete a refresher course and transitional treatment in a community-based program, and you must not commit a prohibited 1000 level act or act involving drugs or alcohol. 28 C.F.R. § 550.58(a)(2) (2007).

295. *See* 28 C.F.R. §545.

296. Fed. Bureau of Prisons, Program Statement 5162.04, at 3–18, *available at* http://www.bop.gov/policy/progstat/5162_004.pdf (last visited Mar. 16, 2011) (listing offenses that are considered violent and will prevent you from participating in RDAP).

297. Fed. Bureau of Prisons, Program Statement 5162.04(7), at 8–18 (1997), *available at* http://www.bop.gov/policy/progstat/5162_004.pdf. In *Lopez v. Davis*, the Supreme Court held reasonable the Bureau of Prisons's regulations making certain prisoners automatically ineligible for early release under 18 U.S.C. § 3621(e) if there was a firearm involved in their offense, even where the underlying was categorized as a non-violent offense. Lopez v. Davis, 531 U.S. 230, 244, 121 S. Ct. 714, 724, 148 L. Ed. 2d 635, 648 (2001).

298. *See* Fed. Bureau of Prisons, Program Statement 5162.04(7), (7)c, at 8–16 (1997), *available at* http://www.bop.gov/policy/progstat/5162_004.pdf (listing offenses that are included in this category and offenses that may create ineligibility for RDAP at the Director's discretion).

299. Fed. Bureau of Prisons, Program Statement 5330.10(5.4.1)(a)(1), at 3–4 (1996), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

300. Fed. Bureau of Prisons, Program Statement 5310.12(5.1)(A), at 5-1 (1993), *available at* http://www.bop.gov/policy/progstat/5310_012.pdf.

You also may be classified as having a drug abuse problem during your participation in a drug abuse education course or non-residential drug abuse treatment after testing positive during a urine test.[301]

The final requirement is that you successfully complete all stages of RDAP. RDAP has three different stages, each of which you must finish before you can even be considered for early release. The first stage of RDAP is the unit-based program that takes place over a twelve month period.[302] The unit-based program has three phases: orientation, intensive treatment and skill development, and pre-release planning. To complete the unit-based program, you must attend and participate in group activities and pass a test given at the end of each subject covered in treatment.[303] If you do not pass a test for any given subject, you will typically be allowed to take the test again.[304]

The second stage of RDAP is transitional drug treatment services. Transitional drug treatment can take place either in an institution (prison) or in the community.[305] If your release date is within six months, you may be placed in a community-based program. Otherwise, you must participate in institution follow-up services for a minimum of one hour per month, for up to twelve months. You must also join a non-residential drug treatment program after your return to a general population housing unit.[306]

The final stage of RDAP is six months of community-based treatment for one to four hours each week. This treatment can take place in a Community Corrections Center or in home-confinement.[307] You will be required to sign another agreement form[308] to participate in the community transition program. The rules for participation in this program are almost identical to those in the unit-based portion of RDAP.[309] If your release date is earlier than the date you will complete the community-based portion of your treatment, your release date may be extended to allow you to finish the program.[310]

Certain people are not allowed to get early release through RDAP under *any* circumstances. You cannot receive early release under RDAP if you:

(1) are a pre-trial or immigration detainee;
(2) are in federal prison for committing a state or military crime;
(3) are not eligible for participation in community-treatment programs as determined by the Warden at your facility;
(4) have a past conviction for homicide, forcible rape, robbery, aggravated assault, or child sexual abuse offenses;
(5) are currently incarcerated for committing a felony that had as an element, or given the crime committed, would likely involve the use of actual or threatened physical force against a person or someone else's property, or that involved a firearm, explosive or other dangerous weapon, or that involved sexual abuse of children;[311] or
(6) were previously released on RDAP early release.[312]

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301. Fed. Bureau of Prisons, Program Statement 5330.10(5.4.1)(a)(1), at 3–4 (1996), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

302. Fed. Bureau of Prisons, Program Statement 5310.12(5.1)(D), at 5-2 to 3 (1993), *available at* http://www.bop.gov/policy/progstat/5310_012.pdf.

303. 28 C.F.R. § 550.56(c) (2007).

304. Fed. Bureau of Prisons, Program Statement 5330.10(5.4.3)(c), at 5-5 (1996), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

305. *See* Bureau of Prisons' Substance Abuse Treatment Frequently Asked Questions, *available at* http://www.bop.gov/inmate_programs/substanceabuse_faqs.jsp# (last visited Sept. 19, 2008).

306. 28 C.F.R. § 550.59(a) (2007); Fed. Bureau of Prisons, Program Statement 5310.12(5.1)(E), at 5-3–4 (1993), available at http://www.bop.gov/policy/progstat/5310_012.pdf; Fed. Bureau of Prisons, Program Statement 5330.10(5.2), at 5-1 to 2 (1997), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

307. 28 C.F.R. § 550.58(a)(3)(i) (2007); Fed. Bureau of Prisons, Program Statement 5330.10(5.2.1), at 5-1 (1996), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

308. Fed. Bureau of Prisons, Form BP-A750.053, Agreement to Participate in Community Transition Program (2002), *available at* http://www.bop.gov/DataSource/execute/dsFormLoc.

309. Fed. Bureau of Prisons, Program Statement 7430.02(8)(c), at 6 (1999), *available at* http://www.bop.gov/policy/progstat/7430_002.pdf.

310. 28 C.F.R. § 550.58(c)(3) (2007).

311. 28 CRF § 550.58 (2007).

312. Fed. Bureau of Prisons, Program Statement 5331.02(5)(7) (2009).

(e) How Might RDAP Affect Your Sentence?

If you meet the requirements for RDAP early release, the BOP can reduce your prison sentence by up to one year, in addition to any good conduct time credit reductions you have received.[313] Your case will be reviewed several times to determine if you remain eligible for early release under RDAP.[314] While the BOP has the ability to reduce your sentence after you successfully complete RDAP, the BOP is not required to do so.[315] If at any time you commit a prohibited act, fail to complete all RDAP requirements, or the BOP discovers it made an error in determining your eligibility, BOP can remove RDAP early release status.[316] The denial of early release after you successfully complete RDAP does not violate any contractual rights guaranteeing your release or the Constitution's *Ex Post Facto* Clause.[317] You can appeal your denial of early release under RDAP using the same procedures explained in the loss of good conduct time credit section but you *must* write in the first sentence of your appeal that you are seeking review for denial of early release eligibility under 18 U.S.C. § 3621(e).[318]

(f) How Can Your Participation in RDAP End?

Your participation in RDAP can end if you choose to voluntarily end your participation in RDAP, fail to pass your subject tests, or are removed from RDAP by the BOP.[319] Once you are no longer in RDAP, you lose your early release eligibility and return to your previous housing unit or facility.[320] The drug treatment coordinator may remove you from the program for disruptive behavior and *must* remove you if you are disruptive four times.[321] Normally, the drug treatment coordinator will give you one warning before removing you.[322] Also, if you do not follow all of the rules and regulations of RDAP you will be expelled from the program.[323]

Your participation in RDAP may also be terminated immediately if an incident report[324] is filed and the DHO finds you (1) used or possessed alcohol or drugs; (2) were violent or threatened violence against staff or another prisoner; or (3) committed a 100 level[325] prohibited act.[326]

If the warden or the drug abuse treatment program coordinator removes you from RDAP, you may request readmission by submitting a "Request to Staff Member" Form.[327] The drug abuse treatment program

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313. 18 U.S.C. § 3621(e)(2)(B) (2006).

314. *See* Fed. Bureau of Prisons, Program Statement 5331.02(7) (2009), *available at* http://www.bop.gov/policy/progstat/5331_002.pdf. Your early release can be delayed or reduced if the Regional Drug Abuse Treatment Coordinator determines you need more time to complete your treatment or additional treatment will make it more likely you will not return to drug use or criminal conduct. Fed. Bureau of Prisons, Program Statement 7430.02(15)(f), at 15 (1999), *available at* http://www.bop.gov/policy/progstat/7430_002.pdf.

315. Richardson v. Joslin, 501 F.3d 415, 420 (5th Cir. 2007) (finding that defendant had no liberty interest in a reduction of his sentence after he successfully completed RDAP since BOP has "the authority, but not the duty" to reduce a term of imprisonment.); *see* Lopez v. Davis, 531 U.S. 230, 241, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635, 646 (2001); *see also* Fed. Bureau of Prisons Form BP-A749.053, Agreement to Participate in a BOP Residential Drug Abuse Treatment Program (2002), *available at* http://www.bop.gov/DataSource/execute/dsFormLoc.

316. Fed. Bureau of Prisons, Program Statement 5331.10(6), at 7 (2003), *available at* http://www.bop.gov/policy/progstat/5331_010.pdf.

317. Seacrest v. Gallegos, No. 01-128930, Fed. Appx. 755, 766, 2002 U.S. App. LEXIS 1094, at **4 (10th Cir. Jan. 25, 2002) (*unpublished*) (finding the BOP's decision to change prisoner's status from eligible to ineligible for early release consideration did not violate the *Ex Post Facto* Clause, since the decision did not affect the legal definition of the crime or increase the prisoner's punishment, and no contractual relationship existed between the prisoner and the BOP).

318. 28 C.F.R. § 550.60 (2007).

319. 28 C.F.R. § 550.56(d) (2006).

320. 28 C.F.R. § 550.56(d)(3) (2006).

321. Fed. Bureau of Prisons, Program Statement 5330.10 (5.4.4) ch. 5, at 6A (1997), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

322. 28 C.F.R. § 550.56(d)(2) (2006).

323. Fed. Bureau of Prisons, Form BP-A749 053, Agreement to Participate in a BOP Residential Drug Abuse Treatment Program (2002), *available at* http://www.bop.gov/policy/forms/Bp_a749.pdf.

324. See Part B(2) for more information on good-conduct time.

325. See 28 C.F.R. § 541.13 (2006) for a complete list of 100 level prohibited acts.

326. 28 C.F.R. §§ 550.56(d)(2)(i),(ii),(iii) (2006); Fed. Bureau of Prisons, Form BP-A749 (2002), *available at* http://www.bop.gov/policy/forms/Bp_a749.pdf.

327. Fed. Bureau of Prisons, Program Statement 5330.10(5.4.4) ch. 5, at 5–6 (1997), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf; *see also* Fed. Bureau of Prisons, Form BP-A148.055 (1998), *available at*

coordinator will decide whether to readmit you to the program. Even if you are readmitted to RDAP, you will not receive credit for the parts of the program you completed before you were expelled.

3. Early Release Under the Second Chance Act

The Second Chance Act of 2007 is a new federal law designed to improve the system for releasing federal prisoners.[328] This Act authorizes the BOP to grant early release to prisoners who meet the following three conditions:[329]

(1) Are over the age of sixty-five;
(2) Have never been convicted of a violent crime or sex offense; and
(3) Have served ten years or 75% of their sentence.

Very few prisoners will be eligible for early release under this program. The Bureau of Prison recently estimated that only about 650 federal inmates (or 0.003% of all federal inmates) will meet the requirements.[330] However, the BOP is beginning a pilot program to test this new early release system. The program began in October 1, 2008. If you think you are eligible for early release under this program, you should ask your warden whether your prison or jail is participating in the program.

4. Federal Compassionate Release

Compassionate release is an extraordinary remedy that is given very rarely. Compassionate release allows the Director of the BOP to recommend that your sentence be reduced to remove you immediately from prison. There are four situations in which compassionate relief might be granted:

(1) upon motion by the BOP Director for "extraordinary or compelling reasons"[331] that develop after the time of sentencing;
(2) upon motion by the BOP Director for people who are seventy years of age or older who have served at least thirty years of their sentence and are determined not to be threats to society;[332]
(3) to modify a sentence under Rule 35 of the Federal Rules of Criminal Procedure (to correct a clear error within seven days of the sentence or for providing substantial assistance to the government to investigate or prosecute someone else);[333] or
(4) if a sentence was given based on a sentencing range that has since been lowered.[334]

This Section deals only with the first category: extraordinary or compelling reasons.

(a) What are "Extraordinary and Compelling" Reasons?

There are no formal definitions for "extraordinary and compelling" reasons. However, the U.S. Sentencing Commission provides four examples of what could be considered extraordinary and compelling reasons that might justify compassionate relief:[335]

(1) You have a terminal illness;[336]
(2) Your only family member who can care for your minor child(ren) is no longer able to do so due to death or incapacitation;[337]
(3) You have a permanent physical or medical condition, or worsening physical or mental health from getting older, and your medical condition does not allow you to properly care for yourself in prison and your condition is unlikely to improve through treatment;[338] or

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http://www.bop.gov/policy/forms/Bp_a148.pdf.

328. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

329. Second Chance Act of 2007, Pub. L. No. 110-199, § 231(g)(5), 122 Stat. 657, 688 (2008).

330. Douglas A. Berman, *Another Report from the USSC Alternatives Symposium*, July 24, 2008, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/another-report.html (last visited Mar. 16, 2011).

331. See 18 U.S.C. § 3582(c)(1)(A) (2006), for offenses that happened on or after November 1, 1987. This section does not discuss the rules for offenses that occurred before November 1, 1987, which are governed by 18 U.S.C. § 4205(g).

332. 18 U.S.C § 3582(c)(1)(A)(ii) (2006).

333. 18 U.S.C. § 3582(c)(1)(B) (2006).

334. 18 U.S.C. § 3582(c)(2) (2006).

335. 28 U.S.C. § 994(t) (2006).

336. 18 U.S.C. App'x § 1B1.13, Application Note 1(A)(i) (2007).

337. 18 U.S.C. App'x § 1B1.13, Application Note 1(A)(iii) (2007).

338. 18 U.S.C. App'x § 1B1.13, Application Note 1(A)(ii) (2007).

(4) The BOP Director has found another reason you should be granted compassionate release.[339]

If you are petitioning for compassionate release because of an illness, your illness must either be terminal or prevent you from caring for yourself, as described in the first two examples. In addition to having a terminal or incapacitating illness, you also must not be a danger to society or be able to commit a further crime.[340] Normally, the BOP will only consider applications from prisoners who are "suffering from terminal medical conditions, or who are severely and permanently mentally or physically debilitated."[341]

(b) How Can You Apply for Compassionate Release?

It is important to know that you cannot make a motion directly to a court to reduce your sentence for compassionate release. If you file a motion yourself, the court will not reduce your sentence. The only way to obtain compassionate release from the court is through a motion made by the Director of the BOP.[342]

To receive this, you must first submit a motion (request) to your warden, asking for compassionate release. The request should be in writing. In the motion you must describe the extraordinary or compelling circumstances that did not exist when you were sentenced.[343] You must also describe your plan for release, including where you will live, how you will support yourself, and, if your reason is based on your health, where you will get medical care and how you will pay for it.[344]

If your reason for compassionate release is based on a medical condition, make sure to state that information at the beginning of your motion so that your request can be reviewed more quickly.

If the warden thinks your motion should be granted, he will send it to the Regional Director of the BOP.[345] The Regional Director will then review your motion, and if he thinks your motion should be granted, he will send it to the BOP's Office of General Counsel.[346] The General Counsel will then review your motion, and if he decides that you should be given compassionate release, he will ask for an opinion from the Medical Director (if your reason is health-related), or the Assistant Director of the Correctional Programs Division (for all other reasons).[347] Finally, the recommendation of the General Counsel, along with the opinion from the Medical or Assistant Director, will be sent to the Director of the BOP to make a final decision on your motion.[348]

If the Director approves your request, he will contact the U.S. Attorney. The U.S. Attorney will then make a motion to the court to have your sentence reduced.[349] The sentencing court will review the Director's motion and decide if there are extraordinary and compelling reasons to justify your release. If the sentencing court grants the motion, it will order your release. The warden at your facility will then release you.[350]

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339. 18 U.S.C. App'x § 1B1.13, Application Note 1(A)(iv) (2007).

340. Leja v. Sabol, 487 F. Supp. 2d 1, 3 (D. Mass. 2007) (holding that the BOP's decision to deny release was not arbitrary or capricious because defendant's illness was not terminal and defendant was still able to commit crimes).

341. Fed. Bureau of Prisons, Legal Resource Guide to the Federal Bureau of Prisons 40 (2008), *available at* http://www.bop.gov/news/PDFs/legal_guide.pdf.

342. *See* United States v. Smartt, 129 F.3d 539, 541 (10th Cir. 1997) (finding that even though the defendant had a medical condition that could be considered an extraordinary and compelling circumstance, the court could not approve his motion because the request was not made by the BOP Director); *see also* United States v. Tyler, 417 F. Supp.2d 80, 84 (D. Me. 2006) (denying relief pursuant to § 3582(c)(1)(A) because no motion was made by the BOP Director).

343. Fed. Bureau of Prisons, Program Statement 5050.46(5)(a)(1), at 3 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.61 (2006).

344. Fed. Bureau of Prisons, Program Statement 5050.46(5)(a)(2), at 3 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.61 (2006).

345. Fed. Bureau of Prisons, Program Statement 5050.46(6)(a)(1), at 3–5 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.62(a)(1) (2006).

346. Fed. Bureau of Prisons, Program Statement 5050.46(6)(a)(2), at 5 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.62(a)(2) (2006).

347. Fed. Bureau of Prisons, Program Statement 5050.46(6)(a)(3), at 5 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.62(a)(3) (2006).

348. Fed. Bureau of Prisons, Program Statement 5050.46(6)(a)(3), at 5 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.62(a)(3) (2006).

349. Fed. Bureau of Prisons, Program Statement 5050.46(6)(a)(4), at 5 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.62(a)(4) (2006).

350. Fed. Bureau of Prisons, Program Statement 5050.46(6)(b), at 5 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.62(b) (2006).

(c) Denial

It is possible that any of the officials described above may deny your motion. The official who denies your motion will send you written notice stating that your request has been denied and explaining why it was denied. If your request for compassionate relief is denied by the warden or the Regional Director, you can appeal the decision.[351] However, if you are denied by the General Counsel or the BOP Director, that decision is a *final* administrative decision and cannot be appealed.[352]

In order to challenge the BOP's decision, you must first go through all of the administrative remedies, as required by the Prison Litigation Reform Act.[353] Even if you are sick or believe that the BOP will not approve your motion on appeal, you must still exhaust all levels of the administrative remedy process. Only after you do this can you file a petition for writ of habeas corpus, which asks the court to reverse the warden's decision.[354] However, some district courts have ruled that they do not have jurisdiction to hear a habeas corpus petition challenging the denial of compassionate release by the warden or the BOP.[355] And some courts of appeals have reached similar decisions by denying review of the BOP's refusal to bring a motion on behalf of prisoners under 18 U.S.C. § 4205(g) (the other statute covered by the BOP policy statements on early release).[356] Other courts that have reviewed the BOP's decisions have been unwilling to find these decisions arbitrary and capricious, which is the standard for overturning these decisions.[357] In other words, it is very unlikely that the court will grant your appeal.

N. Federal Supervised Release

Federal supervised release is different from parole. Federal supervised release is not a way to get out of your sentence early. Instead, it is a period of supervision that you must serve after you are released from

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351. Fed. Bureau of Prisons, Program Statement 5050.46(7)(a), at 6 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. § 571.63(a) (2006).

352. Fed. Bureau of Prisons, Program Statement 5050.46(7), at 6 (1998), *available at* http://www.bop.gov/policy/progstat/5050_046.pdf; 28 C.F.R. §§ 571.63(b)–(d) (2006).

353. See *JLM*, Chapter 14, "The Prison Litigation Reform Act."

354. Leja v. Sabol, 487 F. Supp. 2d 1, 2–3 (D. Mass. 2007) (holding that perceived futility of request and/or medical condition do not relieve a prisoner of the requirement of exhaustion of administrative remedies).

355. United States v. Morales, 353 F. Supp. 2d 204, 205 (D. Mass. 2005) (dismissing habeas corpus petition by terminally ill prisoner who requested compassionate relief and release from prison so he could return to Colombia, live with his family, and obtain a heart transplant, and holding the court lacked statutory authority to reduce his sentence without a motion by the Director of the BOP); United States v. Etters, No. 04-20115-13-JWL, 2007 U.S. Dist. LEXIS 75731, at *1 (D. Kan. Sept. 28, 2007) (denying plaintiff's motion to modify her sentence to home imprisonment because the court lacked jurisdiction under 18 U.S.C. § 3582(c)(1) when no motion was made by the Director of the BOP). A few district courts have gone a step further, holding that even if you have exhausted your administrative appeals, the court will still not review the final decision made by the BOP under the Administrative Procedures Act because it is barred by the terms of 18 U.S.C. § 3582. *See, e.g.*, Pham v. Fed. Bureau of Prisons, No. 1:07-cv-0025-SEB-JMS, 2007 U.S. Dist. LEXIS 38184, at *1–2 (S.D. In. May 23, 2007) (dismissing on summary judgment a request made by a defendant with a chronic heart condition to overrule the BOP's denial of compassionate release, and holding that the decision was assigned by law to the discretion of the BOP and was therefore unreviewable under the Administrative Procedures Act); Gutierrez v. Anderson, No. 06-1714 (JRT/JSM), 2006 U.S. Dist. LEXIS 79580, at *2, 5–6 (D. Minn. Oct. 30, 2006) (finding that 18 U.S.C. § 3582 barred the court "from reviewing the Warden's decision not to recommend compassionate release" and therefore denying the terminally-ill plaintiff's motion to compel compassionate release).

356. Turner v. U.S. Parole Comm'n, 810 F.2d 612, 618 (7th Cir. 1987) (finding the Parole and Reorganization Act barred the court from reviewing the warden's rejection of the Parole Commissioner's recommendation to reduce plaintiff's sentence); Simmons v. Christensen, 894 F.2d 1041, 1043 (9th Cir. 1990) (same); Fernandez v. United States, 941 F.2d 1488, 1492–93 (11th Cir. 1991) (holding that, because the BOP had the exclusive authority to make motions under 18 U.S.C. § 4205(g), a court could not review the BOP's refusal to compel compassionate release).

357. United States v. Maldonado, 138 F. Supp. 2d 328, 333 (E.D.N.Y. 2001) (holding BOP's interpretation of "extraordinary and compelling circumstances," which covered only prisoners with a generally terminal medical condition that limited life expectancy by a predictable amount, was reasonable because it provided an objective way to limit eligibility while still allowing for truly exceptional circumstances to be taken into account); Hubbs v. Dewalt, NO. 05-CV-512-JBC, 2006 U.S. Dist. LEXIS 27950, at *5, 11–12 (D. Ky. May 8, 2006) (*unpublished*) (holding BOP's interpretation of 18 U.S.C. § 3582(c)(1)(A), as applied to a prisoner who was a double-leg amputee, was reasonable and not arbitrary and capricious when the BOP staff based its decision on the fact that the sentencing court knew of the prisoner's condition at the time of sentencing and its interpretation of "extraordinary and compelling" was limited to terminally-ill prisoners who could not complete their sentence). In *Dewalt*, the court did not consider the other group of prisoners covered by the BOP's interpretation—those "who suffer from a severely debilitating and irreversible mental or physical medical condition and are unable to provide self-care." 2006 U.S. Dist. LEXIS 27950, at *5, 11–12 (D. Ky. May 8, 2006).

prison. Federal parole is not available for anyone who is convicted of committing a crime that took place on or after November 1, 1987. However, anyone who was convicted of a crime that took place on or after November 1, 1987, may have a term of federal supervised release included in his sentence. Under federal law, a judge may include a term of supervised release in a sentence of imprisonment for a felony or misdemeanor conviction. There are also certain situations in which a judge *must* include a period of supervised release in your sentence. For example, a judge must include a period of supervised release if you received a first-time conviction for a domestic violence offense or for other offenses that require that supervised release be a part of the sentence by statute.[358]

1. How long is supervised release?

Your sentencing judge will decide how long the supervised release will last. The judge will make this decision based on several factors. Some of these factors are the same factors that the judge considered when deciding your sentence of imprisonment.[359] Among other things, your sentencing judge will look at: the nature of your offense; the circumstances surrounding your offense; your personal character; the level of deterrence you require; the need to protect the public from you committing crimes in the future; the need to provide you with training and programs; the sentencing range for your offense; the similarity of your sentence to others convicted of similar offenses; and the need for you to repay the victims of your offense.[360]

The maximum amount of time that you can be sentenced to supervised release depends on the class of the crime for which you were convicted. For a Class A or Class B felony, the maximum amount of time is five years. For a Class C or Class D felony, your period of supervised release cannot be more than three years. For a Class E felony, or for a misdemeanor (other than a petty offense), the maximum length of your supervised release is one year.[361]

Your period of supervised release starts on the day that you are released from prison.[362] The time will run concurrently to (at the same time as) any other Federal, State, or local period of supervised release, probation, or parole for another offense.[363] Any time spent in prison will not be counted towards your period of supervised release unless it is less than thirty days in a row.[364]

2. What are the conditions of supervised release?

At the time of your sentencing, the judge will include several conditions that you must follow during your period of supervised release. There are some conditions that the judge *must* include and some conditions that the judge can *choose* to include, depending on the circumstances of your case. Your probation officer must give you a written copy of the terms of your supervised release, explaining the terms in clear, understandable language.[365]

The following conditions *must* be included as part of your supervised release:[366]

(1) You cannot commit another crime under federal, state or local law;
(2) You cannot unlawfully possess a controlled substance;
(3) If you were convicted for the first time of a domestic violence offense, you must complete an approved rehabilitation program;
(4) If you are a sex offender, you must
    a. comply with the requirements of the Sex Offender Registration and Notification Act;
    b. cooperate in the collection of your DNA sample under the DNA Analysis Backlog Elimination Act;
    c. submit to a drug test within fifteen days of release and at least two other times after that.[367]

The following conditions *can* be included as part of your supervised release:[368]

358. 18 U.S.C. § 3583(a) (2006).
359. 18 U.S.C. § 3583(c) (2006).
360. 18 U.S.C. § 3553(a)(1), (2)(B)–(D), (4)–(7) (2006).
361. 18 U.S.C. § 3583(b) (2006).
362. 18 U.S.C. § 3624(e) (2006).
363. 18 U.S.C. § 3624(e) (2006).
364. 18 U.S.C. § 3624(e) (2006).
365. 18 U.S.C. § 3583(f) (2006).
366. 18 U.S.C. §3583(d) (2006).
367. This condition can be removed under 18 U.S.C. § 3563(a)(4).

(1) If you are a sex offender, availability to search of person, property, and possessions without a search warrant upon reasonable suspicion;
(2) Deportation;
(3) Any other condition that is related to the factors in 18 U.S.C. § 3553 that does not involve a greater limit on your liberty than is necessary;
(4) Any condition that could be included as a term of probation; or
(5) Any other condition allowed by a statute.[369]

3. What happens if you violate a condition of supervised release?

Your supervised release can be revoked if you violate any of the conditions set out in your sentence. Your supervised release *must* be revoked if you are found to be in possession of a controlled substance or a firearm, in violation of federal law or in violation of a term of your supervised release, or if you refuse to comply with the drug testing requirements.[370] If your supervised release is revoked, you may be sentenced to serve either a part of or all of the time you were sentenced to supervised release in prison, without any credit for the time you spent on supervised release before its revocation.[371] The court may also order that you serve an additional term of supervised release in addition to your new term of imprisonment.[372] The length of the additional term of supervised release can be no longer than the maximum amount of supervised release allowed for in your original sentence, minus the length of imprisonment for violating your supervised release. Instead of sentencing you to more time in prison, the judge can order that you remain in your home during non-working hours and be monitored by telephone or electronic surveillance devices.[373]

You may participate in up to two stages of hearings before your supervised release can be revoked. After you are brought in for an alleged violation of the terms of your supervised release, you will be brought before a magistrate judge. The magistrate judge must tell you which violation of supervised release you are being charged with, must inform you of your right to obtain an attorney or to request that an attorney be appointed to you, and must inform you of your right to a preliminary hearing to determine whether or not there is sufficient evidence for the judge to decide that you may have violated a term of your supervised release.[374] If you decide not to waive the preliminary hearing, the magistrate judge will provide you with notice of the hearing, its purpose, the violation you are alleged to have committed, and your right to retain a lawyer or have a lawyer appointed. You have a right to be present at your hearing, to present evidence, and to request the right to question witnesses testifying against you.[375] The magistrate judge will either dismiss

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368. 18 U.S.C. § 3583(d) (2006).

369. 18 U.S.C. §§ 3583(d)(1)–(3) (2006). See 18 U.S.C. §§ 3563(b)(1)–(10) and (b)(12)–(20) for a list of all discretionary probation conditions that can be included as conditions of your supervised release.

370. 18 U.S.C. § 3583(g) (2006).

371. 18 U.S.C. § 3583(e)(3) (2006).

372. 18 U.S.C. § 3583(h) (2006); *see also* Johnson v. United States, 529 U.S. 694, 713, 120 S. Ct. 1795, 1807, 146 L. Ed. 2d 727, 743–44 (2000) (holding that 18 U.S.C. § 3583(e)(3) authorizes the district court to order a term of imprisonment, followed by a term of supervised release, in response to the revocation of plaintiff's term of supervised release for commission of a new criminal offense).

373. 18 U.S.C. § 3583(e)(4) (2006).

374. Fed. Rules Crim. Proc. R. 32.1(a)(3).

375. Fed. Rules Crim. Proc. R. 32.1(b)(1)(B). The 6th Amendment right to confront witnesses whose testimony will be used against you does not exist in supervised release revocation hearings. United States v. Hall, 419 F.3d 980, 985–86 (9th Cir. 2005) (holding that the right to confront a testimonial witness does not apply to hearsay evidence used in supervised release revocation hearings because these hearings are not criminal prosecutions (citing United States v. Aspinall, 389 F.3d 332, 342 (2d Cir. 2004) and United States v. Martin, 382 F.3d 840, 844 n.4 (8th Cir. 2004))). To determine whether you may confront an adverse witness, the judge will balance your due process right against the government's good cause for denying you this right. United States v. Taveras, 380 F.3d 532, 536 (1st Cir. 2004) (applying the recommendation in the 2002 Committee Advisory Note to Rule 32.1 that a balancing test be applied to protect the due process right of parolees recognized in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The government's good cause in not producing the witness will be judged by the reliability of the hearsay evidence and its reason for not presenting the witness. United States v. Rondeau, 430 F.3d 44, 48–49 (1st Cir. 2005) (providing a full discussion of the factors considered in judging reliability and the government's reasons for not providing the witness). For a case describing reliability standards, see United States v. Redd, 318 F.3d 778, 785 (8th Cir. 2003) (finding that the interest of the releasee in confronting the lab technician who ran his sweat patch reports that showed cocaine use at his supervised release revocation hearing was minimal due to long-established recognition of the reliability of documentary evidence). For a case describing the government's reason for not providing the witness, see United States v. Williams, 443 F.3d 35, 45–46 (2d Cir. 2006) (finding that the releasee waived his right to confront the witness where the witness

the case if he finds there is no probable cause to believe that you committed a violation, or he or she will order a revocation hearing.

To revoke your supervised release, the court must find at the revocation hearing that it is more likely than not that you violated a term of your supervised release.[376] You have the same rights in a revocation hearing that you had in the preliminary hearing, as well as a right to know what evidence will be used against you, the right to question adverse witnesses without first making a request, the right to present information of mitigating factors in your case, and the right to the witnesses' prior statements.[377] If you waived these rights, you must have done so knowingly and voluntarily, otherwise, that waiver will not be upheld.[378] At a revocation hearing, any evidence may be used against you, even evidence taken without probable cause.[379] You cannot defend yourself by saying that the other side gathered evidence improperly.

4. Can you change the length or conditions of your supervised release?

In addition to being revoked, your period of supervised release can also be ended or modified at your request or the court's. Usually there will be a hearing before the court terminates or modifies a condition of your supervised release. At the hearing, you will have the right to counsel and to make a statement on your own behalf and present evidence showing circumstances why the court should decide in your favor.[380] No hearing is required if you waive the right to a hearing, if the change will benefit you and will not extend the length of your supervised release, or if the government attorney does not object to the change you requested after having received notice and had reasonable time to do so.[381] You can also apply to the court to clarify the terms of your supervised release if you are unsure what a particular condition means or whether or not you have met the requirements for that condition.[382]

5. How can you terminate your supervised release?

You can apply to terminate your period of supervised release by either appealing to the court or to the President of the United States through a commutation petition (see Part C(4) below). After you have served one year and one day of your supervised release, you can appeal to the court to have the remaining amount of time on your supervised release sentence discharged under 18 U.S.C. § 3583(e)(1). If you apply before you have served at least one year and one day of supervised release, the court will dismiss your petition.[383] In deciding on your request, the court will first look at "many of the same factors" used to determine your original sentence.[384] It will then decide whether terminating your supervised release is in the interest of justice and warranted by your post-release conduct.[385] The court is not required to hold a hearing to decide your request for termination because its decision does not extend the time you will have to spend in supervised released—it can only lower it.[386]

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would not come forward to present evidence against him out of fear and intimidation caused by threats made by the releasee's acquaintances). Your interest in confrontation is determined by the circumstances of your individual case including the importance of the evidence to the court's finding, your ability to show the evidence was false, and the consequences of the court's decision on factors other the revocation of your supervised release. United States v. Walker, 117 F.3d 417, 420 (9th Cir. 1997), *cert. denied*, 522 U.S. 961 (1997).

376. 18 U.S.C. § 3583(e)(3) (2006).

377. Fed. R. Crim. Proc. R. 32.1(b)(2); Fed. R. Crim. Proc. R. 26.2(g)(3).

378. United States v. Correa-Torres, 326 F.3d 18, 22 (1st Cir. 2003) (ordering a new hearing for plaintiff whose supervised release was revoked after waiver of his rights at his first revocation hearing when he did not know what his rights were or what the charges were against him).

379. United States v. Hebert, 201 F.3d 1103, 1104, 00 Cal. Daily Op. Serv. 917, 2000 Daily Journal D.A.R. 1347 (9th Cir. 2000) (holding that the exclusionary rule does not apply at supervised release revocation hearings).

380. Fed R. Crim. Proc. R. 32.1(c)(1).

381. Fed R. Crim. Proc. R. 32.1(c)(2).

382. United States v. Lilly, 206 F.3d 756, 762 (7th Cir. 2000) (recognizing plaintiff's right to have the district court clarify whether or not he had met the repayment ordered as a part of his supervised release).

383. United States v. Werber, No. 90 Cr. 364 (LLM), 1995 U.S. Dist. LEXIS 12307, at *1–2 (S.D.N.Y. Aug. 25, 1995) (*unpublished*).

384. United States v. Lussier, 104 F.3d 32, 34–35 (2d Cir. 1997).

385. 18 U.S.C. § 3583(e)(1) (2006).

386. United States v. Lai, 458 F. Supp. 2d 177, 177 (2d Cir. 2006) (finding that releasee was not entitled to a hearing under Fed. R. Crim. Proc. R. 32.1(c) on his request for termination of the remaining fourteen months of his period of supervised release and denying that request).

6. How can you change the terms of your supervised release?

You can petition the district court to modify a condition of your supervised release if your circumstances have changed since the time of your sentencing or you believe the condition places a heavy limit on your liberty without meeting any goals of your supervised release. If a condition of supervised release places too great of a burden on a protected liberty interest, without furthering your rehabilitation or protecting the public, a court can order the condition be changed to include no greater limit on your liberty than necessary to meet your supervised release goals.[387] The court will first determine if you have a recognized liberty interest[388] affected by the challenged condition and then determine the sentencing goal of that condition and its reasonableness.[389] The sentencing goal can relate to the offense for which you are currently incarcerated or to a past offense and still be upheld by the court.[390] The court will not approve your requested change if your reason for the change is outweighed by the government's interest in the condition being maintained.[391]

The court can also modify the conditions of your supervised release on its own motion or in response to a request by your probation officer any time before the end of your term of supervised release.[392] The court can add additional conditions of supervised release to your sentence and/or correct your sentence to include the conditions of supervised release as long as the court provides you with a hearing as described in the introduction to this section[393] and the conditions relate to a rehabilitation goal and do not unduly limit your liberty interests.[394] If you participated in RDAP, when you are transferred to the community-based program the BOP will check to see if participation in substance abuse treatment is a condition of your supervised release. If it is not, the BOP will ask you to sign a waiver to modify the conditions of your supervised release; you are not required to sign this waiver.[395]

O. Federal Executive Clemency

The President of the United States has the constitutional power to pardon, commute, or reprieve a sentence, and to remit fines for conviction of a federal offense.[396] The main forms of relief explained in this

387. United States v. Monteiro, 270 F.3d 465, 472–73 (7th Cir. 2001) (ordering a condition of supervised release allowing law enforcement to conduct warrantless seizures of plaintiff, his car, or his home be rewritten by the court to limit the seizure power "to ensure that it relates reasonably to the ends of rehabilitation and protection of the public").

388. *See* United States v. Myers, 426 F.3d 117, 125 (2nd Cir. 2005) (describing recognized liberty interests as those that are constitutionally protected); *see also* United States v. Holman, 532 F.3d 284, 290 (4th Cir. 2008) (discussing fundamental rights and supervised release, in the context of involuntary medication orders).

389. United States v. Meyers, 426 F.3d 117, 125–30 (2d Cir. 2005) (removing as a condition of supervised release that the plaintiff receive approval from his probation office before he could have contact with his minor son where his original sentence for child pornography involved only females and where there was no record demonstrating that his son would be harmed by contact with him or that any sentencing goal that protected other children would be served by this condition, which interfered with his liberty interest in maintaining his parental relationship with his son).

390. United States v. Dupes, 513 F.3d 338, 344 (2d Cir. 2008) (upholding conditions of supervised release for defendant, who was convicted of securities fraud, including: registration as a sex offender; attending sex offender treatment; staying away from places where children are often located; and not using the internet for child pornography, because—given his past conviction for and history of sexual offenses—such conditions were not overly broad or vague and were appropriate to the sentencing goals of providing defendant with needed treatment and protecting the public from defendant), *cert. denied*, 128 S. Ct. 1686, 2008 U.S. LEXIS 2599 (Jan. 9, 2008).

391. United States v. Nonahal, 338 F.3d 668, 670–71 (7th Cir. 2003) (denying request by releasee that the condition of his supervised release that he report monthly, in person, to his probation officer be changed to reporting by mail so that he could attend dentistry school in Pakistan because the government's interest in maintaining close supervision over the releasee outweighed his interest in attending school at that time).

392. 18 U.S.C. § 3583(e)(2) (2006).

393. United States v. Navarro-Espinosa, 30 F.3d 1169, 1171 (9th Cir. 1994) (upholding district court's sentence against releasee, which was amended under 35 U.S.C. §3583(e)(2) to include the four years of supervised release that the court had inadvertently neglected to mention when first pronouncing sentence).

394. United States v. Davies, 380 F.3d 329, 333 (8th Cir. 2004) (holding court's adding a condition of supervised release requiring releasee to participate in an alcohol abuse program did not abuse discretion because it met releasee's rehabilitation goals, given alcoholism and depression history, and was less intrusive than a ban on drinking alcohol).

395. Fed. Bureau of Prisons, Program Statement 5330.10(5.4.5), ch. 5, at 8 (1996), *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.

396. U.S. Const. art. II, §2; *see also* 28 C.F.R. § 1.1 (2006).

section—pardon and commutation—only apply to convictions for federal crimes.[397] See Part B(6) of this Chapter for information on how to seek clemency for New York State convictions.

For federal sentences, pardons and commutations are very different remedies. A pardon restores civil rights that were taken away when you were sentenced. A commutation can shorten the amount of time that you must serve in prison or in supervised release. Because a pardon does not reduce your sentence, it will be discussed only briefly. This section does not deal with federal executive clemency for military offenses or for people who are sentenced to death, both of which involve separate petition procedures and considerations.

1. Pardons

A federal pardon does *not* allow you to get out of your sentence early. Instead, a federal pardon allows you to have your federal conviction officially forgiven and your civil rights restored. It does not mean you are innocent. Because pardons are a showing of forgiveness for your crime and not innocence, you must show remorse and rehabilitation, and good behavior after release from prison. It is important to remember a pardon will not erase your conviction. So, any time you are asked to list your convictions you must still include the pardoned offense.[398] But, you can also note that you received a federal pardon for the offense.[399]

You must wait five years after the date of your release from prison before you can seek a presidential pardon.[400] You cannot request a pardon while you are on supervised release, parole, or probation.[401] If there are exceptional reasons why you need the pardon *now* and cannot wait until the five year period is over, then you can request a waiver. To get a waiver, write a separate letter, stating why you think the waiting period should be waived and submit it with your pardon application. However, waivers are very rarely granted.[402]

Even after the five-year waiting period, you need to give a reason you are seeking a pardon. Examples of reasons include gaining entry into a professional association; obtaining licenses from government authorities; restoration of your civil rights; and accessing benefits provided by administrative agencies. It is important to note than many of your civil rights (like your voting rights, for example) are governed by the state where you were convicted and not by the federal government. So, you might want to pursue state clemency procedures instead of or in addition to federal procedures to increase your chance of success.[403]

To request a federal pardon you must submit a completed, signed, and dated pardon form to the United States Pardon Attorney at:

Office of the Pardon Attorney
1425 New York Avenue, N.W., Suite 11000
Washington, DC 20530.

Pardon forms are available online at: http://www.usdoj.gov/pardon/pardon_petition.htm.

2. Commutations

A commutation of your sentence is a reduction of your sentence's length. A commutation can change your sentence to time served, shorten your imprisonment period so you can be released early, move up the date of your parole hearing,[404] or shorten or terminate your sentence of supervised release.[405] Commutations are

397. 28 C.F.R. § 1.4 (2006).

398. U.S. Dept. of Justice, Pardon Information and Instructions, *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm (last visited Sept. 19, 2008).

399. U.S. Dept. of Justice, Pardon Information and Instructions, *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm (last visited Sept.19, 2008).

400. 28 C.F.R. § 1.2 (2006).

401. 28 C.F.R. § 1.2 (2006).

402. U.S. Dept. of Justice, Petition for Pardon, *available at* http://www.usdoj.gov/pardon/pardon_petition.htm (last visited Sept. 19, 2008).

403. U.S. Dept. of Justice, Pardon Information and Instructions, *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm (last visited Sept. 19, 2008).

404. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm; *see also* Nicholson-El v. Conley, No. 5:01-0798, 2001 U.S. Dist. LEXIS 24168, at *3 (S.D. W.Va. Nov. 27, 2001) (*unpublished*) (noting that petitioner's commutation from President Carter made him immediately eligible for a parole hearing for his two sentences, but did not change the sentences to make them run concurrently).

405. If you are requesting that your period of supervised release be terminated, you must state specifically on your petition that this is the type of relief you are seeking and why serving it would be an undue hardship on you as well as why you cannot obtain the same benefit through a petition under 18 U.S.C. § 3583(e)(1). U.S. Dept. of Justice,

rarely granted and only happen in exceptional circumstances. Commutation is purely discretionary, which means that it is up to the President to decide, and he does not have to issue a commutation if he does not think it is appropriate. The President does not have to state his or her reasons for granting or denying your petition for commutation. You have no right to appeal the denial of your request for commutation.

(a) Eligibility

In general, your petition for commutation will not be reviewed unless you have started serving your sentence and you are not currently appealing or challenging your sentence in court.[406] You cannot apply for a commutation of sentence, except in exceptional circumstances, if you have any other forms of judicial or administrative relief available, including:[407]

(1) A motion by the government under Federal Rule of Criminal Procedure 35 (for providing substantial assistance to the government);[408] or

(2) A petition for compassionate release under 18 U.S.C § 3582(c)(1).[409]

Examples of exceptional or unusual circumstances are: terminal illness or old age,[410] the severity (harshness) of the sentence,[411] ineligibility for parole,[412] and providing beneficial assistance at the request of the government in the investigation or prosecution of another case.[413] These are also the reasons commutations are usually granted.[414] If any of these exceptional or unusual circumstances are present in your case, the Pardon Attorney, who assists the President, will consider your application. But, the Pardon Attorney will still consider the availability of other means of relief and the amount of time you have already served when reviewing your application.[415] For example, President George W. Bush granted a commutation of Lewis Libby's sentence of imprisonment, which was at the low end of the Sentencing Guidelines' range, because it was too harsh. The President announced in his Statement on the Executive Clemency for Libby that he considered critics' "arguments and the circumstances surrounding this case," as well as the fact that "the district court rejected the advice of the probation office, which recommended a lesser sentence and the consideration of factors that could have led to a sentence of home confinement or probation."[416]

Commutation Instructions, *available at* http://www.usdoj.gov/pardon/commutation_instructions.htm (last visited September 19, 2008). See Part C(4)(e) of this Chapter for more information on termination of supervised release.

406. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm.

407. 28 C.F.R. § 1.3 (2006).

408. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm.

409. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions, § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm. See Part B(6) of this Chapter for information about compassionate release in New York State.

410. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm; *see also* Nicholson-El v. Conley, No. 5:01-0798, 2001 U.S. Dist. LEXIS 24168, at *3 (S.D. W.Va. Nov. 27, 2001) (*unpublished*) (noting that petitioner's commutation from President Carter made him immediately eligible for a parole hearing for his two sentences, but did not change the sentences to make them run concurrently).

411. For example, in 2007, President Bush commuted the sentence of Lewis Libby, the Vice President's former chief of staff, because it was "excessive." Though his 30-month sentence was at the low-end of the sentencing guidelines range for perjury, obstruction of justice, and false sentences to investigators, Bush found two years of supervised release and a $250,000 fine "harsh punishment" for these convictions. *See* Statement by the President on Executive Clemency for Lewis Libby (July 7, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html#.

412. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm.

413. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm.

414. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm.

415. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1–2.113 (1997), *available at* http://www.usdoj.gov/pardon/petitions.htm.

416. Statement by the President on Executive Clemency for Lewis Libby (July 2, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html#.

(b) How to Request a Commutation

To be considered for federal commutation, send a written petition requesting a commutation of your sentence, addressed to the President of the United States, to the following address:

Office of the Pardon Attorney
1425 New York Avenue, N.W.
Suite 11000
Washington, DC 20530

If you would like your petition to be sent faster, you must submit it through your facility's warden.[417] There are several benefits to sending your petition through the warden, including assistance in obtaining documents. Therefore, this is the method described in this Section.

(i) Obtain and Complete the Petition for Commutation Form (Form OPA – 6)

You can obtain the petition for commutation form by requesting it from the Pardon Attorney or the warden in your facility.[418] When you complete the form, you must state the truth or you could be fined and/or imprisoned.[419] The form should be easy to read and completed in pen or typewritten.

On the form you will need to include the following information:

(1) The date(s) when you have previously applied for commutation (if any) and the result(s);
(2) The offense(s) that you are seeking to have commuted (including district of conviction, citation of offense if known, and sentence);
(3) The date(s) of any criminal appeals you have filed on your case (if any), the result(s), and the citation to the opinion(s);
(4) The date(s) of any habeas corpus petition(s) you have filed to challenge your conviction (if any), the result(s), and the citation to the opinion(s);
(5) Your story of the events that took place during the offense you were convicted of and what your involvement was in those events;
(6) A list of all of your other arrests and convictions, including any juvenile records (the date, the charge, the arresting agency, and the outcome); and
(7) The reasons you are seeking commutation.

(ii) Submit the form to the warden to be sent to the Pardon Attorney

When you send the petition through the warden at your facility, it will be assigned to a case manager who has thirty days to get the required documents together and submit them to the warden for signature.[420] Your case manager must include with your petition a pre-sentence Investigation Report (if available), Judgment in a Criminal Case, and your most recent Progress Report, if one already exists.[421] Any requests for additional information will be sent directly to the warden.

(iii) Review of Your Petition

Once the Pardon Attorney receives your petition, the Pardon Attorney will conduct an investigation of your case. The Pardon Attorney or the Attorney General may contact other government officials (including your sentencing judge, the Director of the BOP, and the U.S. Attorney in the district where you were convicted) to get their opinions about whether or not your request for commutation should be granted by the President.[422] If you are requesting commutation for a felony offense that involved a victim, the Attorney General may send a notice to the victim (or their spouse, adult child, or parent, if the victim is deceased) to ask if he would like to submit an opinion regarding your request. A victim is someone who has "suffered

417. Fed. Bureau of Prisons, Program Statement 1330.15 § 571.41(7)(a), at 3 (2001), *available at* http://www.bop.gov/policy/progstat/1330_015.pdf.

418. 28 C.F.R. § 1.1 (2007). The form is also available at http://www.usdoj.gov/pardon/commutation_instructions.htm (last visited Mar. 16, 2011).

419. 18 U.S.C. §§ 1001 and 3571 (2006).

420. Fed. Bureau of Prisons, Program Statement 1330.15 § 571.41(7)(a), at 3 (2001), *available at* http://www.bop.gov/policy/progstat/1330_015.pdf.

421. Fed. Bureau of Prisons, Program Statement 1330.15 § 571.41(7)(a), at 3 (2001), *available at* http://www.bop.gov/policy/progstat/1330_015.pdf.

422. *See* 28 C.F.R. § 1.6 (2007).

direct or threatened physical, emotional, or pecuniary harm as a result of the commission of the crime for which clemency is sought" and has filed a request with the BOP to be notified upon your release.[423]

After the Pardon Attorney has received and reviewed the reports on your case, he or she will make a recommendation to the President to deny or approve your petition.[424] If the Pardon Attorney recommends that the President deny your application and the President does not take any other action within thirty days of receiving the recommendation, your petition will be denied and your case closed.[425] Your case can also be closed if the President denies your application directly after reviewing it.[426] You will receive notice about the denial from the warden at your facility.[427] You are not entitled to any appeal if your application is denied.

If the President approves your petition for commutation, a warrant of commutation is sent to the warden, who will deliver it to you to sign.[428] If you are already on parole or supervised release when your petition is granted, the warrant will go to you directly.[429] Your sentence will then be recalculated and, if you are now eligible for a parole hearing, you will be added to the docket.[430] It is important to note in this case that even though you have a right to a parole hearing, you are not guaranteed to be granted parole.

P. Conclusion

If you are in New York State prison and would like to try get out before serving your maximum sentence, three types of release programs (and parole) exist: (1) conditional, (2) early, and (3) presumptive release. The type of sentence you are serving affects your program eligibility. In general, you can decrease the amount of time in prison by showing good behavior, because good behavior can earn you good-time credit. If you have applied unsuccessfully for a release program, have not acquired the required amount of good time, or have not served enough of your underlying sentence to qualify, you can also petition for a pardon or commutation, which allows you to leave prison immediately. Note: you can pursue several options at the same time.

If you are in a federal prison and would like to try to get out before serving your full sentence, you may be able to be released through (1) good conduct time, (2) the Residential Drug Abuse Program, (3) the Second Chance Act, and (4) compassionate relief. In addition, you can receive credit for time already served and this credit can be used to decrease your sentence. Finally, keep in mind that you can also apply to have your sentence of imprisonment or supervised release reduced by the U.S. President through a commutation petition.

Some of these methods can be used together to reduce your sentence (for example, good-conduct time and early release under RDAP can be combined) while others may be pursued as alternate ways to reduce your sentence (for example, compassionate relief *or* executive clemency). You can pursue several of these options at the same time to try to reduce your federal sentence.

423. 28 C.F.R. § 1.6(b)(3) (2007).

424. 28 C.F.R. § 1.6(c) (2007).

425. 28 C.F.R. § 1.8(b) (2007).

426. 28 C.F.R. § 1.8(a) (2007).

427. Fed. Bureau of Prisons, Program Statement 1330.15 § 571.41(7)(d), at 5 (2001), *available at* http://www.bop.gov/policy/progstat/1330_015.pdf.

428. 28 C.F.R. § 1.7 (2007).

429. 28 C.F.R. § 1.7 (2007).

430. Fed. Bureau of Prisons, Program Statement 1330.15 § 571.41(7)(c), at 5 (2001), *available at* http://www.bop.gov/policy/progstat/1330_015.pdf.

A JAILHOUSE LAWYER'S MANUAL

Appendix I: Addresses of Federal Courts and New York State Prisons and Their Respective Federal Judicial Districts

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

APPENDIX I

ADDRESSES OF FEDERAL COURTS
&
NEW YORK STATE PRISONS AND THEIR RESPECTIVE FEDERAL JUDICIAL DISTRICTS

A. Addresses of Federal Courts

1. Federal Courts in the First Circuit

Court of Appeals

John Joseph Moakley
U.S. Courthouse
1 Courthouse Way
Boston, MA 02210
Phone: (617) 748-9057

District Courts

Maine District Court

156 Federal Street
Portland, ME, 04101
Phone: (207) 780-3356

Massachusetts District Court

U.S. District Court
1 Courthouse Way
Boston, MA 02210
Phone: (617) 748-9152

New Hampshire District Court

U.S. District Court
55 Pleasant Street, Room 110
Concord, NH 03301-3941
Phone: (603) 225-1423

Puerto Rico District Court

Clemente Ruiz-Nazario U.S. Courthouse &
Federico Degetau Federal Building
150 Carlos Chardon Street
Hato Rey, P.R. 00918
Phone: (787) 772-3000

Rhode Island District Court

One Exchange Terrace
Federal Building and Courthouse
Providence, RI 02903
Phone: (401) 752-7200

2. Federal Courts in the Second Circuit

Court of Appeals

Court of Appeals for the Second Circuit
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007
Phone: (212) 857-8500

District Courts

Connecticut District Court

Abraham Ribicoff Federal Building
450 Main Street
Hartford, CT 06103
Phone: (860) 240-3200

Richard C. Lee United States Court House
141 Church Street
New Haven, CT 06510
Phone: (203) 773-2140

Brien McMahon Federal Building
915 Lafayette Boulevard
Bridgeport, CT 06604
Phone: (203) 579-5707

New York Eastern District Court

Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818
Phone: (718) 613-2600

Alfonse M. D'Amato United States Courthouse
100 Federal Plaza
Central Islip, NY 11722-4438
Phone: (631) 712-6000

New York Northern District Court

James T. Foley United States Courthouse
445 Broadway, Room 509
Albany, NY 12207-2936
Phone: (518) 257-1800

U.S. Courthouse & Federal Building
15 Henry Street, 2nd Floor
Binghamton, NY 13901
Phone: (607) 773-2893

U.S. District Court
James M. Hanley Federal Building, 7th Floor
100 South Clinton Street
Syracuse, NY 13261-7367
Phone: (315) 234-8500

Mailing address:
P.O. Box 7367
Syracuse, NY 13261

Alexander Pirnie Federal Building
10 Broad Street, 3rd Floor
Utica, NY 13501
Phone: (315) 266-1189

New York Southern District Court

Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007
Phone: (212) 805-0136

Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street
White Plains, NY 10601-4150
Phone: (914) 390-4100

New York Western District Court

United States Courthouse
68 Court Street
Buffalo, NY 14202
Phone: (716) 551-4211

Kenneth B. Keating Federal Building
100 State Street
Rochester, NY, 14614
Phone: (585) 613-4000

Vermont District Court

United States Post Office and Courthouse
204 Main Street
Brattleboro, VT 05301
Phone: (802) 254-0250

Mailing Address:
P.O. Box 998
Brattleboro, VT 05302

Federal Building, 5th Floor
11 Elmwood Avenue
Burlington, VT 05401
Phone: (802) 951-6301

Mailing Address:
P.O. Box 945
Burlington, VT 05402

3. Federal Courts in the Third Circuit

Court of Appeals

James A. Byrne Courthouse
601 Market Street
Philadelphia PA 19106
Phone: (215) 597-2995

District Courts

Delaware District Court

J. Caleb Boggs Federal Building
844 N. King Street
Lockbox 18
Wilmington, DE 19801
Phone: (302)-573-6170

New Jersey District Court

Mitchell H. Cohen Bldg & U.S. Courthouse
Fourth & Cooper Streets Rm 1050
Camden, NJ 08101
Phone: (856) 757-5021

Martin Luther King Bldg & U.S. Courthouse
50 Walnut Street Rm 4015
Newark, NJ 07101
Phone: (973) 645-3730

Clarkson S. Fisher Bldg & U.S. Courthouse
402 East State Street Rm 2020
Trenton, NJ 08608
Phone: (609) 989-2065

Pennsylvania Eastern District Court

James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106
Phone: (215) 598-7704

Edward N. Cahn Federal Courthouse
504 West Hamilton Street
Room 1601
Allentown, PA 18101-1514
Phone: (610) 434-3800

The Holmes Building, 4th Floor
101 Larry Holmes Drive
Easton, PA 18042-7722
Phone: (610) 252-6522

The Madison Building, 4th Floor
400 Washington Street
Reading, PA 19601-3956

Pennsylvania Middle District Court

William J. Nealon Federal Building & U.S. Courthouse
235 N. Washington Ave.
P.O. Box 1148
Scranton, PA 18501
Phone: (570) 207-5680

Federal Building &
U.S. Courthouse
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17108
Phone: (717) 221-3920

U.S. Courthouse
& Federal Office Building
240 West Third Street, Suite 218
Williamsport, PA 17701
Phone: (570) 323-6380

Max Rosenn U.S. Courthouse
197 South Main Street, Suite 161
Wilkes-Barre, PA 18701

Pennsylvania Western District Court

United States Courthouse
700 Grant Street
Pittsburgh, PA 15219
Phone: (412) 208-7500

United States Courthouse
17 South Park Row
Erie, PA 16501
Phone: (814) 464-9600

Mailing Address:
Erie Division
P.O. Box 1820
Erie, PA 16507
Penn Traffic Building
319 Washington Street
Johnstown, PA 15901
Phone: (814) 533-4504

Virgin Islands District Court

St. Thomas/St. John Division
5500 Veterans Drive, Rm 310
St. Thomas, VI 00802
Phone: (340) 774-0640

St. Croix Division
3013 Estate Golden Rock, Suite 219
St. Croix, VI 00820
Phone: (340) 773-1130

4. Federal Courts in the Fourth Circuit

Court of Appeals

Lewis F. Powell, Jr. United States Courthouse
1000 East Main Street
Richmond, VA 23219
Phone: (804) 916-2700

District Courts

Maryland District Court

Edward A. Garmatz Federal Building and United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201
Phone: (410) 962-2600

United States Courthouse
6500 Cherrywood Lane, Suite 200
Greenbelt, MD 20770
(301) 344-0660

North Carolina Eastern District Court

Terry Sanford Federal Building and Courthouse
310 New Bern Avenue
Raleigh, North Carolina 27601
Phone: (919) 645-1700

Mailing Address:
P.O. Box 25670
Raleigh, NC 27611

United States Courthouse
201 South Evans St.
Greenville, NC 27858-1137
Phone: (252) 830-6009

Alton Lennon Federal Building
Two Princess Street
Wilmington, North Carolina 28401
Phone: (910) 815-4663

United States Post Office and Courthouse
413 Middle Street
New Bern, NC 28560
Phone: (252) 638-8534

North Carolina Middle District Court

L. Richardson Preyer Federal Building
324 West Market Street, Suite 1
Greensboro, NC 27401
Phone: (336) 332-6000

Hiram H. Ward Fedearl Building and United States Courthouse, Suite 2
251 North Main St
Winston-Salem, NC 27101
Phone; (336) 332-6000

United States Post Office and Courthouse
323 East Chapel Hill Street
Durham, NC 27701
Phone: (919) 541-5413

North Carolina Western District Court

United States Courthouse
100 Otis St.
Asheville, NC 28801
Phone: (828) 771-7200

Federal Building
306 Main St., Room 306
Bryson City, NC 28713
Phone: (828) 488-3783

Charles R. Jonas Federal Building
401 West Trade Street, Room 212
Charlotte, NC 28202
Phone: (704) 350-7400

United States Courthouse
200 W. Broad St.
Statesville, NC 28677
Phone: (704) 883-1000

South Carolina District Court

Charles E. Simons, Jr. Federal Court House
223 Park Avenue, S.W.
Aiken, SC 29801
Phone: (803) 648-6896

G. Ross Anderson Jr. Federal Building and United States Court House
315 South McDuffie Street, 2nd Floor
Anderson, SC 29624
Phone: (864) 241-2700

Beaufort Federal Court House
1501 Bay Street
Beaufort, SC 29902
Phone: (843) 521-2088

Charleston Federal Court House
85 Broad Street
Charleston, SC 29401
Phone: (843) 579-1401

Matthew J. Perry, Jr. Courthouse
901 Richland Street
Columbia, SC 29201
Phone: (803) 765-5816

McMillan Federal Building
401 West Evans Street
Florence, SC 29501
Phone: (843) 676-3820

Clement F. Haynsworth Federal Building
300 East Washington Street
Greenville, SC 29601
Phone: (864) 241-2700

Donald S. Russell Federal Courthouse
201 Magnolia Street
Spartanburg, SC 29306
Phone: (864) 241-2700

Virginia Eastern District Court

Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314
Phone: (703)-299-2100

Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23501
Phone: (757) 222-7201

United States Courthouse
2400 West Avenue
Newport News, VA 23607
Phone: (757) 247-0784

Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219
Phone: (804) 916-2200

Virginia Western District Court

Richard H. Poff Federal Building
210 Franklin Road, Room 308
Roanoke, VA 24011
Phone: (540) 857-5100

Mailing Address:
P.O. Box 1234
Roanoke, VA 24006

Virginia Western District Court
180 W. Main Street, Room 104
Abingdon, VA 24210
Phone: (276) 628-5116

C. Bascom Slemp Federal Building
322 East Wood Ave., Room 204
P.O. Box 490
Big Stone Gap, VA 24219
Phone: (276) 523-3557

Virginia Western District Court
255 W. Main Street, Room 304
Charlottesville, VA 22902
Phone: (434) 296-9284

Dan Daniel United States Post Office
700 Main Street, Room 202
Danville, VA 24541
Phone: (434) 793-7147

Mailing Address:
P.O. Box 1400
Danville, VA 24543

United States Courthouse
116 N. Main Street, Room 314
Harrisonburg, VA 22802
Phone: (540) 434-3181

United States Courthouse
1101 Court Street, Room A66
Lynchburg, VA 24504
Phone: (434) 847-5722

West Virginia Northern District Court

Clerk U.S. District Court
500 West Pike Street, Room 301
Clarksburg, WV 26301
Phone: (304) 622-8513

Mailing Address:
P.O. Box 2808
Clarksburg, WV 26302

Clerk, U. S. District Court
P.O. Box 1518
300 Third Street, Suite 227
Elkins, WV 26241
Phone: (304) 636-1445

Clerk, U.S. District Court
217 W. King Street
Martinsburg, WV 25401
Phone: (304) 267-8225

Clerk, U.S. District Court
1125 Chapline Street, Suite 247
P.O. Box 471
Wheeling, WV 26003
Phone: (304) 232-0011

West Virginia Southern District Court

District Clerk's Office, Room 2400
300 Virginia Street East
Charleston, WV 25301
Phone: (304) 347-3000

U.S. District Court
601 Federal Street, Room 2303
P.O. Box 4128
Bluefield, WV 24701
Phone: (304) 327-9798

Sidney L. Christie Federal Building
845 Fifth Avenue, Room 101
Huntington, WV 25701
Phone: (304) 529-5588

Mailing Address:
P.O. Box 1570
Huntington, WV 25716

Robert C. Byrd United States Courthouse
110 North Heber Street, Room 119
P.O. Box 5009
Beckley, WV 25801
Phone: (304) 253-7481

U.S. District Court
425 Juliana Street, Room 5102
Parkersburg, WV 26101
Phone: (304) 420-6490

5. Federal Courts in the Fifth Circuit

Court of Appeals

Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408
Phone: (504) 310-7700

District Courts

Louisiana Eastern District Court

United States Courthouse
500 Poydras Street, Room C-151
New Orleans, LA 70130
Phone: (504) 589-7600

United States Courthouse
8046 Main St.
Houma, LA 70360
Phone: (985) 879-2584

Louisiana Middle District Court

U.S. District Court
777 Florida Street, Suite 139
Baton Rouge, LA 70801
Phone: (225) 389-3500

Louisiana Western District Court

United States Courthouse
515 Murray Street
Alexandria, Louisiana 71301
Phone: (318) 473-7415

United States Courthouse
800 Lafayette Street, Suite 2100
Lafayette Louisiana 70501
Phone: (337) 593-5000

Edwin F. Hunter, Jr.
U.S. Courthouse & Federal Building
611 Broad Street, Suite 188
Lake Charles, Louisiana 70601
Phone: (337) 437-3870

United States Courthouse
300 Fannin Street, Suite 1167
Shreveport, Louisiana 71101
Phone: (318) 676-4273

Federal Building
201 Jackson Street, Suite 215
Louisiana 71210
Phone: (318) 322-6740

Mississippi Northern District Court

Thomas G. Abernathy Federal Building
301 W. Commerce St.
Aberdeen, MS 39730
Phone: (662) 369-4952

Mailing Address:
P.O. Box 704
Aberdeen, MS 39730

U.S. District Court
305 Main Street, Room 329
Greenville, MS 38701
Phone: (662) 234-1971

Federal Building
911 Jackson Avenue, Room 369
Oxford, MS 38655
Phone: (662) 234-1971

Mississippi Southern District Court

U.S. District Court
245 East Capitol Street
Suite 316
Jackson, MS 39201

Mailing Address:
P.O. Box 23552
Jackson, MS 39225-3552
Phone: (601) 965-4439

U.S. District Court
701 Main Street, Suite 200
Hattiesburg, MS 39401
Phone: (601) 583-2433

U.S. District Court
2012 15th Street, Suite 403
Gulfport, MS 39501
Phone: (228) 563-1700

Texas Eastern District Court

U.S. District Court
300 Willow Street, Suite 104
Beaumont, Texas 77701
Phone: (409) 654-7000

U.S. District Court
104 N. Third Street
Lufkin, Texas 75901
Phone: (936) 632-2739

U.S. District Court
100 E. Houston, Room 125
Marshall, Texas 75670
Phone: (903) 935-2912

U.S. District Court
101 E. Pecan, Room 216
Sherman TX 75090
Phone: (903) 892-2921

U.S. Courthouse
500 N. State Line Ave.
Texarkana, Texas 75501
Phone: (903) 794-8561

Mailing Address:
P.O. Box 2090
Texarkana, TX 75504

U.S. District Court
211 W. Ferguson, Room 106
Tyler, Texas, 75702
Phone: (903) 590-1000

Texas Northern District Court

U.S. District Court
1100 Commerce, Room 1452
Dallas, TX 75242
Phone: (214) 753-2200

Abilene Divisional Office
341 Pine St., Room 2008
Abilene, TX 79601
Phone: (325) 677-6311

Amarillo Divisional Office
205 E. Fifth St., Room 133
Amarillo, TX 79101-1559
Phone: (806) 468-3800

Ft. Worth Divisional Office
501 W. 10th St., Room 310
Ft. Worth, TX 76102-3673
Phone: (817) 850-6600

Lubbock Divisional Office
1205 Texas Ave., Room 209
Lubbock, TX 79401-4091
Phone: (806) 472-1900

San Angelo Divisional Office
33 E. Twohig St., Room 202
San Angelo, TX 76903-6451
Phone: (325) 655-4506

Wichita Falls Divisional Office
1000 Lamar St., 203
Wichita Falls, TX 76301
Phone: (940) 767-1902

Texas Southern District

United States Courthouse
600 E. Harrison, #101
Brownsville, TX 78520
Phone: (956) 548-2500

United States Courthouse
1133 N Shoreline Blvd
Corpus Christi, TX 78401
Phone: (361) 888-3142

United States Courthouse
515 Rusk Ave
Houston, TX 77002
Phone: (713) 250-5500

Mailing Address:
Clerk of the Court
P. O. Box 61010
Houston, TX 77208

United States Courthouse
1300 Victoria St., Suite 1131
Laredo, TX 78040
Phone: (956) 723-3542

U.S. District Court
1701 W. Bus. Hwy. 83, Suite 1011
McAllen, TX 78501
Phone: (956) 618-8065

Mailing Address:
Clerk of the Court
P. O. Box 5059
McAllen, TX 78501

U.S. District Court
312 S. Main Street, Room 406
Victoria, TX 77901
Phone: (361) 788-5009

Mailing Address:
Clerk of the Court
P. O. Box 1638
Victoria, TX 77902

Texas Western District Court

U.S. District Court
200 West 8th St., Room 130
Austin, Texas 78701
Phone: (512) 916-5896

U.S. District Court
111 East Broadway, Room L100
Del Rio, Texas 78840
Phone: (830)-703-2054

U.S. District Court
511 East San Antonio Ave., Room 219
El Paso, Texas 79901
Phone: (915) 534-6725

U.S. District Court
200 East Wall, Room 107
Midland, Texas 79701
Phone: (432) 686-4001

U.S. District Court
410 South Cedar
Pecos, Texas 79772
Phone: (432) 445-4228

U.S. District Court
2450 State Hwy. 118
Alpine, Texas 79830
Phone: (432) 837-7323

U.S. District Court
655 East Durango Blvd., Room G65
San Antonio, Texas 78206
Phone: (210) 472-6550

U.S. District Court
800 Franklin Ave., Room 380
Waco, Texas 76701
Phone: (254) 750-1501

MG Williams Judicial Center
Bldg. 5794, Tank Destroyer Blvd.
P. O. Box 5507
Fort Hood, Texas 76544-0507
Phone: (254) 287-3487

6. Federal Courts in the Sixth Circuit

Court of Appeals

Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 564-7000

District Courts

Kentucky Eastern District Court

Leslie G. Whitmer, Clerk
101 Barr St., Room 206
P.O. Drawer 3074
Lexington, KY 40588-3074
Phone: (859) 233-2503

Christina Riley, Deputy-in-Charge
336 Carl Perkins Fed Bldg.
1405 Greenup Ave.
Ashland, KY 41101
Phone: (606) 329-8652

Lynn Battaglia, Deputy-in-Charge
35 West 5th Street
P.O. Box 1073
Covington, KY 41012-1073
Phone: (859) 392-7925

Kay Ratliff, Deputy-in-Charge
313 John C. Watts Fed Bldg.
330 West Broadway
Frankfort, KY 40601
Phone: (502) 223-5225

Shirley Allen, Deputy-in-Charge
310 South Main Street
P.O. Box 5121
London, KY 40745-5121
Phone: (606) 877-7910

Malinda Bevins, Deputy-in-Charge
110 Main Street, Suite 203
Pikeville, KY 41501-1100
Phone: (606) 437-6160

Kentucky Western District Court

Clerk's Office
241 East Main Street, Suite 120
Bowling Green, KY 42101-2175
Phone: (270) 393-2500

Clerk's Office
601 W. Broadway, Rm 106
Gene Snyder United States Courthouse
Louisville, KY 40202
Phone: (502) 625-3500

Clerk's Office
423 Frederica Street, Suite 126
Owensboro, KY 42301-3013
Phone: (270) 689-4400

Clerk's Office
501 Broadway, Suite 127
Paducah, KY 42001-6801
Phone: (270) 415-6400

Michigan Eastern District

Theodore Levin United States Courthouse
231 W. Lafayette Blvd, Room 564
Detroit, MI 48226
Phone: (313) 234-5005

U.S. District Courthouse
Federal Building
200 E. Liberty Street, Room 120
Ann Arbor, Michigan 48104
Phone: (734) 741-2380

Mailing Address:
P.O. Box 8199
Ann Arbor, MI 48107

U.S. District Court
U.S. Post Office Building
1000 Washington Avenue, Room 304
Bay City, MI 48708
Phone: (989) 894-8800

Mailing Address:
P.O. Box 913
Bay City, MI 48707

Federal Building & U.S. Courthouse
600 Church St., Room 140
Flint, MI 48502
Phone: (810) 341-7840

Michigan Western District Court

U.S. District Court
399 Federal Building
110 Michigan St NW
Grand Rapids, MI 49503
Phone: (616) 456-2381

U.S. District Court
B-35 Federal Bldg
410 W Michigan Ave
Kalamazoo, MI 49007
Phone: (269) 337-5706

U.S. District Court
113 Federal Bldg
315 W Allegan St
Lansing, MI 48933
Phone: (517) 377-1559

U.S. District Court
PO Box 698
229 Federal Bldg
202 W Washington St
Marquette, MI 49855
Phone: (906) 226-2021

Ohio Northern District Court

568 United States Courthouse
Federal Building
Two South Main Street
Akron, Ohio 44308-1813
Phone: (330) 252-6000

Carl B. Stokes United States Court House
801 West Superior Avenue
Cleveland, Ohio 44113-1830
Phone: (216) 357-7000

114 United States Courthouse
1716 Spielbusch Avenue
Toledo, Ohio 43604-5383
Phone: (419) 213-5500

337 U.S. Federal Building & Courthouse
125 Market Street
Youngstown, Ohio 44503-1780
Phone: (330) 884-7400

Ohio Southern District Court

Office of the Clerk
Potter Stewart U.S. Courthouse
Room 103
100 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 564-7500

Office of the Clerk
Joseph Kinneary U.S. Courthouse
Room 260
85 Marconi Boulevard
Columbus, Ohio 43215
Phone: (614) 719-3000

Office of the Clerk
Federal Building, Room 712
200 West Second Street
Dayton, Ohio 45402
Telephone: (937) 512-1400

Tennessee Eastern District Court

U.S. District Court, Greeneville
220 West Depot Street, Suite 200
Greeneville, TN 37743
Phone: (423) 639-3105

U.S. District Court, Knoxville
800 Market Street, Suite 130
Knoxville, TN 37902
Phone: (865)-545-4228

U.S. District Court, Chattanooga
900 Georgia Avenue
Chattanooga, TN 37402
Phone: (423) 752-5200

U.S. District Court, Winchester
200 South Jefferson Street
Winchester, TN 37398
Phone: (931) 967-1444

Tennessee Middle District Court

U.S. District Court
801 Broadway
Nashville, TN 37203
Phone: (615) 736-5498

Tennessee Western District Court

U.S. District Court
167 N. Main Street
Memphis, TN 38103
Phone: (901) 495-1200

U.S. Courthouse
111 South Highland Avenue
Jackson, TN 38301
Phone: (731) 421-9200

7. Federal Courts in the Seventh Circuit

Court of Appeals

Court of Appeals for the Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604
Phone: (312) 435-5850

District Courts

Illinois Central District Court

Peoria Division
309 Federal Bldg
100 North East Monroe Street
Peoria, IL 61602
Phone: (309) 671-7117

Rock Island Division
40 U.S. Courthouse
211 19th Street
Rock Island, IL 61201
Phone: (309) 793-5778

Springfield Division
151 Paul Findley Federal Bldg and U.S. Courthouse
600 East Monroe Street
Springfield, IL 62701
Phone: (217) 492-4020

Urbana Division
218 U.S. Courthouse
201 South Vine Street
Urbana, IL 61801
Phone: (217) 373-5830

Illinois Northern District Court

Main Office
Everett McKinley Dirksen Building
U.S. Courthouse, 20th Floor
219 South Dearborn Street
Chicago, IL 60604
Phone: (312) 435-5670

Rockford Division
Federal Bldg
211 South Court Street
Rockford, IL 61101
Phone: (815) 987-4355

Illinois Southern District Court

Benton Division
U.S. Courthouse, 1st Floor
301 West Main Street
Benton, IL 62812
(618) 439-7767

Main Office
104 Melvin Price Federal Bldg and U.S. Courthouse
750 Missouri Avenue
East St. Louis, IL 62201
(618) 482-9371

Indiana Northern District Court

Fort Wayne Division
1108 E. Ross Adair Federal Bldg and U.S. Courthouse
1300 South Harrison Street
Fort Wayne, IN 46802
Phone: (260) 423-3000

Hammond Division
United States Courthouse, Ste, 2300
5400 Federal Plaza
Hammond, IN 46320
Phone: (219) 852-6500

Lafayette Division
214 Charles A. Halleck Federal Bldg
230 North Fourth Street
Lafayette, IN 47901
Phone: (765) 420-6250

South Bend Division
102 Robert A. Grant Federal Bldg and U.S. Courthouse
204 South Main Street
South Bend, IN 46601
Phone: (574) 246-8000

Indiana Southern District Court

Evansville Division
304 Federal Building
101 NW Martin Luther King Jr. Blvd.
Evansville, IN 47708
Phone: (812) 434-6410

Indianapolis Division
105 Birch Bayh Federal Bldg and U.S. Courthouse
46 East Ohio Street
Indianapolis, IN 46204
Phone: (317) 229-3700

New Albany Division
210 Lee H. Hamilton Federal Bldg and U.S. Courthouse
121 West Spring Street
New Albany, IN 47150
Phone: (812) 948-5238

Terre Haute Division
207 United States Post Office Bldg
30 North Seventh Street
Terre Haute, IN 47801
Phone: (812) 234-9484

Wisconsin Eastern District Court

Milwaukee Division
362 U.S. Courthouse and Federal Bldg
517 East Wisconsin Avenue
Milwaukee, WI 53202
Phone: (414) 297-3372

Green Bay Division
Jefferson Ct Bldg, 1st Fl
125 South Jefferson Street
Green Bay, WI 54305
Phone: (920) 884-3720

Wisconsin Western District Court

Main Office
Robert W. Kastenmeier U.S. Courthouse
120 North Henry Street, Room 320
Madison, WI 53703
Phone: (608) 264-5156

8. Federal Courts in the Eighth Circuit

Court of Appeals

Court of Appeals for the Eighth Circuit
Main Office
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102
Phone: (314) 244-2400

Court of Appeals for the Eighth Circuit
St. Paul Office
Room 500
180 East Fifth Street
St. Paul, MN 55101
Phone: (651) 848-1300

District Courts

Arkansas Eastern District Court

Main Office
A149 Richard Sheppard Arnold
U.S. Courthouse
600 West Capitol Avenue
Little Rock, AR 72201
Phone: (501) 604-5351

Jonesboro Division
312 Federal Bldg
615 South Main Street
Jonesboro, AR 72401
Phone: (870) 972-4610

Pine Bluff Division
3103 George Howard, Jr. Federal
Bldg and U.S. Courthouse
100 East Eighth Avenue
Pine Bluff, AR 71601
Phone: (870) 536-1190

Batesville Divisional Office
490 College Street
Batesville, AR 72501
(This office is not staffed.)

Helena Divisional Office
617 Walnut
Helena, AR 72342
(This office is not staffed.)

Arkansas Western District Court

El Dorado Division
U,S, Post Office and Courthouse
101 South Jackson Avenue
El Dorado, AR 71730
Phone: (870) 862-1202

Fayetteville Division
510 John Paul Hammerschmidt Federal Bldg
35 East Mountain St, Suite 510
Fayetteville, AR 72701
Phone: (479) 521-6980

Main Office
1038 Judge Isaac C. Parker Federal Bldg
South 6th Street & Rogers Avenue
Fort Smith, AR 72901
Phone: (479) 783-6833
J. Smith Henley Federal Building
402 N. Walnut, Room 238
Harrison, AR 72601
Phone: (479) 521-6980
(This office is not staffed; inquiries should be sent to the Fayetteville office.)

Hot Springs Division
347 U.S. Post Office and Courthouse
100 Reserve Street, Room 347
Hot Springs, AR 71901
Phone: (501) 623-6411

Texarkana Division
U.S. Courthouse and Post Office Bldg
500 North State Line Blvd.
Texarkana, AR 75501
Phone: (870) 773-3381

Iowa Northern District Court

Main Office
4200 C Street SW
Cedar Rapids, IA 52404
Phone: (319) 286-2300

Sioux City Division
301 U.S. Courthouse
320 Sixth Street
Sioux City, IA 51101
Phone: (712) 233-3900

Iowa Southern District Court

Main Office
123 E. Walnut St., Room 300
Des Moines, IA 50309-
Phone: (515) 284-6421

Davenport Division
U. S. Courthouse
211 19th Street
Davenport, IL 52801
Phone: (563) 884-7607

Council Bluffs Division
313 U. S. Post Office and Courthouse
8 South 6th Street
Council Bluffs, IA 51501
Phone: (712) 320-0283

Minnesota District Court

Main Office
202 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415
Phone: (612) 664-5000

St. Paul Division
Warren E. Burger Federal Bldg
316 North Robert Street
St. Paul, MN 55101
Phone: (651) 848-1100

Duluth Division
417 Gerald W. Heaney Federal Bldg and U.S. Courthouse
515 West 1st Street
Duluth, MN 55802-1397
Phone: (218) 529-3500

Fergus Falls Division
205 U.S. Courthouse
118 South Mill Street
Fergus Falls, MN 56537
Phone: (218) 739-5758

Missouri Eastern District Court

Main Office
3.300 Thomas F. Eagleton U.S. Courthouse
111 South 10th Street
St. Louis, MO 63102
Phone: (314) 244-7900

Cape Girardeau Division
Rush Hudson Limbaugh, Sr. U.S. Courthouse, 2nd Fl
555 Independence Street
Cape Girardeau, MO 63701
Phone: (573) 331-8800

Hannibal Division
801 Broadway
Hannibal, MO 63401
Phone: (573) 221-8303
(This office is not staffed except when court is in session.)

Missouri Western District

Central Division at Jefferson City
310 U.S. Courthouse
131 West High Street
Jefferson City, MO 65101
Phone: (573) 636-4015

Springfield Division
1400 U.S. Courthouse
222 N. John Q. Hammons Parkway
Springfield, MO 65806
Phone: (417) 865-3869

Main Office
1510 Charles Evans Whittaker U.S. Courthouse
400 East 9th Street
Kansas City, MO 64106
Phone: (816) 512-5000

Nebraska District Court

Main Office
Roman L. Hruska U.S. Courthouse, Ste. 1152
111 South 18th Plaza
Omaha, NE 68102
Phone: (402) 661-7350

Lincoln Division
593 Robert V. Denney U.S. Courthouse
593 Federal Bldg
100 Centennial Mall North
Lincoln, NE 68508
Phone: (402) 437-5225

North Dakota District Court

Main Office
159 Federal Bldg and U.S. Courthouse
220 East Rosser Ave.
Bismarck, ND 58501
Phone: (701) 530-2400

Fargo Division
130 Quentin N. Burdick U.S. Courthouse
655 1st Avenue North
Fargo, ND 58102
Phone: (701) 297-7000

Grand Forks Division
Ronald N. Davies Federal Bldg and
U.S. Courthouse, Ste. 308
102 North 4th Street
Grand Forks, ND 58201
Phone: (701) 746-0259

Minot Division
Federal Bldg, Ste. 307
100 1st Street, SW
Minot, ND 58701
Phone: (701) 839-7960

South Dakota District Court

Main Office
128 U.S. Courthouse
400 South Phillips Avenue
Sioux Falls, SD 57104
Phone: (605) 330-6600

405 U.S. Post Office and Courthouse
225 South Pierre Street
Pierre, SD 57501
Phone: (605) 945-4600

302 Federal Bldg and U.S. Courthouse
515 Ninth Street
Rapid City, SD 57701
Phone: (605) 399-6000

9. Federal Courts in the Ninth Circuit

Court of Appeals

Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
Phone: (415) 355-8000

The Richard H. Chambers
125 South Grand Avenue
Pasadena, CA 91105
Phone: (626) 229-7250

Mailing Address:
PO Box 91510
Pasadena CA 91109-1510

Pioneer Courthouse
700 S.W. 6th Avenue, Suite 110
Portland, Oregon 97204-1434
Phone: (503) 833-5311

Park Place Building
1200 6th Avenue
Seattle, WA 98101
Phone: (206) 553-2937

District Courts

Alaska District Court

U.S. District Court
222 W. 7th Avenue, #4
Anchorage, AK 99513
Phone: (866) 243-3814 toll free

U.S. District Court
101 12th Avenue
Room 332
Fairbanks, AK 99701
Phone: (866) 243-3813 toll free

U.S. District Court
PO Box 020349
Juneau, AK 99802
Phone: (866) 243-3812 toll free

U.S. District Court
648 Mission Street
Room 507
Ketchikan, AK 99901
Phone: (907) 247-7576

U.S. District Court
PO Box 130
Nome, AK 99762
Phone: (907) 443-5216

Arizona District Court

123 N. San Francisco Street, Suite 200
Flagstaff, AZ 86001
Phone: (928) 774-2566

Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, Suite 130, SPC 1
Phoenix, AZ 85003-2118
Phone: (602) 322-7200

U.S. Post Office Building
101 W. Goodwin Street
Prescott, AZ 86303
Phone: (928) 445-6598

Evo A. DeConcini U.S. Courthouse
405 W. Congress Street, Suite 1500
Tucson, AZ 85701-5010
Phone: (520) 205-4200

325 W. 19th Street
Yuma, AZ 85364
Phone: (928) 329-4766

California Central District Court

Riverside Courthouse
3470 Twelfth Street
Riverside, CA 92501
Phone: (951) 328-4450

Santa Ana Courthouse
411 West Fourth Street
Room 1053
Santa Ana, CA 92701
Phone: (714) 338-4750

Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012
Phone: (213) 894-1565 or
(213) 894-2215

Spring Street Courthouse
312 N. Spring Street
Los Angeles, CA 90012
Phone: (213) 894-1565 or
(213) 894-2215

California Eastern District Court

501 I Street, Suite 4-200
Sacramento, CA 95814
Phone: (916) 930-4000

U.S. District Court
2500 Tulare Street
Fresno, CA 93721
Phone: (559) 499-5600

P. O. Box 575
9004 Castle Cliffs Court
Yosemite National Park, CA 95389.
Phone: (209) 372-0320

2986 Bechelli Lane
Redding, CA 96002
Phone: (530) 246-5416

California Northern District Court

514 H Street
Eureka, CA 95501-1038
Phone: (707) 445-3612

1301 Clay Street,
Suite 400 S
Oakland, CA 94612-5212
Phone: (510) 637-3530

450 Golden Gate Ave., 16th Floor
San Francisco, CA 94102
Phone: (415) 522-2000

280 South 1st Street
San Jose, CA 95113
Phone: (408) 535-5363

California Southern District Court

Edward J. Schwartz U.S. Courthouse
940 Front Street
San Diego, CA 92101-8900
Phone: (619) 557-5600

U.S. District Court
Office of the Clerk
880 Front Street, Suite 4290
San Diego, CA 92101-8900
Phone: (619) 557-5600

U.S. District Court
2003 W. Adams Ave, Ste 220
El Centro, CA 92243
Phone: (760) 353-1271

Guam District Court

4th Floor, U.S. Courthouse
520 West Soledad Avenue
Hagatna, Guam 96910
Phone: (671) 473-9100

Hawaii District Court

300 Ala Moana Boulevard Rm C338
Honolulu, HI 96850
Phone: (808) 541-1300

Idaho District Court

Clerk of the Courts
451 West State Street
Boise, ID 83702
Phone: (208) 334-2210

Mailing Address:
PO Box 83720
Boise, ID 83720-0101

Ada County Courthouse
Room 4171
200 W. Front Street
Boise, Idaho 83702
Phone: (208) 287-7500

Nez Perce County Courthouse
PO Box 896
Lewiston, ID 83501
Phone: (208) 799-3050

PO Box 9000
Coeur d'Alene, ID 83816-9000
Phone: (208) 446-1170

Montana District Court

James F. Battin Courthouse
316 North 26th Street
Billings, MT 59101
Phone: (406) 247-7000

U.S. District Court
400 North Main
Butte, MT 59701
Phone: (406) 782-0432

U. S. District Court
125 Central Avenue West
Great Falls, MT 59401
Phone: (406) 727-1922

Paul G. Hatfield Courthouse
901 Front Street
Helena, MT 59626
Phone: (406) 441-1355

Russell Smith Courthouse
201 East Broadway
Missoula, MT 59801
Phone: (406) 542-7260

Nevada District Court

333 S. Las Vegas Blvd.
Las Vegas, NV 89101
Phone: (702) 464-5400

400 S. Virginia St.
Reno, NV 89501
Phone: (775) 686-5800

Northern Mariana Islands District Court

2nd Floor, Horiguchi Building, Garapan
P.O. Box 500687
Saipan, MP 96950
Phone: (670) 236-2902

Oregon District Court

Mark O. Hatfield U.S. Courthouse
1000 S.W. Third Avenue
Office of the Clerk, Suite 740
Portland, OR 97204-2902
Civil Cases: (503) 326-8008
Criminal Cases (503) 326-8003

Wayne L. Morse U.S. Courthouse
405 East Eighth Avenue, Room 2100
Eugene, OR 97401
Phone: (541) 431-4100

James A. Redden U.S. Courthouse
310 West Sixth, Room 201
Medford, OR 97501
Phone: 541-608-8777

Washington Eastern District Court

Thomas S. Foley U.S. Courthouse
920 West Riverside Avenue
Spokane, WA 99201
Phone: (509) 458-3400

Mailing Address:
PO Box 1493
Spokane, WA 99210

U.S. Courthouse & Federal Building
825 Jadwin Avenue, Room 174
Richland, WA 99352
Phone: (509) 376-7262

William O. Douglas Courthouse
25 South Third Street
Yakima, WA 98907
Phone: (509) 573-6600

Mailing Address:
US District Court
P.O. Box 2706
Yakima, WA 98907

Washington Western District Court

U.S. Courthouse
700 Stewart Street
Seattle, WA 98101
Phone: (206) 370-8400

Union Station Courthouse
1717 Pacific Avenue
Tacoma, WA 98402
Phone: (253) 882-3800

10. Federal Courts in the Tenth Circuit

Court of Appeals

Court of Appeals for the Tenth Circuit
The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
Phone: (303) 844-3157

District Courts

Colorado District Court

Alfred A. Arraj U.S. Courthouse
901 19th Street, Room A105
Denver, Colorado 80294-3589
Civil Division: (303) 844-3433
Criminal Division: (303) 844-2115

Kansas District Court

500 State Ave.
259 U.S. Courthouse
Kansas City, Kansas 66101
Phone: (913) 551-6719

444 S.E. Quincy
490 U.S. Courthouse
Topeka, Kansas 66683
Phone: (785) 295-2610

401 N. Market
204 U.S. Courthouse
Wichita, Kansas 67202
Phone: (316) 269-6491

New Mexico District Court

Clerk's Office
U.S. District Court
333 Lomas N.W.
Albuquerque, NM 87102
Phone: (505) 348-2000

Clerk's Office
U.S. District Court
200 E. Griggs Ave.
Las Cruces, NM 88001
Phone: (575) 528-1400

Santiago E. Campos United States Courthouse
106 S. Federal Place
Santa Fe, NM 87501
Phone: (505) 988-6481

U.S. Circuit Court
500 N. Richardson
Roswell, NM 88201
Phone: (575) 625-2388

Oklahoma Eastern District Court

101 N. 5th Street, P.O. Box 607
Muskogee, OK 74402-0607
Phone: (918) 684-7920

Oklahoma Northern District Court

333 W. 4th St., Room 411
Tulsa, OK 74103
Phone: (918) 699-4700

Oklahoma Western District Court

200 NW 4th Street, Room 1210
Oklahoma City, OK 73102
Phone: (405) 609-5000

Utah District Court

350 S Main St, Room 150
Salt Lake City, UT, 84101-2106
Phone: (801) 524-6100

Wyoming District Court

2120 Capitol Avenue, Second Floor
Cheyenne, WY 82001-3658
Phone: (307) 433-2120

111 South Wolcott St.
Casper, WY 82601-2534
Phone: (307) 232-2620

11. Federal Courts in the Eleventh Circuit

Court of Appeals

Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303
Phone: (404) 335-6100

District Courts

Alabama Middle District Court

Frank M. Johnson Federal Courthouse
One Church Street
Montgomery, AL 36104
Phone: (334) 954-3600

Mailing Address:
Clerk of the Court
P.O. Box 711
Montgomery, AL 36101

Alabama Northern District Court

Hugo L. Black U. S. Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203
Phone: (205) 278-1700

Alabama Southern District Court

United States District Courthouse
113 St. Joseph Street
Mobile, AL 36602
Phone: (251) 690-2371

Florida Middle District Court

Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202
Phone: (904) 549-1900

Golden-Collum Federal Building & U.S. Courthouse
207 Northwest Second Street
Ocala, FL 34475
Phone: (352) 369-4860

U.S. Courthouse
401 West Central Boulevard, Suite 1200
Orlando, FL 32801-0120
Phone: (407) 835-4200

Sam M. Gibbons U.S. Courthouse
801 North Florida Ave.
Tampa, FL 33602
Phone: (813) 301-5400

U.S. Courthouse & Federal Building
2110 First Street
Fort Myers, FL 33901
Phone: (239) 461-2000

Florida Northern District Court

United States Courthouse
401 SE First Ave. Rm 243
Gainesville, FL 32601
Phone: (352) 380-2400

United States Courthouse
30 W. Government St.
Panama City, FL 32401
Phone: (850) 769-4556

United States Courthouse
1 North Palafox St.
Pensacola, FL 32502
Phone: (850) 435-8440

United States Courthouse
111 N. Adams St.
Tallahassee, FL 32301-7730
Phone: (850) 521-3501

Florida Southern District Court

United States Courthouse
Room 108
299 East Broward Boulevard
Fort Lauderdale, FL 33301
Phone: (954) 769-5400

300 South Sixth Street
Fort Pierce, FL 34950
Phone: (772) 467-2300

Wilkie D. Ferguson, Jr. U.S. Courthouse
400 North Miami Avenue, 8th floor
Miami, FL 33128
Phone: (305) 523-5100

301 Simonton Street
Key West, FL 33040
Phone: (305) 295-8100

Paul G. Rogers Federal Building & U.S. Courthouse
701 Clematis Street
West Palm Beach, FL 33401
Phone: (561) 803-3400

Georgia Middle District Court

C. B. King U.S. Courthouse
201 West Broad Avenue
Albany, Georgia 31701
Phone: (229) 430-8432

U.S. Post Office & Courthouse
115 E. Hancock Avenue
Athens, GA 30601
Phone: (706) 227-1094

Mailing Address:
P.O. Box 1106
Athens, GA 30601
Phone: (706) 227-1094

U.S. Post Office & Court House
Suite 216
120 12th Street
Columbus, GA 31902
Phone: (706) 649-7816

Mailing Address:
P.O. Box 124
Columbus, GA 31902

William A. Bootle Federal Building and U.S. Courthouse
475 Mulberry Street, Suite 216
Macon, GA 31202
Phone: (478) 752-3497

Mailing Address
P.O. Box 128
Macon, GA 31202

U.S. Courthouse & Post Office
401 N. Patterson Street, Suite 212
Valdosta, GA 31601
Phone: (229) 242-3616

Mailing Address:
P.O. Box 68
Valdosta, GA 31601

Georgia Northern District Court

Richard B. Russell Federal Building & U.S. Courthouse
75 Spring Street, SW
Atlanta, GA 30303-3361
Phone: (404) 215-1600

Federal Building
121 Spring Street, S.E., Room 201
Gainesville, Georgia 30501
Phone: (678) 450-2760

Lewis R. Morgan Federal Building & U.S. Courthouse
18 Greenville Street
Newnan, Georgia 30263
Phone: (678) 423-3060

United States Courthouse
600 East First Street
Rome, Georgia 30161
Phone: (706) 378-4060

Georgia Southern District Court

U.S. Courthouse
125 Bull Street
Savannah, GA 31401
Phone: (912) 650-4020

Federal Justice Center
600 James Brown Blvd
Augusta, GA 30901
Phone: (706) 849-4400

Frank M. Scarlett Federal Building
801 Gloucester Street
Brunswick, GA 31520
Phone: (912) 280-1330

12. Federal Courts in the D.C. Circuit and Federal Circuit

DC Circuit Court of Appeals

Court of Appeals for the D.C. Circuit
333 Constitution Avenue, N.W.
Washington, DC 20001
Phone: (202) 216-7300

DC District Court

United States District Court for the District of Columbia
5423 E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001
Phone: (202) 354-3000

Federal Circuit

U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439
Phone: (202) 633-6550

B. New York State Prisons and Their Respective Federal Judicial Districts

Prison	Federal District
Adirondack	Northern
Albion	Western
Altona	Northern
Arthur Kill	Eastern
Attica	Western
Auburn	Northern
Bare Hill	Northern
Bayview	Southern
Beacon	Southern
Bedford Hills	Southern
Buffalo	Western
Butler	Western
Camp Gabriels	Northern
Camp Georgetown	Northern
Camp Pharsalia	Northern
Camp Vincent	Northern
Cayuga	Northern
Chateaugay	Northern
Clinton	Northern
Collins	Western
Coxsackie	Northern
Downstate	Southern
Eastern	Northern
Edgecombe	Southern
Elmira	Western
Fishkill	Southern
Franklin	Northern
Fulton	Southern
Gouverneur	Northern
Gowanda	Western
Great Meadows	Northern
Green Haven	Southern
Greene	Northern
Groveland	Western
Hale Creek	Northern
Hudson	Northern
Lakeview	Western
Lincoln	Southern
Livingston	Western
Lyon Mountain	Northern
Marcy	Northern
Mid-Orange	Southern
Mid-State	Northern
Mohawk	Northern
Monterey	Western
Moriah	Northern
Mt. McGregor	Northern
Ogdensburg	Northern
Oneida	Northern
Orleans	Western
Otisville	Southern
Queensboro	Eastern
Riverview	Northern
Rochester	Western
Shawangunk	Northern
Sing Sing	Southern
Southport	Western
Sullivan	Southern
Summit Shock	Northern
Taconic	Southern
Ulster	Northern
Upstate	Northern
Wallkill	Northern
Washington	Northern
Watertown	Northern
Wende	Western
Willard	Western
Woodbourne	Southern
Wyoming	Western

A JAILHOUSE LAWYER'S MANUAL

Appendix II: New York State: Filing Instructions & Addresses of New York State Courts

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

APPENDIX II

NEW YORK STATE: FILING INSTRUCTIONS & ADDRESSES OF NEW YORK STATE COURTS

This Appendix contains information on how to file legal papers in New York State as well as contact information for New York State Courts, including clerks' offices.

A. General Filing Instructions

The Chapter explaining the legal action you are filing should tell you with whom you need to file your papers. This Appendix provides the addresses for the Supreme Courts and County Clerks of New York. Part B explains how to file your poor person's papers with a County Attorney. Part C lists the addresses of the New York Supreme Courts. Part D lists the addresses of the New York County Clerks. Part E lists the addresses of the New York Court of Appeals and Appellate Division Courts.

The County Clerk generally forwards all mail to the judge in his or her county. But, the addresses of Supreme Court Clerks are also included for your convenience. If you are unsure of the Supreme Court address, always send your mail to the County Clerk, who will forward it to the appropriate party.

If you already have an index number,[1] you should send your documentation to the Supreme Court Clerk and should include the index number with all correspondence. If you do not have an index number and you are filing a new petition (like an Article 78 petition), you need to file a Request for Judicial Intervention ("RJI") with the County Clerk to obtain an index number. When mailing documentation, you should make specific reference to the person you are trying to contact by addressing the envelope: "[name or title of the person you are trying to contact] c/o County Clerk [or Supreme Court Clerk], _____ County," followed by the correct town, state, and ZIP code.

For Article 440 and other proceedings related to your criminal sentence, you should mail documents and letters to the "Clerk of the Criminal Court, Supreme Court, _____ County." For Article 78 and all civil proceedings, you should mail documents and letters to the "Clerk of the Civil Court, Supreme Court, _____ County."

If the Chapter about the type of lawsuit you are filing instructs you to file any of your papers (for example, poor person's papers, notice of your suit, or any other motion or filing) with the District Attorney, see Appendix III for a list of their addresses.

B. How to File Poor Person's Papers with the County Attorney

If you are applying for poor person's status to not have to pay full court costs, send a copy of your poor person's papers either to the county clerk or to the county attorney for the county where the court is located.[2] The county attorney is *not* the same as the district attorney. The County Attorney can be reached at the county office building, listed in this Appendix's County Clerk part. Send your papers to the "County Attorney" at that address. If you address the envelope "County Attorney, _____ County Office Building, [name of county], New York," your papers should arrive at the right place.

If you are filing suit in New York City, you should send a copy of your poor person's papers to the Corporation Counsel instead of the county attorney. The address is Corporation Counsel, 100 Church Street, 4th Floor, New York, New York 10007. The phone number is (212) 788-0303.

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1. The index number appears on the top right-hand corner of all papers submitted to the court in your case.

2. § 1101 of the New York Civil Practice Law and Rules requires poor person's status applicants to notify the county attorney only if they are applying for poor person's status *after* the start of a legal action. But, several of the legal actions discussed in the *JLM* are merely continuations of prior actions. To be safe, notify the county attorney or Corporation Counsel every time you request poor person's status. When you notify the county attorney or Corporation Counsel, include a letter stating the county in which you were convicted and sentenced and the indictment number (or docket number) from your trial. This may speed the processing of your papers, since they customarily check to see if you had a private attorney at your trial. If you did, they may decide to oppose your petition for poor person's status.

C. New York Supreme Court Addresses

1. Supreme Court Clerk Addresses Within New York City

BRONX COUNTY
Supreme Court Clerk, Civil Term
Bronx County Courthouse
851 Grand Concourse
Bronx, NY 10451
(718) 618-1200

Supreme Court Clerk, Criminal Term
265 East 161st Street
Bronx, NY 10451
(718) 618-3000

KINGS COUNTY (BROOKLYN)
Supreme Court Clerk
Kings County Courthouse
360 Adams Street, Room 189
Brooklyn, NY 11201
(347) 404-9772 (Main Clerks Office)
(347) 404-9123 (Civil Term)
(347) 296-1122 (Criminal Term)

NEW YORK COUNTY (MANHATTAN)
Supreme Court Clerk, Civil Term
60 Centre Street, Room 161
New York, NY 10007
(646) 386-5955

Supreme Court Clerk, Criminal Term
New York County Courthouse
111 Centre Street, Room 927
New York, NY 10013
(646) 386-4000

QUEENS COUNTY

* Queens County has three different Supreme Courts. If you don't know which of these three parts you are in, call (718) 520-3933 to find out.

Supreme Court Clerk, Civil Term
88-11 Sutphin Boulevard
Jamaica, NY 11435
(718) 298-1140

Supreme Court Clerk, Criminal Term
125-01 Queens Boulevard
Kew Gardens, NY 11415

Supreme Court Clerk, Criminal Term
25-10 Court Square
Long Island City, NY 11101
(718) 298-1408)

RICHMOND COUNTY (STATEN ISLAND)
Supreme Court Clerk
Richmond County Courthouse
130 Stuyvesant Place
Staten Island, NY 10301
(718) 390-5386

2. Supreme Court Clerk Addresses Outside of New York City

ALBANY COUNTY
Supreme Court Clerk
Albany County Courthouse
16 Eagle Street, Room 102
Albany, NY 12207
(518) 285-8989

ALLEGANY COUNTY
Supreme Court Clerk
Allegany County Courthouse
7 Court Street
Belmont, NY 14813
(585) 268-5813

BROOME COUNTY
Supreme Court Clerk
Broome County Courthouse
P.O. Box 1766
Binghamton, NY 13902
(607) 778-2448

CATTARAUGUS COUNTY
Supreme Court Clerk
Cattaraugus County Courthouse
303 Court Street
Little Valley, NY 14755
(716) 938-9111

CAYUGA COUNTY
Supreme Court Clerk
Cayuga County Courthouse
152 Genesee Street
Auburn, NY 13021
(315) 255-4320

CHAUTAUQUA COUNTY
Supreme Court Clerk
Chautauqua County Courthouse
1 North Erie Street
P.O. Box 292
Mayville, NY 14757
(716) 753-4266

CHEMUNG COUNTY
Supreme Court Clerk
Hazlett Building
P.O. Box 588
Elmira, NY 14902
(607) 737-2084

CHENANGO COUNTY
Supreme Court Clerk
Chenango County Office Building
5 Court Street
Norwich, NY 13815
(607) 337-1457

CLINTON COUNTY
Supreme Court Clerk
Clinton County Government Center
137 Margaret Street, 1st Floor
Plattsburgh, NY 12901
(518) 565-4700

COLUMBIA COUNTY
Supreme Court Clerk
Columbia County Courthouse
401 Union Street
Hudson, NY 12534
(518) 828-7858

CORTLAND COUNTY
Supreme Court Clerk
Cortland County Courthouse
46 Greenbush Street, Suite 301
Cortland, NY 13045
(607) 753-5013

DELAWARE COUNTY
Supreme Court Clerk
Delaware County Courthouse
3 Court Street
Delhi, NY 13753
(607) 746-2131

DUTCHESS COUNTY
Supreme Court Clerk
Dutchess County Courthouse
10 Market Street
Poughkeepsie, NY 12601
(845) 486-2260

ERIE COUNTY
Supreme Court Clerk
Erie County Court Building
25 Delaware Avenue, Ground Floor
Buffalo, NY 14202
(716) 845-9301

ESSEX COUNTY
Supreme Court Clerk
Essex County Courthouse
7559 Court Street
P.O. Box 247
Elizabethtown, NY 12932
(518) 873-3601

FRANKLIN COUNTY
Supreme Court Clerk
Franklin County Courthouse
355 West Main Street
P.O. Box 70
Malone, NY 12953
(518) 481-1681

FULTON COUNTY
Supreme Court Clerk
Fulton County Office Building
223 West Main Street
P.O. Box 485
Johnstown, NY 12095
(518) 736-5555

GENESEE COUNTY
Supreme Court Clerk
Courts Facility Building
CO Bldg. #1, Box 379
Batavia, NY 14021
(585) 344-2550

GREENE COUNTY
Supreme Court Clerk
Greene County Courthouse
411 Main Street
Catskill, NY 12414
(518) 719-3255

HAMILTON COUNTY
Supreme Court Clerk
Hamilton County Court Chambers
Route 8, Box 204
Lake Pleasant, NY 12108
(518) 548-7111

HERKIMER COUNTY
Supreme Court Clerk
Herkimer County Office & Court Facility
109 Mary Street, Suite 1111
Herkimer, NY 13350
(315) 867-1129

JEFFERSON COUNTY
Supreme Court Clerk
State Office Building
175 Arsenal Street
Watertown, NY 13601
(315) 785-3081

LEWIS COUNTY
Supreme Court Clerk
Lewis County Courthouse
7660 State Street
P.O. Box 232
Lowville, NY 13367
(315) 376-5333

LIVINGSTON COUNTY
Supreme Court Clerk
County Government Center
6 Court Street, Room 201
Geneseo, NY 14454
(585) 243-7000

MADISON COUNTY
Supreme Court Clerk
County Office Building
P.O. Box 668
Wampsville, NY 13163
(315) 366-2261

MONROE COUNTY
Supreme Court Clerk
County Building
39 West Main Street, Room 101
Rochester, NY 14614
(585) 753-1624

MONTGOMERY COUNTY
Supreme Court Clerk
County Office Building
P.O. Box 1500
Fonda, NY 12068
(518) 853-8111

NASSAU COUNTY
Supreme Court Clerk
Supreme Court Building
240 Old Country Road
Mineola, NY 11501
(516) 571-2664

NIAGARA COUNTY
Supreme Court Clerk
175 Hawley Street
P.O. Box 461
Lockport, NY 14094
(716) 439-7025

ONEIDA COUNTY
Supreme Court Clerk
County Office Building
800 Park Avenue
Utica, NY 13501
(315) 798-5773

ONONDAGA COUNTY
Supreme Court Clerk
County Clerk's Office
401 Montgomery Street, Room 200
Syracuse, NY 13202
(315) 435-2226

ONTARIO COUNTY
Supreme Court Clerk
County Municipal Building
20 Ontario Street
Canandaigua, NY 14424
(585) 396-4200

ORANGE COUNTY
Supreme Court Clerk
Orange County Government Center
255 Main Street
Goshen, NY 10924
(845) 291-2690

ORLEANS COUNTY
Supreme Court Clerk
3 South Main Street
Albion, NY 14411
(585) 589-5334

OSWEGO COUNTY
Supreme Court Clerk
County Office Building
46 East Bridge Street
Oswego, NY 13126
(315) 349-8621

OTSEGO COUNTY
Supreme Court Clerk
Otsego County Office Building
197 Main Street
P.O. Box 710
Cooperstown, NY 13326
(607) 547-4276

PUTNAM COUNTY
Supreme Court Clerk
40 Gleneida Avenue
Carmel, NY 10512
(845) 225-3641, ext. 300

RENSSELAER COUNTY
Supreme Court Clerk
Rensselaer County Courthouse
105 Third Street
Troy, NY 12180
(518) 270-4080

ROCKLAND COUNTY
Supreme Court Clerk
Rockland County Courthouse
1 South Main Street, Suite 100
New City, NY 10956
(845) 638-5221

SARATOGA COUNTY
Supreme Court Clerk
County Office Building
40 McMaster Street
Ballston Spa, NY 12020
(518) 885-2213

SCHENECTADY COUNTY
Supreme Court Clerk
County Office Building
620 State Street, 3rd Floor
Schenectady, NY 12305
(518) 388-4225

SCHOHARIE COUNTY
Supreme Court Clerk
284 Main Street
P.O. Box 549
Schoharie, NY 12157
(518) 295-8316

SCHUYLER COUNTY
Supreme Court Clerk
105 9th Street, Unit 8
Watkins Glen, NY 14891
(607) 535-8133

SENECA COUNTY
Supreme Court Clerk
1 DiPronio Drive
Waterloo, NY 13165
(315) 539-1771

ST. LAWRENCE COUNTY
Supreme Court Clerk
48 Court Street
Canton, NY 13617
(315) 379-2237

STEUBEN COUNTY
Supreme Court Clerk
3 East Pulteney Square
Bath, NY 14810
(607) 776-9631

SUFFOLK COUNTY
Supreme Court Clerk
310 Center Drive
Riverhead, NY 11901
(631) 852-2048

SULLIVAN COUNTY
Supreme Court Clerk
County Office Building
100 North Street
Monticello, NY 12701
(845) 794-3000, ext. 5012

TIOGA COUNTY
Supreme Court Clerk
County Clerk's Office
P.O. Box 307
16 Court Street
Owego, NY 13827
(607) 687-8660

TOMPKINS COUNTY
Supreme Court Clerk
Tompkins County Courthouse
320 North Tioga Street
Ithaca, NY 14850
(607) 274-5431

ULSTER COUNTY
Supreme Court Clerk
244 Fair Street
P.O. Box 1800
Kingston, NY 12402
(845) 340-3000

WARREN COUNTY
Supreme Court Clerk
Warren County Municipal Center
1340 State Route 9
Lake George, NY 12845
(518) 761-6429

WASHINGTON COUNTY
Supreme Court Clerk
383 Broadway, Building A
Fort Edward, NY 12828
(518) 746-2170

WAYNE COUNTY
Supreme Court Clerk
9 Pearl Street
P.O. Box 608
Lyons, NY 14489
(315) 946-7470

WESTCHESTER COUNTY
Supreme Court Clerk
110 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
(914) 995-3071

WYOMING COUNTY
Supreme Court Clerk
143 North Main Street, Suite 104
Warsaw, NY 14569
(585) 786-8810

YATES COUNTY
Supreme Court Clerk
417 Liberty Street, Suite 1107
Penn Yan, NY 14527
(315) 536-5120

D. County Clerk Addresses for Counties Outside New York City

ALBANY COUNTY
County Clerk
Courthouse
32 North Russell Road
Albany, NY 12206
(518) 487-5100

ALLEGANY COUNTY
County Clerk
Count Office Building
7 Court Street, Room 18
Belmont, NY 14813
(585) 268-9270

BROOME COUNTY
County Clerk
Broome County Courthouse
Room 204
P.O. Box 1776
Binghamton, NY 13902
(607) 778-2451

CATTARAUGUS COUNTY
Cattaraugus County Center
303 Court Street
Little Valley, NY 14755
(716) 938-9111

CAYUGA COUNTY
County Clerk
Cayuga County Office Building
160 Genesee Street, 1st Floor
Auburn, NY 13021
(315) 253-1653

CHAUTAUQUA COUNTY
County Clerk
1 North Erie Street
P.O. Box 170
Mayville, NY 14757
(716) 753-4331

CHEMUNG COUNTY
County Clerk
210 Lake Street
P.O. Box 588
Elmira, NY 14902
(607) 737-2920

CHENANGO COUNTY
County Clerk
County Office Building
5 Court Street
Norwich, NY 13815
(607) 337-1450

CLINTON COUNTY
County Clerk
County Government Center
137 Margaret Street, Suite 301
Plattsburgh, NY 12901
(518) 565-4700

COLUMBIA COUNTY
County Clerk
Courthouse
560 Warren Street
Hudson, NY 12534
(518) 828- 3339

CORTLAND COUNTY
County Clerk
Courthouse
46 Greenbush Street, Suite 301
Cortland, NY 13045
(607) 753-5021

DELAWARE COUNTY
County Clerk
Courthouse
P.O. Box 426
Delhi, NY 13753
(607) 746-2123

DUTCHESS COUNTY
County Clerk
County Office Building
10 Market Street
Poughkeepsie, NY 12601
(845) 486-2260

ERIE COUNTY
Erie County Clerk's Office
25 Delaware Avenue
Buffalo, NY 14202
(716) 845-9301

ESSEX COUNTY
County Clerk
Courthouse
7559 Court Street
P.O. Box 247
Elizabethtown, NY 12932
(518) 873-3601

FRANKLIN COUNTY
County Clerk
Courthouse
355 West Main Street
P.O. Box 70
Malone, NY 12953
(518) 481-1681

FULTON COUNTY
County Clerk
County Building
223 West Main Street
P.O. Box 485
Johnstown, NY 12095
(518) 736-5555

GENESEE COUNTY
County Clerk
County Office Building
P.O. Box 379
Batavia, NY 14021
(585) 344-2550

GREENE COUNTY
County Clerk
Courthouse
P.O. Box 446
Catskill, NY 12414
(518) 943-2050

HAMILTON COUNTY
County Clerk
P.O. Box 204
Route 8
Lake Pleasant, NY 12108
(518) 548-7111

HERKIMER COUNTY
County Clerk
County Office Building
109 Mary Street, Suite 1111
Herkimer, NY 13350
(315) 867-1135

JEFFERSON COUNTY
County Clerk
175 Arsenal Street
Watertown, NY 13601
(315) 785-3081

LEWIS COUNTY
County Clerk
Courthouse
7660 State Street, 1st Floor
P.O. Box 232
Lowville, NY 13367
(315) 376-5333

LIVINGSTON COUNTY
County Clerk
Courthouse
6 Court Street
Geneseo, NY 14454
(585) 243-7000

MADISON COUNTY
County Clerk
County Office Building
P.O. Box 668
Wampsville, NY 13163
(315) 366-2261

MONROE COUNTY
County Clerk
County Office Building
39 West Main Street, Room 101
Rochester, NY 14614
(585) 428-5151

MONTGOMERY COUNTY
County Clerk
County Office Building
P.O. Box 1500
Fonda, NY 12068
(518) 853-8111

NASSAU COUNTY
County Clerk
County Office Building
240 Old Country Road
Mineola, NY 11501
(516) 571-2661

NIAGARA COUNTY
County Clerk
Courthouse
175 Hawley Street
P.O. Box 461
Lockport, NY 14094
(716) 439-7022

ONEIDA COUNTY
County Clerk
Oneida County Office Building
800 Park Avenue
Utica, NY 13501
(315) 798-5773

ONONDAGA COUNTY
County Clerk
Courthouse
County Office Building
401 Montgomery Street, Room 200
Syracuse, NY 13202
(315) 435-2226

ONTARIO COUNTY
County Clerk
20 Ontario Street
Canandaigua, NY 14424
(585) 396-4200

ORANGE COUNTY
County Clerk
Orange County Government Center
255 Main Street
Goshen, NY 10924
(845) 291-2690

ORLEANS COUNTY
County Clerk
3 South Main Street
Albion, NY 14411
(585) 589-5334

OSWEGO COUNTY
County Clerk
46 East Bridge Street
Oswego, NY 13126
(315) 349-8621

OTSEGO COUNTY
County Clerk
197 Main Street
Cooperstown, NY 13326
(607) 547-4276

PUTNAM COUNTY
County Clerk
Putnam County Office Building
40 Gleneida Avenue, Room 100
Carmel, NY 10512
(845) 225-3641

RENSSELAER COUNTY
County Clerk
105 Third Street
Troy, NY 12180
(518) 270-4080

ROCKLAND COUNTY
County Clerk
Rockland County Courthouse
1 South Main Street, Suite 100
New City, NY 10956
(845) 638-5070

SARATOGA COUNTY
County Clerk
40 McMaster Street
Ballston Spa, NY 12020
(518) 885-2213

SCHENECTADY COUNTY
County Clerk
620 State Street
Schenectady, NY 12305
(518) 388-4220

SCHOHARIE COUNTY
County Clerk
300 Main Street
P.O. Box 549
Schoharie, NY 12157
(518) 295-8316

SCHUYLER COUNTY
County Clerk
County Office Building
105 Ninth Street
Watkins Glen, NY 14891
(607) 535-8133

SENECA COUNTY
County Clerk
Seneca County Office Building
1 DiPronio Drive
Waterloo, NY 13165
(315) 539-1771

ST. LAWRENCE COUNTY
County Clerk
48 Court Street
Canton, NY 13617
(315) 379-2237

STEUBEN COUNTY
County Clerk
3 East Pulteney Square
Bath, NY 14810
(607) 776-9631, ext. 3203

SUFFOLK COUNTY
County Clerk
310 Center Drive
Riverhead, NY 11901
(631) 852-2000

SULLIVAN COUNTY
County Clerk
Sullivan County Government Center
100 North Street
P.O. Box 5012
Monticello, NY 12701
(845) 794-3000, ext. 5012

TIOGA COUNTY
County Clerk
Courthouse
16 Court Street
P.O. Box 307
Owego, NY 13827
(607) 687-8660

TOMPKINS COUNTY
County Clerk
Courthouse
320 North Tioga Street
Ithaca, NY 14850
(607) 274-5431

ULSTER COUNTY
County Clerk
County Office Building
244 Fair Street
P.O. Box 1800
Kingston, NY 12401
(845) 340-3000

WARREN COUNTY
County Clerk
Warren County Municipal Center
1340 State Route 9
Lake George, NY 12845
(518) 761-6429

WASHINGTON COUNTY
County Clerk
County Office Building
383 Broadway, Building A
Ft. Edward, NY 12828
(518) 746-2170

WAYNE COUNTY
County Clerk
County Office Building
9 Pearl Street
P.O. Box 608
Lyons, NY 14489
(315) 946-7470

WESTCHESTER COUNTY
County Clerk
110 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
(914) 995-3071

WYOMING COUNTY
County Clerk
143 North Main Street, Suite 104
Warsaw, NY 14569
(585) 786-8810

YATES COUNTY
County Clerk
County Building
417 Liberty Street, Suite 1107
Penn Yan, NY 14527
(315) 536-5120

E. New York Court of Appeals and Appellate Division Addresses

COURT OF APPEALS

20 Eagle Street
Albany, NY 12207
(518) 455-7700

FIRST DEPARTMENT

Appellate Division
First Department
27 Madison Avenue
New York, NY 10010
(212) 340-0400

District includes: Bronx and New York (Manhattan) counties

SECOND DEPARTMENT

Appellate Division
Second Department
Supreme Court Building
45 Monroe Place
Brooklyn, NY 11201
(718) 875-1300

District includes: Dutchess, Kings (Brooklyn), Nassau, Orange, Putnam, Queens, Richmond (Staten Island), Rockland, Suffolk, and Westchester counties

THIRD DEPARTMENT

Appellate Division
Third Department
Justice Building
P.O. Box 7288
Capitol Station
Albany, NY 12224
(518) 471-4777

District includes: Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, and Washington counties

FOURTH DEPARTMENT

Appellate Division
Fourth Department
M. Dolores Denman Courthouse
50 East Avenue
Rochester, New York 14604
(585) 530-3100

District includes: Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, and Yates counties

A JAILHOUSE LAWYER'S MANUAL

Appendix III: Addresses of New York District Attorneys

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

APPENDIX III

ADDRESSES OF NEW YORK DISTRICT ATTORNEYS

You should send copies of your papers to the District Attorney when you are filing a criminal appeal or Article 440 motion.

ALBANY COUNTY
District Attorney
Albany County
Albany Judicial Center
6 Lodge Street, 4th Floor
Albany, NY 12207
(518) 487-5460

ALLEGANY COUNTY
District Attorney
Allegany County
7 Court Street, Room 212A
Belmont, NY 14813
(585) 268-9225

BRONX
District Attorney
Bronx County
198 East 161st Street, 9th Floor
Bronx, NY 10451
(718) 590-2000

BROOKLYN
See KINGS COUNTY

BROOME COUNTY
District Attorney
Broome County
Press Building
19 Chenango Street, 7th Floor
Binghamton, NY 13901
(607) 778-2423

CATTARAUGUS COUNTY
District Attorney
Cattaraugus County Center
303 Court Street
Little Valley, NY 14755
(716) 938-9111, ext. 2220

CAYUGA COUNTY
District Attorney
Cayuga County
95 Genesee Street
Auburn, NY 13021
(315) 253-1391

CHAUTAUQUA COUNTY
District Attorney
Chautauqua County
County Courthouse
1 North Erie Street
Mayville, NY 14757
(716) 753-4241

CHEMUNG COUNTY
District Attorney
Chemung County
226 Lake Street
P.O. Box 588
Elmira, NY 14902
(607) 737-2944

CHENANGO COUNTY
District Attorney
Chenango County
Courthouse Office Building
5 Court Street, Suite 205
Norwich, NY 13815
(607) 337-1745

CLINTON COUNTY
District Attorney
Clinton County
County Government Center
137 Margaret Street, Suite 201
Plattsburgh, NY 12901
(518) 565-4770

COLUMBIA COUNTY
District Attorney
Columbia County
Courthouse Annex
Hudson, NY 12534
(518) 828-3414

CORTLAND COUNTY
District Attorney
Cortland County Courthouse
46 Greenbush Street, Room 101
Cortland, NY 13045
(607) 753-5008

DELAWARE COUNTY
District Attorney
Delaware County
1 Courthouse Square, Suite 5
Delhi, NY 13753
(607) 746-3557

DUTCHESS COUNTY
District Attorney
Dutchess County Courthouse
236 Main Street
Poughkeepsie, NY 12601
(845) 486-2300

ERIE COUNTY
District Attorney
Erie County
25 Delaware Avenue
Buffalo, NY 14202
(716) 858-2467

ESSEX COUNTY
District Attorney
Essex County
P.O. Box 217
Elizabethtown, NY 12932
(518) 873-3335

FRANKLIN COUNTY
District Attorney
Franklin County Courthouse
355 West Main Street, Suite 466
Malone, NY 12953
(518) 481-1544

FULTON COUNTY
District Attorney
Fulton County Office Building
Johnstown, NY 12095
(518) 736-5511

GENESEE COUNTY
District Attorney
Genesee County Courts Facility
1 West Main Street
Batavia, NY 14020
(558) 344-2550, ext. 2250

GREENE COUNTY
District Attorney
Greene County Courthouse
411 Main Street
Catskill, NY 12414
(518) 719-3590

HAMILTON COUNTY
District Attorney
Hamilton County
277 White Birch Lane
P.O. Box 277
Indian Lake, NY 12842
(518) 648-5113

HERKIMER COUNTY
District Attorney
Herkimer County Courthouse
301 N. Washington Street, Suite 2401
Herkimer, NY 13350
(315) 867-1155

JEFFERSON COUNTY
District Attorney
Jefferson County
175 Arsenal Street
Watertown, NY 13601
(315) 785-3053

KINGS COUNTY
District Attorney
Kings County
350 Jay Street, 19th Floor
Brooklyn, NY 11201
(718) 250-2202

LEWIS COUNTY
District Attorney
Lewis County
7659 South State Street
Lowville, NY 13367
(315) 376-5390

LIVINGSTON COUNTY
District Attorney
Livingston County Courthouse
2 Court Street
Geneseo, NY 14454
(716) 243-7020

MADISON COUNTY
District Attorney
Veterans Memorial Building
North Court Street
P.O. Box 578
Wampsville, NY 13163
(315) 366-2236

MONROE COUNTY
District Attorney
Monroe County
832 Watts Building
47 South Fitzhugh Street
Rochester, NY 14614
(585) 753-4334

MONTGOMERY COUNTY
District Attorney
58 Broadway Court Street
P.O. Box 1500
Fonda, NY 12068
(518) 853-8250

NASSAU COUNTY
District Attorney
Nassau County Courthouse
262 Old Country Road
Mineola, NY 11501
(516) 571-3800

NEW YORK COUNTY
District Attorney
New York County
1 Hogan Place, Room 854
New York, NY 10013
(212) 335-9000

NIAGARA COUNTY
District Attorney
Niagara County Courthouse
175 Hawley Street
Lockport, NY 14094
(716) 439-7085

ONEIDA COUNTY
District Attorney
Oneida County Courthouse
800 Park Avenue
Utica, NY 13501
(315) 798-5766

ONONDAGA COUNTY
District Attorney
Onondaga County
505 South State Street, 4th Floor
Syracuse, NY 13202
(315) 435-2470

ONTARIO COUNTY
District Attorney
Ontario County Courthouse
27 North Main Street
Canandaigua, NY 14424
(716) 396-4010

ORANGE COUNTY
District Attorney
Orange County Government Center
255-275 Main Street
Goshen, NY 10924
(845) 291-2050

ORLEANS COUNTY
District Attorney
13925 State Route 31, Suite 300
Albion, NY 14411
(585) 590-4130

OSWEGO COUNTY
District Attorney
Oswego County
Courthouse
39 Churchhill Road
Oswego, NY 13326
(315) 349-3200

OTSEGO COUNTY
District Attorney
Otsego County
197 Main Street
Cooperstown, NY 13326
(607) 547-4249

PUTNAM COUNTY
District Attorney
Putnam County Office Building
40 Gleneida Avenue
Carmel, NY 10512
(845) 225-3641, ext. 277

QUEENS COUNTY
District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415
(718) 286-6000

RENSSELAER COUNTY
District Attorney
Rensselaer County Courthouse
Congress and 2nd Streets
Troy, NY 12180
(518) 270-4040

RICHMOND COUNTY
District Attorney
Richmond County
130 Stuyvesant Place, 7th Floor
Staten Island, NY 10301
(718) 876-6300

ROCKLAND COUNTY
District Attorney
Rockland County
County Office Building
1 South Maine Street, 5th Floor
New City, NY 10956
(845) 638-5001

SARATOGA COUNTY
District Attorney
Saratoga County Municipal Center
25 West High Street
Ballston Spa, NY 12020
(518) 885-2263

SCHENECTADY COUNTY
District Attorney
Schenectady County Courthouse
612 State Street
Schenectady, NY 12305
(518) 388-4364

SCHOHARIE COUNTY
District Attorney
Schoharie County
Public Safety Building
P.O. Box 888
Schoharie, NY 12157
(518) 295-2272

SCHUYLER COUNTY
District Attorney
Schuyler County
105 9th Street, Unit 26
Watkins Glen, NY 14891
(607) 535-8383

SENECA COUNTY
District Attorney
Seneca County
48 West Williams Street
Waterloo, NY 13165
(315) 539-1300

ST. LAWRENCE COUNTY
District Attorney
St. Lawrence County
48 Court Street
Canton, NY 13617
(315) 379-2225

STATEN ISLAND
See RICHMOND COUNTY

STEUBEN COUNTY
District Attorney
Steuben County Office Building
3 East Pulteney Square
Bath, NY 14810
(607) 776-2270

SUFFOLK COUNTY
District Attorney
Suffolk County
North County Complex, Building 77
Veterans Memorial Highway
Hauppauge, NY 11788
(631) 853-4169

SULLIVAN COUNTY
District Attorney
Sullivan County Courthouse
414 Broadway
Monticello, NY 12701
(845) 794-3344

TIOGA COUNTY
District Attorney
Tioga County
20 Court Street
P.O Box 300
Owego, NY 13827
(607) 687-8650

TOMPKINS COUNTY
District Attorney
Tompkins County Courthouse
320 North Tioga Street
Ithaca, NY 14850
(607) 274-5461

ULSTER COUNTY
District Attorney
Ulster County Courthouse
275 Wall Street
Kingston, NY 12401
(845) 340-3280

WARREN COUNTY
District Attorney
Warren County
1340 State Route 9
Lake George, NY 12845
(518) 761-6405

WASHINGTON COUNTY
District Attorney
Washington County Courthouse
383 Upper Broadway
Ft. Edward, NY 12828
(518) 746-2525

WAYNE COUNTY
District Attorney
Wayne County Courthouse
Hall of Justice
54 Broad Street, Suite 202
Lyons, NY 14489
(315) 946-5905

WESTCHESTER COUNTY
District Attorney
Westchester County
Richard J. Daronco Courthouse
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
(914) 995-3414

WYOMING COUNTY
District Attorney
Wyoming County
147 North Main Street
Warsaw, NY 14569
(716) 786-8822

YATES COUNTY
District Attorney
Yates County
415 Liberty Street
Penn Yan, NY 14527
(315) 536-5550

A JAILHOUSE LAWYER'S MANUAL

Appendix IV: Directory of Legal and Social Services for Prisoners

Columbia Human Rights Law Review

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Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

APPENDIX IV

DIRECTORY OF LEGAL AND SOCIAL SERVICES FOR PRISONERS

This Appendix contains a directory of legal and social services that will be useful for prisoners, those leaving prison, and their families. Please be aware that this type of information changes rapidly.

A. Legal Services

(1) Organizations that Specifically Serve Prisoners
(2) Organizations that Serve Specific Regional and Cultural Interest Groups
(3) Organizations that Do Not Specifically Serve Prisoners
(4) Other Legal Services Organizations
   a. New York City
   b. Other Counties
(5) Organizations that Specialize in Death Penalty Cases

B. Social Services

(1) New York City
(2) Other Counties

C. Official Corrections Agencies

(1) Watchdog Agencies
(2) Administrative Agencies

A. Legal Services

1. Organizations That Specifically Serve Prisoners

(a) Prisoners' Legal Services of New York ("PLS")

If you are a prisoner at a New York State correctional facility in need of legal assistance, you should first contact PLS. PLS provides legal services, free of charge, to prisoners of New York State prisons who cannot afford legal representation. PLS will only handle cases that other attorneys and legal services are unlikely to handle. For example, PLS does not handle criminal trials or direct criminal appeals because these are normally handled by private attorneys or legal service organizations. However, PLS will provide assistance to prisoners for other matters.

If you qualify for PLS legal assistance, you should contact the PLS office serving your institution (see below). Because of budget cuts, PLS has in the past been forced to stop services temporarily. Check with the PLS serving your institution for more information. Application forms for PLS assistance should be available in the prison law library. The offices are listed below:

301 South Allen Street
Albany, NY 12208
(518) 438-8046

Prisons served: Arthur Kill, Bayview, Bedford Hills, Camp Beacon, Central New York Psychiatric Center, Coxsackie, Downstate, Eastern, Edgecomb, Fishkill, Fulton, Great Meadow, Green Haven, Greene, Hail Creek ASATC, Hudson, Lincoln, Lincoln Annex, Marcy, Mid-Orange, Mohawk, Mount McGregor, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Summit Shock, Taconic, Ulster, Walkill, Walsh Medical Center, Washington, and Woodbourne.

121 Bridge Street
Suite 202
Plattsburgh, NY 12901
(518) 561-3088
FAX: (518) 561-3262

Prisons served: Adirondack, Altona, Barehill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensberg, Riverview, and Upstate.

Statler Towers
Suite 1360
107 Delaware Avenue
Buffalo, NY 14202
(716) 854-1007

Prisons served: Attica, Albion, Buffalo, Collins, Groveland, Camp Groveland, Lakeview, Lakeview ASATCA, Livingston, Orleans, Rochester, Wende, and Wyoming.

102 Prospect Street
Ithaca, NY 14850
(607) 273-2283

Prisons served: Auburn, Butler, Camp Georgetown, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Monteray Shock, Southport, Camp Pharsalia, Watertown, and Willard.

(b) Other Organizations Serving Prisoners in New York

Prisoners' Rights Project
The Legal Aid Society
Criminal Appeals Bureau
199 Water Street, 6th Floor
New York, NY 10038
(212) 577-3530
http://www.legal-aid.org/en/ineedhelp/civilproblem/prisonersrightsproject.aspx

This organization specializes in cases involving jail and confinement conditions. It represents New York City residents incarcerated in city jails or New York State prisons. It handles only those cases that

might expand prisoners' rights or improve prison conditions for large numbers of prisoners; thus, it rarely accepts cases involving only individual prisoners.

Parole Revocation Unit
The Legal Aid Society
Criminal Defense Division
111 Livingston Street
Brooklyn, NY 11201
(212) 577-3500

This organization represents prisoners who either violate or are accused of violating parole. It represents only New York City residents in city jails or New York State prisons.

National Lawyers Guild, Buffalo Chapter
Prison Task Force
John Lord O'Brian Hall
State University of New York Law School
Buffalo, NY 14260
E-mail: buffaloptf@yahoo.com

The Prison Task Force goes to prisons to provide eight-week courses for prisoners in legal research and writing.

American Civil Liberties Union
National Prison Project
915 15th Street NW, 7th Floor
Washington, D.C. 20005
(202) 393-4930
www.aclu.org/prison

The National Prison Project is the only organization to litigate on behalf of prisoners at a national level. Since its founding in 1972, the National Prison Project has worked in more than twenty-five states to improve conditions of confinement.

2. Organizations That Serve Specific Regional and Cultural Interest Groups

These groups are in no way affiliated with consulates and receive no rights or privileges under the Vienna Convention. They also tend not to represent individual criminal defendants. They may be interested in your case if you have a claim that you are being discriminated against because of your ethnic or cultural background. In addition, most of these organizations will probably provide you with a referral.

If you are experiencing difficulties of a religious nature (for example, if you cannot find a clergyperson of your faith or are not being allowed to practice your religion), you should also consult the resources listed in Chapter 27 of the *JLM*, "Religious Freedom in Prison."

AFRICAN
African Services Committee, Inc.
429 West 127th Street
New York, NY 10016
(212) 222-3882
African Services Committee, Inc. provides social services and conducts outreach programs for immigrants from Africa, the Caribbean, and the Middle East, without regard to ethnicity. They also provide referrals.

NAACP National Headquarters
4805 Mt. Hope Drive
Baltimore, MD 21215
(877) 622-2798
The National Association for the Advancement of Colored People ("NAACP") helps all minority people in the United States. It can only take a few legal cases every year, but it may be able to provide referrals. It also has a wide variety of non-legal programs.

ARAB

American-Arab Anti-Discrimination Committee
1732 Wisconsin Avenue NW
Washington, D.C. 20007
(202) 244-2990
E-mail: legal@adc.org
www.adc.org
The American-Arab Anti-Discrimination Committee is a national grassroots non-profit civil rights organization that defends the civil rights of Arab-Americans.

ASIAN

Asian-American Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013
(212) 966-5932
www.aaldef.org
Asian-American Legal Defense and Education Fund may be particularly interested in your case if it involves police brutality. They do not represent criminal defendants; instead, they usually conduct large-scale impact litigation (lawsuits that are designed to get a result for a broad class of people) on civil issues, much like the American Civil Liberties Union.

Asian Counseling & Referral Service
3639 Martin Luther King Jr. Way South
Seattle, WA 98144
(206) 695-7600
www.acrs.org
Asian Counseling and Referral Service is a community-based, multi-cultural, multilingual, private nonprofit organization that provides and advocates for social services to empower Asian and Pacific Islanders.

Asian Law Caucus, Inc.
55 Columbus Avenue
San Francisco, CA 94111
(415) 896-1701
www.asianlawcaucus.org
Asian Law Caucus, Inc. serves the needs of predominantly monolingual, low-income Asian Pacific Americans living in the San Francisco Bay Area. It provides legal services and educational programs, in English and seven Asian languages, in the areas of civil rights, housing, employment, immigration, and the rights of the elderly.

Organization of Chinese Americans (OCA)
1322 18th Street NW
Washington, D.C. 20036
(202) 223-5500
www.ocanational.org
OCA is a civil rights organization that lobbies on behalf of Chinese-Americans and other Asian-Americans.

World Relief
316 Maynard Avenue South #103
Seattle, WA 98104
(206) 587-0234
World Relief is a Christian organization that provides free legal representation for refugees and assists with employment and citizenship.

CARIBBEAN

Caribbean Bar Association
200 South Biscayne Boulevard, Suite 2680
Miami, FL 33131
(305) 548-3800
www.caribbeanbar.org
The Caribbean Bar Association ("CBA") is a voluntary bar organization that has over 150 attorneys from the Caribbean-American community in Florida. CBA attorneys work in the public and private sector and practice in several areas of the law, including criminal and commercial litigation.

National Association of Jamaican and Supportive Organizations ("NAJASO")
4440 Hill Avenue
Bronx, NY 10466
718-994-5496
http://www.najaso.org/
E-mail: president@najaso.org
NAJASO addresses general problems affecting Caribbean communities in the United States. See also AFRICAN.

HMONG

Hmong National Development, Inc. ("HND")
1628 Sixteenth St. N.W., Suite 203
Washington, DC 20009
(202) 797-9105
http://www.hndinc.org/
E-mail: info@hndinc.org
HND advocates on behalf of Hmong-American communities through legal advocacy, civic engagement, and policy advocacy.

JEWISH (ALL NATIONALITIES)

Jewish Family and Children's Services
2150 Post Street
San Francisco, CA 94115
(415) 449-1200
www.jfcs.org
Jewish Family and Children's Services helps refugees, immigrants, and other newcomers to the San Francisco Bay area and provides services in Russian.

Jewish Federation of Greater Philadelphia
2100 Arch Street
Philadelphia, PA 19103
(215) 832-0500
http://www.jewishphilly.org/index.html
Jewish Federation of Greater Philadelphia tends to assist Israeli and Ethiopian Jews who have recently immigrated to the United States.

Jewish Prisoner Services International
P.O. Box 85840
Seattle, WA 98145
(206) 985-0577 (206) 528-0363
E-mail: jewishprisonerservices@msn.com
http://www.jewishprisonerservices.org/
Provides pen pals, advocacy, and outreach programs for Jewish offenders. See also the Appendix to JLM Chapter 27, "Religious Freedom in Prison" for religious outreach programs.

KURDISH

American Kurdish Information Network ("AKIN")
2722 Connecticut Avenue NW, #42
Washington, D.C. 20008
(202) 483-6444
E-mail: akin@kurdish.org

LATIN AMERICAN

Alianza Dominicana
2410 Amsterdam Ave., 4th Floor
New York, NY 10033
212-740-1960
Alianza Dominicana maintains several offices in northern Manhattan in New York City. They do not provide legal assistance but can help you with a wide variety of related matters, including drug addiction, health problems, and gay and lesbian concerns.

Hispanic National Bar Association
Benjamin Franklin Station
P.O. Box 14347
Washington, D.C. 20044
(202) 223-4777
Hispanic National Bar Association maintains a directory of over 4,000 Hispanic attorneys nationwide and may be able to assist consulates.

Mexican-American Legal Defense and Educational Fund ("MALDEF")
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512
Mexican-American Legal Defense and Educational Fund promotes equality and protects the civil rights of Hispanics nationwide through litigation, leadership training, and law school scholarships.

National Association of Cuban-American Women
308 38th Street
Union City, NJ 07087
Attn: Ms. Siomara Sanchez
National Association of Cuban-American Women will normally try to help anyone from a Latin American country, especially with their immigration paperwork. They do not represent criminal defendants but may be able to provide referrals.

LatinoJustice PRLDEF (Puerto Rican Legal Defense and Education Fund)
99 Hudson Street, 14th Floor
New York, NY 10013-2815
(212) 219-3360; Toll Free: (800) 328-2322
www.prldef.org
LatinoJustice PRLDEF conducts primarily large-scale, civil impact litigation. They do not represent criminal defendants, but you can contact them if your rights are being violated, and they will at least provide you with a referral. They help all Hispanic people, not just Puerto Ricans.

NATIVE AMERICAN

International Indian Treaty Council ("IITC")
2390 Mission Street
Suite 301
San Francisco, CA 94110
(415) 641-4482
www.treatycouncil.org
International Indian Treaty Council is an organization of indigenous peoples from North, Central, and South America, the Caribbean and the Pacific, which seeks to protect indigenous human rights, culture, and sacred lands. Services are also available in Spanish.

Native American Rights Fund ("NARF")
1506 Broadway
Boulder, CO 80302
(303) 447-8760
www.narf.org
NARF provides legal representation and assistance to Indian tribes. They probably will not take your case if it will affect only you as an individual, but they can provide referrals.

United American Indians of New Engand
284 Amory Street
Jamaica Plain, MA 02130
(617) 522-6626
www.uaine.org

3. Organizations That Do Not Specifically Serve Prisoners

The following is a list of legal organizations that have previously represented prisoners or groups of prisoners in cases involving prison conditions, parole, sentencing, etc. Note that the primary function of these organizations is not to provide legal services to prisoners.

American Civil Liberties Union ("ACLU")
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
www.aclu.org
The ACLU's mission is to preserve all of the protections and guarantees of the United States Constitution.

Center for Constitutional Rights ("CCR")
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
www.ccrjustice.org
CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

Children's Defense Fund
Juvenile Justice Division
25 East Street NW
Washington, D.C. 20001
(202) 628-8787
www.childrensdefense.org
The Children's Defense Fund provides assistance to women prisoners with legal problems involving custody of their children.

Community Law Offices ("CLO") of
The Legal Aid Society
Volunteer Division
230 E. 106th Street
New York, NY 10029
(212) 426-3000
www.legal-aid.org
Provides free legal services to residents of Central and East Harlem who meet its low income requirements. CLO handles civil matters; however, it has not had extensive dealings with the Parole Board, Corrections Department, disciplinary hearings, or prisoners' rights litigation.

Jewish Board of Family and Children's Services ("JBFCS")
120 W. 57th Street
New York, NY 10019
(212) 582-9100; Toll Free: (888) 523-2769
E-mail: admin@jbfcs.org
www.jbfcs.org
This organization is a nonprofit mental health and social services agency providing a range of community-based programs, residential facilities, and day-treatment centers. JBFCS makes referrals to legal services through its family violence prevention program, and provides therapy to adolescents who have been involved with the criminal justice system through its juvenile justice program.

Legal Action Center ("LAC")
225 Varick Street
New York, NY 10014
(212) 243-1313; Toll Free: (800) 223-4044
www.lac.org
The Legal Action Center is a public interest law firm that generally handles law reform litigation. LAC has a program that focuses on challenging discrimination against ex-offenders, especially in employment. It has also handled challenged guard brutality at a New York City correctional institution.

National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025
www.nelp.org
Handles employment discrimination cases. Ex-offenders with employment-related problems and prisoners with work-related problems should contact this organization.

National Lawyers Guild ("NLG") National Office
132 Nassau Street, Suite 922
New York, NY 10038
(212) 679-5100
www.nlg.org
The NLG seeks to unite the lawyers, law students, legal workers and jailhouse lawyers of America in an organization that acts as an effective political and social force in the service of the people to promote human rights.

4. Other Legal Services Organizations

Below is a list of free legal service organizations in New York City and State. These groups do not necessarily provide legal services to prisoners. But, if you are a prisoner at a city or county jail in either New York City or New York State, and you do not have access to any of the organizations listed above, you should contact a general legal service organization in the city or county where you are incarcerated. However, be aware that law or the people funding them might prevent them from helping prisoners.

If you are a prisoner at a state institution and seek legal assistance in a criminal trial or direct criminal appeal, you should contact a legal service organization in the city or county where you are incarcerated. Many counties in New York State have a public defender's office and a county bar association program designed to assist you by providing free legal counsel. These organizations are not listed below. To find the address for your county's public defender's office and bar association program, ask your librarian or consult a telephone book for your county.

(a) Legal Services Organizations in New York City

(i) The Legal Aid Society (Civil and Criminal Divisions)

MANHATTAN
Civil Practice
199 Water Street, 3rd Floor
New York, NY 10038
(212) 577-3300; Toll Free: (888) 218-6974

Criminal Defense Office
49 Thomas Street
New York, NY 10013
(212) 732-5000

Juvenile Rights Office
New York County Family Court Building
60 Lafayette Street, Room 9A
New York, NY 10013
(212) 312-2260

Harlem Community Law Office (Civil)
230 E. 106th Street
New York, NY 10029
(212) 426-3000

BRONX
Civil Practice
953 Southern Boulevard, 4th Floor
Bronx, NY 10459
(718) 991-4600

Criminal Defense Office
1020 Grand Concourse
Bronx, NY 10451
(718) 579-3000

Juvenile Rights Office
Bronx County Family Court Building
900 Sheridan Avenue, Room 6-C12
Bronx, NY 10451
(718) 579-7900

BROOKLYN
Civil and Criminal Practices
111 Livingston Street
Brooklyn, NY 11201
(718) 722-3100 (Civil Practice)
(718) 237-2000 (Criminal Defense Office)

Juvenile Rights Office
111 Livingston Street
Brooklyn, NY 11201
(718) 237-3100

QUEENS
Civil and Criminal Division
120-46 Queens Boulevard
Kew Gardens, NY 11415
(718) 286-2450 (Civil Division)
(718) 286-2000 (Criminal Division)

STATEN ISLAND
Civil Division
60 Bay Street
Staten Island, NY 10301
(718) 273-6677

Juvenile Rights Division
60 Bay Street
Staten Island, NY 10301
(718) 981-0219

(ii) Community Action for Legal Services (civil cases only)

MANHATTAN
Legal Services for New York - Manhattan
90 John Street, Suite 301
New York, NY 10038
(646) 442-3100

Harlem Legal Services, Inc.
55 West 125th Street, 10th Floor
New York, NY 10027
(212) 348-7449

BROOKLYN
South Brooklyn Legal Services
105 Court Street, 3rd Floor
Brooklyn, New York, NY 11201
(718) 237-5500

Legal Services of Brooklyn
3049 Brighton Sixth Street
Brooklyn, NY 11235
(718) 852-8888

Bedford-Stuyvesant Community Legal Services
1360 Fulton Street, 3rd Floor
Brooklyn, NY 11216
(718) 636-1155

Brooklyn Legal Services Corp. A
80 Jamaica Avenue
Brooklyn, NY 11207
(718) 487-1300

BRONX
Bronx Legal Services Corporation
579 Courtlandt Ave.
Bronx, NY 10451
(718) 928-3700

QUEENS
Queens Legal Services Corporation
89-00 Sutphin Boulevard
Jamaica, NY 11435
(718) 657-8611

Queens Legal Services Corporation
42-15 Crescent Street
Long Island City, NY 11101
(718) 392-5646

(b) Legal Services Organizations in Other Counties (Legal Aid & CALS)

ALBANY COUNTY
Legal Aid Society of Northeastern New York
55 Colvin Avenue
Albany, NY 12206
(518) 462-6765; Toll Free: (800) 462-2922
www.lasnny.org

ALLEGANY COUNTY
Southern Tier Legal Services
104 East Steuben Street
Bath, NY 14810
(607) 776-4126; Toll Free: (877) 776-4126

AUBURN COUNTY
Legal Services of Mid-New York
472 South Salina Street, Suite 300B
Syracuse, NY 13202
(315) 475-3127
www.lasmny.org

BROOME COUNTY
Legal Aid Society of Mid-New York
30 Fayette Street
Binghamton, NY 13901
(607) 723-7966
www.lasmny.org

CATTARAUGUS COUNTY
Southern Tier Legal Services
103 South Barry Street
Olean, NY 14760
(716) 373-4701; Toll Free: (888) 767-1950

CAYUGA COUNTY
Legal Aid Society of Mid-New York, Inc.
472 South Salina Street, Suite 300
Syracuse, NY 13202
(315) 703-6600
www.lasmny.org

CHAUTAUQUA COUNTY
Legal Aid of Chautauqua Region, Inc. (LACR)
111 West 2nd Street, Suite 250
Jamestown, NY 14701
(716) 483-2116
(716) 664-9590 (fax)

Southern Tier Legal Services
Hotel Jamestown Building
110 West Third Street, Suite 507
Jamestown, NY 14701
(716) 664-4535; Toll Free: (866) 664-4567

CHEMUNG COUNTY
Chemung County Neighborhood Legal Services
215 East Church Street, Suite 301
Elmira, NY 14901
(607) 734-1647
www.wnylc.net

COLUMBIA COUNTY
Legal Aid Society of Northeastern New York
55 Colvin Avenue
Albany, NY 12207
(518) 462-6765
www.lasnny.org

CORTLAND COUNTY
Legal Aid Society of Mid-New York
111 Port Watson Street
Cortland, NY 13045
(607) 428-8400
www.lasmny.org

ERIE COUNTY
New York Civil Liberties Union,
Western Region
712 Main St # B2
Buffalo, NY 14202
(716) 852-4033
www.nyclu.org

Legal Aid Bureau of Buffalo, Inc.
Civil, Public Defender, and Appellate Divisions
237 Main Street, Suite 1602
Buffalo, NY 14203
(716) 853-9555
www.legalaidbuffalo.org

GENESEE COUNTY
Oak Orchard Legal Services
5073 Clinton Street Road
Batavia, NY 14020
(585) 343-5450

GREENE COUNTY
Legal Aid Society of Northeastern New York, Inc.
55 Colvin Avenue
Albany, NY 12207
(518) 462-6765; Toll Free: (800) 462-2922
www.lasnny.org

JEFFERSON COUNTY
Legal Aid Society of Mid-New York, Inc.
44 Public Square
Watertown, NY 13601
(315) 955-6700
www.lasmny.org

Legal Aid Society of Nassau County
Criminal Bureau
1 Helen Keller Way, 3rd Floor
Hempstead, NY 11550
(516) 560-6400

Legal Aid Society of Rochester
1 West Main Street, Suite 800
Rochester, NY 14614
(585) 232-4090
www.lasroc.org

Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
(914) 949-1305
www.lshv.org

LEWIS COUNTY
Legal Aid Society of Mid-New York
44 Public Square
Watertown, NY 13601
(315) 788-2072 (General Office)
(315) 955-6700 (Lewis County Office)
www.lasmny.org

LIVINGSTON COUNTY
Legal Assistance of the Finger Lakes
P.O. Box 487
1 Franklin Square
Geneva, NY 14456
(315) 781-1465
www.lawny.org

MONROE COUNTY
Monroe County Legal Assistance Center
1 West Main Street, 4th Floor
Rochester, NY 14614
(585) 325-2520
www.mclac.org

Monroe County Legal Assistance Center
80 St. Paul Street, Suite 700
Rochester, NY 14604
(585) 325-2520
www.mclac.org

Empire Justice Center
1 West Main Street
Rochester, NY 14614
(585) 454-4060
www.empirejustice.org

NASSAU COUNTY
Nassau/Suffolk Law Services
1 Helen Keller Way, 5th Floor
Hempstead, NY 11550
(516) 292-8100
www.nslawservices.org

NIAGARA COUNTY
Niagara County Legal Aid Society
775 Third Street, P.O. Box 844
Niagara Falls, NY 14302
(716) 284-8831

ONEIDA COUNTY
Legal Aid Society of Mid-New York, Inc.
255 Genesee Street, 2nd Floor
Utica, NY 13501
(315) 793-7000
www.lasmny.org

ONONDOGA COUNTY
Frank H. Hiscock Legal Aid Society
351 South Warren Street #2515
Syracuse, NY 13202
(315) 422-8191
www.hiscocklegalaid.org

Legal Aid Society of Mid-New York, Inc.
472 South Salina Street, Suite 300
Syracuse, NY 13202
(315) 703-6600
www.lasmny.org

ONTARIO COUNTY
Legal Assistance of the Finger Lakes
P.O. Box 487
1 Franklin Square
Geneva, NY 14456
(315) 781-1465
www.lawny.org

ORANGE COUNTY
Legal Aid Society of Orange County
P.O. Box 328
2 Court Lane
Goshen, NY 1092
(845) 562-1333

ORLEANS COUNTY
Oak Orchard Legal Services
5073 Clinton Street Road
Batavia, NY 14020
(585) 343-5450

OSWEGO COUNTY
Legal Aid Society of Mid-New York
108 West Bridge Street
Oswego, NY 13126
(315) 342-2191

OTSEGO COUNTY
Legal Aid Society of Mid-New York
P.O. Box 805
387 Chestnut Street
Oneonta, NY 13820
(607) 433-2600

PUTNAM COUNTY
Putnam County Legal Aid Society
19 Fair Street
Carmel, NY 10512
(845) 225-8466

RENSSELAER COUNTY
Legal Aid Society of Northeastern New York
55 Colvin Avenue
Albany, NY 12206
(518) 462-6765
www.lasnny.org

ROCKLAND COUNTY
Legal Aid Society of Rockland County
2 Congers Road
New City, NY 10956
(845) 634-3627

SARATOGA COUNTY
Legal Aid Society of Northeastern New York
10 Lake Avenue
Saratoga Springs, NY 12866
(518) 587-5188
www.lasnny.org

SCHENECTADY COUNTY
Legal Aid Society of Northeastern New York
55 Colvin Avenue
Albany, NY 12206
(518) 462-6765
www.lasnny.org

SENECA COUNTY
Legal Assistance of the Finger Lakes
P.O. Box 487
1 Franklin Square
Geneva, NY 14456
(315) 781-1465; Toll Free: (866) 781-5235
www.lawny.org

STEUBEN COUNTY
Southern Tier Legal Services
104 East Stueben Street
Bath, NY 14810
(607) 776-4126

SUFFOLK COUNTY
Legal Aid Society of Suffolk County
Juvenile Rights Law Guardian Office
Cohalan Court Complex
P.O. Box 9082
400 Carleton Avenue
Central Islip, NY 11722
(631) 853-4336

Criminal Division Offices
Cromarty Courts Building
300 Center Drive
Riverhead, NY 11901
(631) 852-1650

SULLIVAN COUNTY
Sullivan County Legal Aid Panel Inc.
11 Bank Street
Monticello, NY 12701
(845) 794-4094

TIOGA COUNTY
Tompkins/Tioga Neighborhood Legal Services
215 N. Cayuga Street
Ithaca, NY 14850
(607) 273-3667; Toll Free: (800) 724-4176
www.mclac.org

TOMPKINS COUNTY
Cornell Legal Aid Clinic
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-4196

Tompkins/Tioga Neighborhood Legal Services
215 N. Cayuga Street
Ithaca, NY 14850
(607) 273-3667 or Toll Free: (800) 724-4176
www.mclac.org

WAYNE COUNTY
Legal Assistance of the Finger Lakes
1 Franklin Square, P.O. Box 487
Geneva, NY 14456
(315) 781-1465; Toll Free: (866) 781-5235
www.mclac.org

WESTCHESTER COUNTY
Legal Aid Society
1 North Broadway, Suite 910
White Plains, NY 10601
(914) 286-3400

WYOMING COUNTY
Oak Orchard Legal Services
5073 Clinton Street Road
Batavia, NY 14020
(585) 343-5450

YATES COUNTY
Legal Assistance of the Finger Lakes
1 Franklin Square, P.O. Box 487
Geneva, NY 14456
(315) 781-1465; Toll Free: (866) 781-5235
www.mclac.org

5. Organizations that Specialize in Death Penalty Cases

NATIONAL
American Bar Association
Death Penalty Representation Project
740 15th Street NW, 9th Floor
Washington D.C., 20005-1009
(202) 662-1738
FAX: (202) 662-8649
www.abanet.org/deathpenalty/

ALABAMA
Equal Justice Initiative
Bryan Stevenson, Executive Director
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
FAX: (334) 269-1806
www.eji.org

ARIZONA
Arizona Justice Project, azjusticeproject.org, 480-727-0009, Arizona Justice Project c/o Sandra Day O'Connor College of Law, P. O. Box 877906, Tempe, AZ 85287-7906

CALIFORNIA
California Appellate Project
Michael G. Millman, Esq.
101 2nd Street, Suite 600
San Francisco, CA 94105
(415) 495-0500
FAX: (415) 495-5616
http://www.capsf.org

Habeas Corpus Resource Center
Michael Laurence, Esq.
50 Fremont St., Suite 1800
San Francisco, CA 94105
(415) 348-3800
www.hcrc.ca.gov

COLORADO
Federal Public Defender
633 12th Street, Suite 1000
Denver, CO 80202
(303) 294-7002
FAX: (303) 294-1192

CONNECTICUT
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800
FAX: (203) 432-1426

FLORIDA
Commission on Capital Cases
402 S. Monroe Street
Tallahassee, FL 32399-1300
(850) 921-4704
FAX: (850) 921-4737

GEORGIA
Southern Center for Human Rights
Lisa Kung, Director
83 Poplar Street, NW
Atlanta, GA 30303
(404) 688-1202
FAX: (404) 688-9440
www.schr.org

Georgia Appellate Practice and Educational Resource Center
Tom Dunn, Director
303 Elizabeth Street, NE
Atlanta, GA 30307
(404) 222-9202
FAX: (404) 222-9212

IDAHO
Capital Habeas Unit
317 W. 6th Street, Suite 204
Moscow, ID 83843
(208) 883-0180
FAX: (208) 883-1472
http://www.fdewi.org/

ILLINOIS
Office of the State Appellate Defender
Post-Conviction Unit
20 North Clark Street, 28th Floor
Chicago, IL 60602
(312) 814-5100
FAX: (312) 814-5951

INDIANA
Public Defender of Indiana
Susan Carpenter
1 North Capitol, Suite 800
Indianapolis, IN 46204
(317) 232-2475
(Only state court post-conviction relief)

KANSAS
Paul E. Wilson Kansas Defender Project
University of Kansas School of Law
1535 W 15th Street
Green Hall #409
Lawrence, KS 66045
(785) 864-5571

Death Penalty Defense Unit
112 West Sixth, Suite 300
Topeka, KS 66603
(785) 296-6555

KENTUCKY
Department of Public Advocacy
Capital Post-Conviction Branch
100 Fair Oaks Lane, Suite 301
Frankfort, KY 40601
(502) 564-3948
FAX: (502) 564-3949

LOUISIANA
Center for Equal Justice
7100 St. Charles Avenue
New Orleans, LA 70118
(504) 864-0700
FAX: (504) 864-0780

Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867
FAX: (504) 558-0378

MARYLAND
Federal Public Defender
Northern Division
Tower II, Suite 1100
100 South Charles Street
Baltimore, MD 21201-2705
(410) 962-3962
FAX: (410) 962-0872

Federal Public Defender
Southern Division
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770-4510
(301) 344-0600
FAX: (301) 344-0019

MISSOURI
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
(816) 363-2795
FAX: (816) 363-2799

Eastern Federal Public Defender
1010 Market Street, Suite 200
St. Louis, MO 63101
(314) 241-1255
FAX: (314) 421-3177

NEVADA
Nevada Federal Public Defender
330 South 3rd St., Suite 700
Las Vegas, NV 89101
(702) 388-6577 ext. 279

NEW JERSEY
Office of the Public Defender – Capital Litigation
Huges Justice Complex
1st Floor, N-Wing
25 Market Street
P.O. Box 850
Trenton, NJ 08625
(609) 292-7087

NEW YORK
Capital Defender Office c/o Arnold & Porter
399 Park Avenue, 34th Floor
New York, NY 10022
(917) 301-6761

NORTH CAROLINA
Center for Death Penalty Litigation
201 West Main St., Suite 301
Durham, North Carolina 27701
(919) 956-9545
FAX: (919) 956-9547

OHIO
Ohio Public Defender
Death Penalty Division
8 East Long Street, Suite 1100
Columbus, Ohio 43215-2998
(614) 466-5394; Toll Free: (800) 686-1573
FAX: (614) 728-3670
www.opd.ohio.gov

OKLAHOMA
Oklahoma Indigent
Defense System
P.O. Box 926
Norman, OK 73070
(405) 801-2700 (Capital Trials)
(405) 801-2665 (Capital Direct Appeals)
(405) 801-2770 (Capital Post-Conviction)
www.state.ok.us/~oids/divisions.htm

OREGON
Office of Public Defense Services
1320 Capitol Street NE, Suite 200
Salem, OR 97303-6469
(503) 378-3349
FAX: (503) 375-9701
www.opd.state.or.us

PENNSYLVANIA
Defender Association of Philadelphia
1441 Sansom St
Philadelphia, PA 19102
(215) 568-3190

Capital Habeas Unit
Federal Community Defender Office
The Curtis Center
Independence Square West
Suite 545 West
Philadelphia, PA 19106

SOUTH CAROLINA
Center for Capital Litigation
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650
FAX: (803) 765-0705

TENNESSEE
Tennessee Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
FAX: (615) 736-5265

TEXAS
Texas Defender Service
412 Main Street, Suite 1150
Houston, TX 77002
(713) 222-7788
FAX: (713) 222-0260

Texas Defender Service – Austin Office
510 South Congress, Suite 304
Austin, Texas 78704
(512) 320-8300
FAX: (512) 477-2153
www.texasdefender.org

Texas Defender Service – Houston Office
Texas Defender Service
412 Main Street, # 1150
Houston, Texas 77002
(713) 222-7788
FAX: (713) 222-0260
www.texasdefender.org

VIRGINIA
Virginia Capital Representation Resource Center
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
Toll Free: (800) 697-6841

WYOMING
Legal Services for Southeast Wyoming
1620 Central Avenue, Suite 200
Cheyenne, Wyoming 82001-4575
(307) 634-1566

B. Social Services

The following is a list of social service agencies and prisoners' rights projects in New York City and New York State. Most do not provide legal services, although many refer clients to legal services. Some of these organizations provide counseling, referral, and support services specifically for prisoners and ex-offenders. Others provide services to members of the general public. Offenders and ex-offenders should contact any of the listed agencies with their problems.

A short description of the services provided follows most addresses. In some of the counties in New York State, no agencies are listed. This does not necessarily mean that no social service agencies exist in these counties. If there are no agencies listed for your county, you should consult your telephone book for a Department of Social Services office under either the name of the county or New York State; you should also consult the listings for neighboring counties.

1. Social Services in New York City

In the New York City listings, the code following each address describes the services provided by the particular agency.

C = Counseling
R = Referral
JD = Job Development
EV = Educational and Vocational Training
FA = Financial Assistance
SS = Support Services
P = Directed Especially Towards Prisoners and Ex-Offenders
H = Housing

Argus Community, Inc.
760 East 160th Street
Bronx, NY 10456
(718) 401-5700
www.arguscommunity.org
EV, JD

GED Plus
198 Forsyth Street
New York, NY 10002
(212) 673-8254
EV, R
Provides GED preparation, direct-to-employment, and vocational opportunities for parolees and ex-offenders under 21 years of age.

Center for Alternative Sentencing and Employment Services, Inc. (CASES, Inc.)
346 Broadway, 3rd Floor
New York, NY 10013
(212) 732-0076
www.cases.org
C, EV, SS, P, R, JD
Provides alternatives to incarceration and detention. Provides counseling, and vocational and educational assistance to selected participants, aiming for non-jail sentences.

Civil Rights Clinic
New York University School of Law
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6448
C, R
Helps prisoners understand their legal problems. Handles prisoners' cases or refers them to legal services.

Congress of Racial Equality (CORE)
817 Broadway
New York, NY 10003
(212) 598-4000
www.core-online.org
EV, R, C, SS
Administers welfare-to-work programs available to ex-offenders. Prefers that those interested in their services contact them by writing a letter.

Federation Employment and Guidance Service ("FEGS")
58-19 Van Cleef Street
Corona, NY 11368
(212) 366-8400
www.fegs.org
JD, C, R

Fortune Society
53 West 23rd Street, 8th Floor
New York, NY 10011
(212) 691-7554
www.fortunesociety.org
C, R, SS, P, EV, JD, H
Works with prisoners on a one-to-one basis to help them readjust to society. Counsels individuals in alternative-to-incarceration programs, ex-offenders and the families of prisoners. Provides information and referral services for ex-offenders who are HIV positive or have AIDS-related diseases.

Greenhope Services for Women
448 East 119th Street
New York, NY 10035
(212) 369-5100
www.greenhope.org
H, JD, C, R, P, EV, SS
Counsels both incarcerated women and those participating in programs affording an alternative to incarceration. Provides counseling for substance abuse, HIV/AIDS, parenting and nutrition, as well as GED training, employment, medical and residence referral services, and legal advocacy.

Institute for Community Living
6209 16th Avenue
Brooklyn, NY 11204
(718) 234-0073
EV, H, C, R, JD, SS
Serves patients with mental illness or substance abuse issues.

NAACP
39 Broadway, Suite 2201
New York, NY 10006
(212) 344-7474
www.naacp.org

Salvation Army
Main Office:
120 West 14th Street
New York, NY 10011
(212) 337-7200

Salvation Army
Drug Rehabilitation Office:
536 West 46th Street
New York, NY 10036
(212) 757-2311
P, C, R, JD, SS
Visits prisoners and provides social services to ex-offenders in the boroughs of New York. Provides prison counseling, parole planning, parole counseling services, and programs in pre-release job training.

State University Educational Opportunity Center in Brooklyn
111 Livingston Street
Brooklyn, NY 11201
(718) 488-9840
www.bklyn.eoc.cuny.edu
EV, JD
Provides academic and career counseling and job placement assistance through a tuition-free program.

The Correctional Association of New York
135 East 15th Street
New York, NY 10003
(212) 254-5700
www.correctionalassociation.org
SS, P
Monitors New York state prisons, ensures proper conditions, and investigates complaint letters.

The Osborne Association, Inc.
175 Remsen Street, 8th Floor
Brooklyn, NY 11201
(718) 637-6560
www.osborneny.org
EV, JD, FA, P, R, SS
Provides substance abuse counseling, youth micro-enterprise project, and alternatives to incarceration programs for nonviolent or youthful offenders.

The Osborne Association, Inc.
36-31 38th Street
Long Island City, NY 11101
(718) 707-2600
www.osborneny.org
EV, JD, FA, P, R, SS
Provides programs in prisoner reentry, family services, court advocacy, and employment guidance.

The Osborne Association, Inc.
809 Westchester Avenue
Bronx, NY 10455
(718) 707-2600
www.osborneny.org
EV, JD, FA, P, R, SS
Provides HIV/AIDS and substance abuse counseling.

Vocational and Educational Services for
Individuals with Disabilities
New York State Department of Education
116 West 32nd Street
6th Floor
New York, NY 10001
(212) 630-2300
www.vesid.nysed.gov
JD, EV

Provides services to those who fit their disability criteria, which includes physical or mental disabilities, drug or alcohol abuse, or learning disabilities.

Vocational Foundation, Inc.
53 Broadway
New York, NY 10004
(212) 823-1001
EV, JD
Provides GED preparation and job training for young adults aged 17–20 who pass an admittance test.

Women's Prison Association & Home, Inc.
110 Second Avenue
New York, NY 10003
(646) 336-6100
www.wpaonline.org
P, EV, JD, FA, H, C, R
Rehabilitates female ex-offenders. Operates as a halfway house available to those with alternative-to-incarceration acceptance; clients may stay for six months without paying a fee. Also offers counseling and training in life-skills. Provides additional services for women involved in the prison system. For more information, contact the Community Linkage Unit at (212) 674-1163, ext. 25.

2. Social Services in Other Counties

ALBANY COUNTY
New York State Catholic Conferences
465 State Street
Albany, NY 12203
(518) 434-6195
www.nyscatholic.org
C
Acts as a liaison for Catholic chaplains in New York state correctional institutions.

BROOME COUNTY
The Reverend Cris Mogenson
The Jail Ministry
Broome County Council of Churches
3 Otseningo Street
Binghamton, NY 13903
(607) 724-8771
www.broomecouncil.net/jail.asp
C, SS, FA
Counsels prisoners and provides family support, clothing and services to releasees.

CAYUGA COUNTY
Auburn Hospitality Center
148 State Street
Auburn, NY 13021
(315) 253-0121
SS
Assists visitors to Auburn prison, and attempts to increase citizen and prison administration awareness of criminal justice system problems.
See MONROE COUNTY

CHENANGO COUNTY
Opportunities for Chenango
P.O. Box 470
44 West Main Street
Norwich, NY 13815
(607) 334-7114
www.ofcinc.org
SS, FA
Assists families in moving out of poverty and into situations where they are self-sufficient.

ERIE COUNTY
Buffalo Half-Way House
115 Glenwood Avenue
Buffalo, NY 14209
(716) 882-0027
H, P
Provides transitional housing for both male and female ex-offenders returning to Buffalo County who meet the eligibility requirements of the New York Division of Parole or the U.S. Federal Bureau of Prisons.

FRANKLIN COUNTY
Community Action Agency of Franklin County
("ComLinks")
343 West Main Street
Malone, NY 12953
(518) 483-1261
www.comlinkscaa.net
P, SS
Provides support services for ex-offenders.

GREENE COUNTY
Department of Social Services
411 Main Street
Post Office Box 528
Catskill, NY 12414
(518) 943-3200
FA, H, SS
Helps find housing and provides support services for ex-offenders.

HAMILTON COUNTY
Department of Social Services
White Birch Lane
Post Office Box 725
Indian Lake, NY 12842
(518) 648-6131
FA, SS
Provides support services, such as public assistance, food stamps, and Medicaid, for low-income residents of Hamilton County.
See WARREN COUNTY

LEWIS COUNTY
Lewis County Opportunities
8265 State Route 812
Lowville, NY 13367
(315) 376-8202
www.lcopps.com
SS
Provides support services for low-income residents of Lewis County.

MONROE COUNTY
Judicial Process Commission
121 North Fitzhugh Street
Rochester, NY 14614
(585) 325-7727
C, EV, SS, R
Develops public awareness of the criminal justice system. Answers prisoner correspondence, refers prisoners to legal services, provides a community jobs program and a mentorship program for ex-offenders, and advocates on behalf of prisoners.

NASSAU COUNTY
Port Washington Community Action Council
382 Main Street
Port Washington, NY 11050
(516) 883-3201
SS
Provides translation services to prisoners or those awaiting trial.

Nepperhan Community Center
Youthful Ex-Offender Program, Project Return
342 Warburton Avenue
Yonkers, NY 10701
(914) 965-0203
www.nepperhan communitycenter.org
C, JD, EV, SS, P
Provides support services for youthful (ages 21 and under) ex-offenders returning to the Yonkers community, including basic skills remediation, pre-employment maturity skills, and job-specific skills training.

New Rochelle Outreach Center
33 Lincoln Avenue
Suite # 2
New Rochelle, NY 10801
(914) 636-2721
C, R
Provides both voluntary and mandated treatment for drug addiction.

NIAGARA COUNTY
Niagara Community Action Program, Inc.
1521 Main Street
Niagara Falls, NY 14305
(716) 285-9681
SS
Provides support for low-income Niagara County residents, particularly housing, food, and emergency shelter.

Open Door Family Medical Group
165 Main Street
Ossining, NY 10562
(914) 941-1263
C
Provides medical and dental care, HIV testing, and counseling.

Pretrial Services Institute of Westchester County
300 Hamilton Avenue, Suite 204
White Plains, NY 10601
(914) 428-6663
Interviews and screens defendants in the Westchester County Jail for release without bail, through its "ROR" Program. Runs a monitored release program, allowing Pretrial Services Institute to monitor released prisoners through daily contact and supervise additional conditions the court may order. Runs a bail expediting program for defendants whose bail is less than $5,000, assisting with calls to collect the necessary funds for bail.

Probe
229 State Street
Binghamton, NY 13901
(607) 772-8912
C, EV, SS
Provides counseling, employment training, and education to help individuals avoid crime. Assists ex-offenders returning to Broome County and works with at-risk youth.

SCHOHARIE COUNTY
Schoharie County Community Action Program, Inc.
795 East Main Street, Suite 5
Cobleskill, NY 12043
(518) 234-2568
www.sccapinc.org
FA, SS
P*rovides family development and emergency support services for low-income residents but only after other social services have been exhausted.*

SENECA COUNTY
Salvation Army
P.O. Box 532
41 North Street
Geneva, NY 14456
(315) 789-1055
C, SS, R
Provides support services for ex-offenders, including counseling, referral to drug rehabilitation programs, help with food and medication, and jail visitation (if requested).

Society of St. Vincent de Paul
Central Council, Diocese of Rockville Centre
249 Broadway
Bethpage, NY 11714
(516) 822-3132
C, R, JD, H, SS, EV
Provides transitional programming for ex-offenders with substance abuse problems. Provides job assistance and subsidized housing. Runs a juvenile offender program.

SULLIVAN COUNTY
Tioga Opportunities Program
9 Sheldon Guile Boulevard
Owego, NY 13827
(607) 687-4222
SS, P, H
Provides support services for ex-offenders, including housing, and head-start programs for family health and planning.

TOMPKINS COUNTY
Offender Aid and Restoration of Tompkins County ("OAR")
518 West Seneca Street
Ithaca, NY 14850
(607) 272-7885
SS, P
Provides support services and advocacy for ex-offenders to aid in community readjustment.

WARREN COUNTY
Warren-Hamilton Counties
Community Action Agency
P.O. Box 968
190 Maple Street
Glen Falls, NY 12801
(518) 793-0638
R, FA, SS, P
Provides support services for ex-offenders, including referrals and emergency food, clothing, and rental assistance.

WAYNE COUNTY
Wayne County Action Program
159 Montezuma Street
Lyons, NY 14489
(315) 946-7530
www.waynecap.org
C, SS
Provides support services for qualifying

ex-offenders through a structured program that includes counseling and referral (even ex-offenders who were incarcerated for periods as short as one day may be admitted). Works with probation and parole officers.

WESTCHESTER COUNTY
Mount Vernon Community Action Group of WestCOP
Outreach Office Ex-offender Counseling
42 East Third Street
Mount Vernon, NY 10550
(914) 664-8680
C
Provides counseling for drug addiction, alcoholism, and AIDS.

C. Official Corrections Agencies

1. Watchdog Agencies

The New York State Commission of Correction and the New York City Board of Correction help prisoners in many areas. The State Commission provides information and investigates complaints by prisoners of state prisons. The City Board provides similar services for prisoners in New York City.

NEW YORK STATE COMMISSION OF CORRECTION
80 Wolf Road, 4th Floor
Albany, NY 12205
(518) 485-2346
www.scoc.state.ny.us

NEW YORK CITY BOARD OF CORRECTION
51 Chambers Street
Room 923
New York, NY 10007
(212) 788-7840

2. Administrative Agencies

These agencies have responsibility for care of prisoners in New York State and City prisons.

STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES
Building 2, 1220 Washington Avenue
Albany, NY 12226
(518) 457-8126
www.docs.state.ny.us

NEW YORK CITY DEPARTMENT OF CORRECTIONS
60 Hudson Street
New York, NY 10013
(212) 266-1000
www.nyc.gov/doc

A JAILHOUSE LAWYER'S MANUAL

Appendix V: Definitions of Words Used in the *JLM*

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

APPENDIX V

DEFINITIONS OF LEGAL TERMS USED IN THE *JLM*[*]

A.L.R.: stands for American Law Reporter; a reference book that aids your legal research by referring you to cases and legal writings on particular topics. The different editions of A.L.R. are indicated by numbers. For example, A.L.R. refers to the first edition, and A.L.R.2d refers to the second edition.

Acquit: An acquittal means a *jury* or court finds a *defendant* (in a *criminal* trial) not guilty of a crime.

Adjournment: Delaying or temporarily stopping a court *session* that is already in progress. For example, a judge may call an adjournment due to a holiday, after which the court *session* will continue.

Administrative agency: A political body created by the state or *federal* government to carry out the laws. For example, the New York's Department of Corrections is an administrative agency that carries out the laws passed by the New York state legislature relating to prisons.

Administrative law judge: An administrative law judge (ALJ) is a representative of an administrative agency. The ALJ *hears* cases related to the *administrative agency* (for example, INS) when disputes arise between the agency and a person whom the agency's decision affects. The ALJ has the power to take testimony and decide issues of *evidence*, like a judge who *hears civil* and *criminal* cases in a court of law.

Admissible evidence: *Evidence* that can legally be introduced at a trial; the evidence must be relevant and not, for example, unfairly *prejudicial*, based on *hearsay*, or *privileged.*

Affidavit: A written or printed statement of facts that is made *voluntarily* by a person who swears to the truth of the statement before a public officer, such as a *notary public*.

Affidavit of service: A sworn statement saying that legal papers have been delivered to, or *served* upon, the other party in a lawsuit.

Affirm: When the *appellate court* agrees with the decision of the trial court, the appellate court affirms the decision of the trial court. When this happens, the party who lost in the trial court and *appealed* to the *appellate court* is still the loser in the case.

Affirmative defense: A defense the *defendant* offers to justify his *criminal* act. When a *defendant* asserts an affirmative defense, he means that even if the *allegations* against him are true, he should still be found not guilty. Affirmative defenses include self-defense, *coercion*, insanity, and *duress*.

Aggravated felony: A *felony* is a crime that involves serious bodily injury or the use of a dangerous weapon. It also means that a harsher *sentence* may be imposed. In the context of immigration, aggravated *felony* has a different meaning. Please refer to the Immigration and Consular Access Supplement to the *JLM* for more information about immigration.

Aggravating factors: In deciding whether to impose a *sentence*, a judge and *jury* consider certain "aggravating factors," which are defined by *statutes*. Aggravating factors require a harsher punishment. Some examples of aggravating factors are murder committed for money, robbery committed by someone out on bail, or assault perpetrated for racist reasons.

Allege: To claim or to charge that someone acted, or that something happened, but that act or occurrence has yet to be proven. When you allege something, you make an allegation.

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[*] Words that are defined elsewhere in this Appendix are printed in *italics*.

Amendment (for example, 14th Amendment): Any change that is made to a law after it is written originally. In the United States Constitution, an amendment is a law added to the original document that further defines the *rights* and duties of individuals and the government.

Annotation: A remark, note, or comment on a section of legal writing, which is intended to explain and clarify the passage.

Appeal: To complain to a higher court that the *judgment* of a lower court was wrong or that the lower court made an error. For example, if you lose in the trial court, you may *appeal* to the *appellate court*.

Appellate Court: A court that reviews the decision of the lower court on *appeal*. It has the authority to *affirm*, *reverse*, or *remand* the decision of the lower court.

Appellate Term: One of the two types of *intermediate appellate courts* in New York State. The appellate term is housed within the New York Supreme Court and initially handles all of the appeal cases coming from lower courts such as county courts, town courts, district courts, civil courts, etc.

Appellate Division: One of the two types of *intermediate appellate courts* in New York State. New York State is divided up into territorial departments, and each department has an Appellate Division that serves as its *intermediate appellate court*. The *Appellate Division* handles appeals from the *Appellate Term* and the New York Supreme Court.

Arbitrator: An *impartial* person who, in a special *proceeding* called arbitration, decides a dispute between parties, who have chosen arbitration instead of trial. Arbitration is sometimes required by law.

Authorities: Legal sources affecting how your case is decided. Authorities include cases and *statutes*. If neither cases nor *statutes* exist, secondary sources such as law reviews may be considered authorities.

Beyond a reasonable doubt: The standard by which the government must prove every element (part) of its case in a *criminal trial*. It is the most demanding *burden of proof*.

Burden of proof: A party's duty in a trial to prove a fact or facts at issue to convince the *jury* of the truth of the party's claim. If a party does not fulfill this duty, all or part of the case must be dismissed. In *civil* cases, juries must decide whether the *plaintiff* proved the case by a *preponderance of the evidence*; in other words, the plaintiff's burden of proof in *civil* suits is a *preponderance of the evidence*. In *criminal* cases, juries must decide whether the government proved its case *beyond a reasonable doubt*; in other words, the government's burden of proof is *beyond a reasonable doubt*. *Beyond a reasonable doubt* is a higher burden of proof than a *preponderance of the evidence*, meaning it is more difficult to satisfy.

Certiorari, Writ of (cert.): An order by an *appellate* (higher) *court* declaring that it will review the decision of a lower court. "Certiorari *granted*" means that the appellate court decided to approve a *petition* for certiorari and review the trial court's decision. "Certiorari denied" means that the appellate court decided not to approve a *petition* for certiorari and, thus, not to review the lower court's decision. Some courts, such as in New York, simply call certiorari "leave to *appeal*."

Cf.: A signal used in legal writing that means "compare" but that still supports the statement to which it cites. *Cf.* directs the reader to another case or article to compare, contrast, or explain differing views.

Circuit Court of Appeals: The United States is divided into *federal* judicial circuits, based on geographical areas (New York is located in the Second Circuit). Each circuit has a court of *appeals* known as the U.S. Court of Appeals for that particular circuit. These courts are one level below the U.S. Supreme Court. See the front inside cover of the *JLM* for a diagram of the structure of the U.S. judiciary.

Civil ("civil trial," "civil case," or "civil action"): In general, all types of actions that are not *criminal*. Civil actions are brought by a private party to protect a private right. The *burden of proof* and the procedural rules in a civil trial may be different from those in a *criminal* trial.

Class action: A lawsuit in which the *plaintiffs* represent and sue on behalf of all the people in the same situation as the *plaintiffs* and with similar legal claims. See Chapter 16 for an explanation of class actions.

Clear and convincing evidence: A *burden of proof* that requires more convincing evidence than a *preponderance of the evidence*, but not as much as *beyond a reasonable doubt*. This *burden of proof* is used in certain types of immigration proceedings. Please refer to the Immigration and Consular Access Supplement to the *JLM* for more information.

Clemency (mercy, leniency): Kindness that is shown toward a criminal act. It is often used to describe the act of a state governor in which he or she *commutes* or reduces a *sentence*.

Coerce/coercion: To force someone to do something. A confession of a *defendant* that is coerced may be *held inadmissible* by a court. Coercion is defined as force—physical or mental—that overcomes a person's free choice in doing something. Coercion can be an *affirmative defense*.

Collateral (attack or appeal): To make a collateral appeal means to bring a *civil proceeding* to challenge an error in an earlier *proceeding* with the purpose of obtaining a ruling on the alleged *error*. This takes place in a different *proceeding* than a direct appeal from the earlier case.

Commuted sentence: A *sentence* that is reduced.

Concurrent sentences: When a person is *convicted* of several *criminal* charges, the judge can order that the person's *sentences* run at the same time (concurrently) rather than one after another (consecutively). For example, if you are sentenced to six months for assault and nine months for robbery, you would have to serve fifteen months total under consecutive sentencing; however, if the judge orders your sentences to run concurrently, you only have to serve nine months total.

Contingent fee: A method of fee payment describing how a lawyer may agree to represent a client. The *plaintiff* who *retains* (hires) the lawyer only pays the lawyer if the *plaintiff* wins the case. The lawyer accepts an agreed-upon percentage of the money *judgment* the *plaintiff* wins. For example, most lawyers who are paid like this charge a 33% contingency fee, which means that if you win $1000, the lawyer will keep $330 plus his or her expenses for things like phone calls and photocopies. Some lawyers may charge you for their expenses even if you lose your case. Lawyers generally may *not* charge contingent fees in *criminal* cases.

Convict: To find a *defendant* guilty of the crime he or she has been accused of committing.

Counsel: A lawyer (attorney).

Court of Appeals: In New York, the Court of Appeals is the highest level appellate court that can review your case. It reviews the decision of the *appellate division*, which reviewed the trial court decision.

Counterclaim: In a *civil proceeding*, a *defendant* who is sued may then bring suit against the person suing him or her. This suit brought by the *defendant* against the *plaintiff* is called a counterclaim.

Criminal ("criminal case," "criminal proceeding," or "criminal trial"): A case in which the government brings a charge against a person for a crime the person is accused of committing. The *burden of proof* and the procedural rules in a criminal *trial* may be different from those in a *civil trial*. See the definition of *beyond a reasonable doubt*.

Cross-examination: At a trial or *hearing*, when the lawyer for the opposing party questions a witness. Cross-examination takes place after the direct examination. The lawyer usually asks questions that require a yes or no answer. Each party has a *right* to cross-examine the other party's witnesses.

Custody (Custodian): Being "in custody" means that police officers or law enforcement authorities have control over you. It may refer to arrest, actual imprisonment, or a temporary restraint of liberty at the station house. A custodian is the person or law enforcement agency with the control over a person.

Damages: The money awarded by a court to a person who has suffered loss, injury, or harm, either to the person's body or to property.

De minimis: A term used to describe something that is insignificant or small, and thus ignored by the law and the courts. For example, you experienced a *de minimis* injury if your car was bumped by another car, and you will not be successful if you try to sue the person who bumped you for assault.

Declaratory judgment (Declaratory relief): A court's decision in a civil case declaring the *rights* of the parties or expressing the court's *opinion* on a certain part of the law, without ordering *relief* for either side.

Defendant: The party against whom a lawsuit is brought.

Denial: A rejection, as in rejecting an application, motion, or *petition*. Also, denial can be an assertion that the statement offered is untrue, as someone who denies a statement made about him that he has committed a crime.

Determinate sentence: A prison *sentence* that sets a fixed period of incarceration, as opposed to an *indeterminate sentence*, which sets a range of possible periods of incarceration.

Dictum: An observation or a remark made by a judge in his or her *opinion*, about a *question of law* suggested by the case, but that is not considered the law of the case because it is not the legal basis for the judge's decision. Therefore, other courts do not have to follow the legal analysis found in dictum (although sometimes judges may choose to) even when the same *question of law* comes up in the future.

Direct examination: At a trial or *hearing*, when the lawyer questions a *witness* for the *party* that the lawyer is representing in attempting to prove his or her side of the case.

Discipline (Disciplinary proceeding): Punishment for violation of rules. At the *proceeding*, a person or committee decides what punishment is appropriate.

Discovery: In preparation for a trial, the process of obtaining information about your case. See Chapter 8 for more information.

Discretion: The power of a legal body, such as a court or agency, to act or decide in a situation in which the law provides no precise answers. For example, the judge may have discretion to create remedies for you if the law does not say precisely how to do so.

Disposition: The disposition of a case refers to how the case was decided or settled.

Dissent (Dissenting opinion): A judge who disagrees with the decision of the *majority* of the other judges on the same appellate court. He or she writes the reasons for disagreeing in what is known as a dissenting *opinion*. The dissenting opinion is not the main opinion of the case nor is it considered the law.

Due process (Constitutional right to due process): You have two types of due process rights. Your *right* to **procedural** due process means government proceedings must treat you fairly. It limits the ways the government can take away your property, liberty, and life. Your *right* to **substantive** due process prevents government interference with other *rights* individuals have that the government cannot take away—rights such as privacy, speech, and religion. Many Chapters in the *JLM* deal with these two types of due process.

Duress: A threat of harm that causes a person to do some act that the person otherwise would not have done. Duress can be an *affirmative defense*. Threats of imprisonment and injury are examples of duress.

Entitled: Having a legal right.

Evidence: Anything presented to a court that proves, or helps to prove, the claim of a party. Evidence can be presented orally by *witnesses*; or through documents, physical objects, or any means to help prove a point.***Ex rel. (Ex relatione)***: A Latin[1] phrase meaning "by or on the relation of." A lawsuit "*ex rel.*" is brought by the government if a private party (someone not acting as a government official) interested in the matter asks the government to bring suit. For example, if Smith asks the government to bring a lawsuit against Jones, the case would be written as "State *ex rel.* Smith v. Jones."

Exclude from evidence: The use of legal means to keep certain *evidence* from being considered in deciding the case.

Exculpate: To free from blame. For example, "exculpatory *evidence*" is *evidence* that shows the innocence of the *defendant*. A prosecutor is required to disclose such *evidence* to the defense attorney.

Facially: Appearing on the surface. Something may seem to be true on the surface, but turn out to be false upon further investigation. For example, the words in a *statute* may not seem "facially" discriminatory toward women but can still discriminate against them when the *statute* is applied.

Federal: In the *JLM*, "federal" is used to describe a system of government, including courts and laws, organized under the United States Constitution. In contrast, "state" describes fifty separate and differing systems of government, including courts and laws, organized under the constitutions and statutes of each of the fifty states that make up the United States of America.

Felony: In many states, this is any crime that is punishable by imprisonment of more than one year in prison or is punishable by death. Felonies are crimes that are more serious than *misdemeanors*.

Felony murder: In many states, this is an unintended death that occurs during the commission of a *felony* (such as armed robbery). In those states, anyone accused of the felony can automatically be charged with murder, too. This is called the "felony murder doctrine").

File: To submit for recognition, as in "filing papers with the court."

Footnote (Footnote Number): A number appearing in the body of a piece of legal writing that indicates that at the bottom of the page there is more information about the particular section or sentence next to which the number appears. The information at the bottom of the page is the footnote itself.[2] In legal citations, footnotes are usually abbreviated as 'n.'—for example to refer to footnote number 7, you should use "n.7." In the *JLM*, this information is especially useful for clarifying sentences in the text and providing cases to support the text.

Grant (as in "grant a motion"): To allow or permit. For example, when the court grants a *motion*, it allows what the *motion* was requesting.

Habeas corpus (writ of habeas corpus): This is a Latin term that refers to the form of relief that the court may grant, after a prisoner files a petition, to release the prisoner from unlawful confinement or incarceration. The prisoner must prove that he or she was held in violation of his rights. The *habeas writ* can be sought in both state and federal courts. For more information, see Chapters 13 and 21 of the *JLM*. A *habeas* petition is a form of *collateral attack* on a conviction or sentence.

Hear (for example, "hear a motion"): To listen to both sides on a particular legal issue. For example, when a judge hears a case, he or she considers the validity of the case by listening to the arguments of the lawyers from both sides in the *litigation*.

Hearing officer: A person appointed to preside over a *hearing*. This person does not have to be a judge.

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[1] Latin phrases are italicized in legal writing. Therefore, if you submit any motions, briefs, complaints, etc. to the court, you should italicize any Latin phrases you use.

[2] This is an example of a footnote. If you were citing it, you would call it n.2.

Hearing: A legal *proceeding* before a judge or *hearing officer* that is similar to a trial. In a hearing, the judge or *hearing officer* decides an issue of the case, but does not decide the *defendant*'s guilt or innocence.

Hearsay: Used to describe testimony in which a witness talks about something he or she does not know through personal experience, but that he or she has been told by others. (Hearsay is defined by Fed. R. Evid. 801(c) as a "statement other than one made by the declarant [the person testifying] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") Hearsay testimony generally is **not** *admissible* in court and may be excluded. But, many exceptions to the hearsay rule exist.

Holding: The decision of a court in a case and the accompanying explanation.

Immunity (as in "immunity from lawsuit"): When a person or governmental body cannot be sued (is immune from suit). For example, sovereign immunity means that you cannot sue certain parts of the government without the government's consent.

Impartial: *Not* favoring either side; fair and unbiased.

Inadmissible evidence: *Evidence* that cannot legally be introduced at trial.

Indeterminate Sentence: A prison *sentence* that does not set a fixed period of time for incarceration, but sets a minimum and a maximum period, so that the incarceration cannot last less than a certain period or more than a certain period. The length of incarceration is determined later, according to factors such as behavior in prison.

Indictment (pronounced "in-DITE-ment"): A written accusation presented by the grand jury charging a person with a particular crime or crimes. After the issuing of an indictment, the charges must be proven at trial in order for the defendant to be convicted.

Indigent person: A person who does not have enough money to hire a lawyer to defend him or herself. In most *criminal* cases, an indigent *defendant* is *entitled* to *counsel* provided by the state. Court costs may also be waived for an indigent *defendant*. To request the services of an attorney or a reduction or waiver of court filing fees, you must *file* poor person's papers, which is also called filing "*in forma pauperis*."

Injunction (Injunctive relief): An order of the court that a person should immediately stop doing something, or should begin to do something it has stopped doing.

Intentional: On purpose. In general, to act with intention is to act with the conscious objective of bringing about a particular result. For certain crimes, intentional acts may have to be proven by the state.

Intermediate appellate court: The court above the trial court that reviews some decisions of the trial court, but that is lower than the final *appellate court* (such as the New York Court of Appeals). There are two intermediate appellate courts in New York State, the *Appellate Division* and the *Appellate Term*. These courts review decisions of the lower trial court (in New York it is confusingly called the New York Supreme Court), and their decisions are reviewed by the *New York Court of Appeals.* Generally, in the federal justice system, the *circuit court* is the intermediate appellate court; it reviews the decisions of the district courts, and its own decisions are reviewed by the U.S. Supreme Court in Washington, D.C.

Interrogatories: A set of questions. See Chapter 8 for an explanation of interrogatories and how they fit into the *discovery* process.

Involuntary: Describes an act that you did not intend to do.

Judgment: The final decision of a court that resolves a case and determines the parties' rights and duties.

Jurisdiction: The authority under which a court decides a case. A court must have subject matter jurisdiction over the kind of dispute (for example, only *criminal* courts can *hear criminal* cases) and personal jurisdiction over both sides. Put very simply, personal jurisdiction means that either you have agreed to come to that particular court or you have certain relationships with the state that allow them to bring you to court—for example, if you live in that state.

Jury: A jury is a group of people who will vote to decide the outcome of a case. The Sixth *Amendment* of the U.S. Constitution provides for a jury trial for *criminal* offenses. State constitutions also often contain the *right* to a jury trial. For some "petty offenses" (low-level offenses that do not carry *sentences* of more than six months), a *defendant* may not be *entitled* to a jury trial.

Lesser included offense: A crime that has some, but not all, of the elements of another, more serious, crime. It must also not have any elements that are different from the greater crime. A lesser included offense occurs when it is impossible to commit a crime without also committing a crime of a lesser degree. For example, manslaughter is a lesser included offense of murder. See Chapter 9 for more information.

Liable: To be obligated by the court to make compensation. For example, if the court decides that A must pay B $100 for the injury A caused B, A is liable to B for $100.

Litigate (Litigation): To participate in a *trial*. All the events in a *trial*, including the *trial* itself and *proceedings* prior to *trial* (sometimes called pre-trial proceedings), constitute litigation.

Majority (Majority opinion): An *opinion* signed by more than half of the judges of a court or panel; it constitutes the court's decision.

Material evidence: *Evidence* that is *relevant* and important to the legal issues being decided in a lawsuit.

Minor: Someone under the legal age of adulthood. In most states, the age of adulthood is eighteen years old. Being charged as a minor in a criminal case means there will be much lower penalties; however, this decision is up to the court's *discretion.*

Minutes: Transcript. The final copy of the *record* taken from the shorthand originally written by the court reporter.

Miranda (Miranda v. Arizona): A U.S. Supreme Court case setting forth the rights you should be informed about just after you are arrested. This case requires police officers to inform suspects in police custody of certain rights before their interrogation.

Misdemeanor: In general, misdemeanors are punishable by fine, penalty, or imprisonment of less than one year. In most states and under *federal* law, any offense that is not a *felony* is classified as a misdemeanor. Both felonies and misdemeanors are grouped into classes (for example, Class A, B, C, etc.) and the *sentencing* varies by the class. There may be procedural differences in how felonies and misdemeanors are handled by a court.

Misrepresentation: A written or oral statement that is an untrue statement of the facts.

Mistrial: If a fundamental error occurs during *trial* (for example, a court does not have *jurisdiction*, or a *jury* selection error or hung *jury* occurs) that cannot be corrected, a judge may decide the *trial* should not continue and declare a "mistrial." A judge may also declare a mistrial if an extraordinary event takes place (like a juror's or attorney's death). Often, when a mistrial occurs, the accused may be tried again.

Mitigating factors: Factors that reduce your blameworthiness and that the *jury* or judge may rely upon to decide on a lower level of punishment. Examples of mitigating factors are you have no significant history of prior criminal activity, you committed the crime while you were under the influence of extreme mental disturbance, or you were very young when you committed the crime. Mitigating factors are sometimes defined by *statute*.

Moot: An issue or case is considered moot when it is no longer necessary for a court to render a decision about that issue or case because of a change in circumstances or passage of time. For example, if the law changes, then the case concerning that old law can (but not always does) become moot. Another example is a case about custody of a *minor*; if the *minor* becomes an adult, then that case becomes moot.

Motion: In *litigation*, a request that the judge take some sort of action, or make some sort of ruling.

Motion papers: Papers presented to court requesting that the judge make a decision. Typically, if a factual question is raised in motion papers, the court will hold a *hearing*.

Negligence: To be negligent is to not behave as a reasonable person would under the same circumstances. This includes to do something that a reasonable person would not do, or to not do something thing a reasonable person would do. Negligence is often a standard in a case, meaning that a party needs to prove that the opposing party in the suit was negligent in order to win the case. For example, if you do not shovel your sidewalks all winter (and you live in a place where it snows), you may be negligent.

Notary (Notary public): A person who is authorized to fix his or her seal on certain legal papers in order to verify that a particular person signed the papers. This is known as notarizing the papers.

Notice (Notification): "Notice" has several meanings in the law. First, the law often requires that "notice" be given to an individual about a certain fact. For example, the government is required to provide "notice" to a *defendant* of the charges against the *defendant* in *criminal proceedings* or in *civil proceedings* in which an individual's interests are involved. This means the government must give you a piece of paper explaining the charges. It also means that if you sue someone, you must give them "notice" through *service of process*. Second, "notice" is used in cases to refer to whether an individual was aware of something. For example, a *statute* may require that before an individual be *held liable* for *damages*, the individual have "notice" about a certain fact.

Objection: During a trial, the prosecutor or the defense attorney may disagree, based on the rules of the courtroom, with something opposing *counsel* says (for example, the way questioning is being conducted during testimony) or does (for example, the way *evidence* is presented). An attorney tells the court of his or her disagreement by saying "I object" or "objection." The judge decides immediately after each objection whether to "sustain" (uphold) or "*overrule*" the objection. If the judge sustains an objection, it means the judge (based on his or her interpretation of the law) agrees with the attorney raising the objection and whatever is objected to must stop because it is against the rules. If an objection is *overruled*, it means the judge disagrees with the attorney raising the objection and whatever is objected to may continue.

Off the record: This is what the judge says when he or she wants to say something or wants to hold a discussion that he or she does not want to appear in the court *record*. For example, *plea* bargaining discussions between lawyers and the judge usually are held off the record.

Opinion: When a court decides a case, the court writes an explanation of how it reached its decision. This is an "opinion."

Oral arguments: Spoken arguments made by the parties of a case that a judge may *hear* before reaching a decision and issuing an *opinion*. Oral arguments are often presented to appellate judges; see Chapter 9 for more information on the *criminal appeals* process.

Overrule: To *reverse*, reject or rule against. When a court's later decision on a point of law conflicts with a prior decision by the same court, it "overrules" the prior decision. The earlier decision is no longer *precedent* because it has been *reversed*. A judge also "overrules" an attorney's *objection* when he or she disagrees with that attorney and believes that the conduct objected to should be allowed.

Party: The people who are involved in the lawsuit on either side. For example, the defendant is a party. Multiple defendants can also collectively be considered one party.

Peace officer: Officers in various state agencies appointed to maintain order or "keep the peace," including sheriffs, police officers, and state highway patrol.

Per se: A Latin phrase meaning "by itself" or "in itself." For example, in considering a *habeas* petition, a court may consider a violation "*per se* prejudicial" and not require you to present further evidence to prove you were prejudiced (harmed) because the court has already assumed that you were prejudiced by the violation.

Peremptory strike or peremptory challenges: In selecting a *jury* for a *jury trial*, both the prosecution and defense can remove a potential juror from serving on the *jury* without providing a reason; each such removal is called a peremptory strike or challenge. The number of peremptory challenges for the prosecution and defense are fixed, and after the given number is used up, each side must then provide reasons for refusing a potential juror. Peremptory challenges are defined by state *statutes*.

Personal property: Everything that a person owns that does not fall under the definition of *real property*.

Petition: A formal, written request to the court to take action on a particular matter. The petition should contain all necessary information and be presented in the proper format.

Petitioner: The person who brings a lawsuit or an *appeal* by "petitioning" the court for *relief*.

Plaintiff: The person who brings a lawsuit.

Pleas: After being *indicted* for a particular crime, a *defendant* enters a plea of guilty, not guilty, or no contest. A plea of no contest, usually in a situation of a *misdemeanor* as part of a plea arrangement, means you are not denying or admitting the allegations against you on the *record* but that you accept the *sentence*. A plea of not guilty may lead to a trial. A guilty plea may be a requirement of "plea bargaining," which takes place when the prosecutor and the accused negotiate a resolution to the case subject to court approval. Usually, a "plea bargain" includes a *defendant* pleading guilty in return for a lower *sentence*. A plea of guilty leads to a *sentencing hearing* at which the *defendant's sentence* is decided by a judge.

Post-conviction relief: A *remedy granted* by a court after *conviction* that changes the terms of *conviction*, either by awarding a new *sentence* or trial, or by reversing the *conviction*. Examples of post-conviction relief include *habeas corpus* and, in New York, Article 440 motions.

Precedent: A case decided by a court that serves as the rule to be followed in similar later cases. For example, a case decided in the United States Supreme Court is precedent for all other courts—any rules established in that case become laws that must be followed by all other courts unless or until *overruled* by a later decision of the Supreme Court.

Prejudice, Prejudicial: When something happens that biases the jury against one of the parties in a case, there has been prejudice to that party's case. For example, if there has been a long delay between your arrest and your final parole revocation *hearing*, *habeas corpus* may be *granted* because of the delay, which may have been prejudicial to your case.

Preponderance of the evidence: This is the *burden of proof* in a *civil* suit. To meet this *burden of proof*, there must be more *evidence* that the thing being proved happened than that it did not happen.

Presumption: Something that a court takes to be true according to the rules of the court or the laws of the *jurisdiction*. For example, in all *criminal trials*, a *defendant* is presumed innocent. Therefore a *jury* must believe the *defendant* is innocent unless there is sufficient *evidence* to demonstrate that the *defendant* is guilty. A rebuttable presumption is one that can be overcome by proof that it is not true in the case being considered by the court. For a presumption to be rebutted, the rebutter must meet the *burden of proof* (either by *preponderance of the evidence*, *clear and convincing evidence*, or *beyond a reasonable doubt*, depending upon the type of presumption). An irrebuttable presumption is one that the court always considers to be true, and cannot be rebutted by any amount of proof.

Privilege: A special legal right or exemption that allows certain people to not testify about information they learned from a specific source—for example, the attorney-client privilege and the spousal privilege. The attorney-client privilege means that the information exchanged between an attorney and his or her client is confidential, so an attorney may not reveal information regarding the representation of a client without the client's consent. The spousal privilege means that information exchanged between spouses is also protected, and a spouse may not be required to testify against his or her spouse. There are narrow exceptions to these privileges.

Pro se: A Latin phrase meaning "for oneself"; someone who appears in court *pro se* is representing him or herself without the services of a lawyer.

Probable Cause: A reasonable ground for believing, based on existing facts, that a crime has been committed, or that an arrest or search is necessary. Generally, the police must show probable cause to have a judge issue an arrest, search, or eavesdropping warrant. Same as *reasonable cause.*

Proceeding: Courtroom or related matter that occurs during the course of a dispute or lawsuit, or any individual courtroom or related event that takes place during the course of the dispute or lawsuit.

Questions of fact: The issues of a case that deal with the facts, or, in other words, what actually happened. This is in contrast to the issues of a case that deal with the law. In a jury trial, the *jury* decides questions of facts. In the absence of a jury, the judge decides the questions of fact (as well as *questions of law*).

Questions of law: The issues of a case that deal with what the law means, or how the law is applied or should be applied to the facts of the case. A *jury* cannot decide questions of law; only the judge can.

Real property: Land, and whatever is built or grows upon land.

Reasonable cause: Same as *probable cause*.

Reckless: To act despite the fact that you are aware that your action creates a substantial and unjustifiable (large and unnecessary) risk of harm to others. For certain crimes, recklessness is the mental state that must be proved by the prosecution.

Record (as in the record of a trial): A written account of all of the *proceedings* of a trial, as transcribed by the court reporter. Errors made by the court that appear in the record can be *appealed*, while those that do not appear in the record must be *collaterally* attacked.

Regulation: A rule or order that manages or governs a situation, as in "prison regulation." A regulation has the same effect as a law if the regulation is legally issued by an executive authority of government.

Relator: The person on whose behalf the state brings a claim, or who is permitted to bring a claim in the name of the state. See *ex rel.*

Relevant: A fact or circumstance that is important or helpful in the process of determining the truth of a matter is relevant. Something that is not important to determining the truth is "irrelevant."

Relief: *Remedy* or benefit that a *plaintiff* or *petitioner* seeks from a court or that is awarded by a court to a plaintiff or petitioner. See *remedy*, as these terms are often used interchangeably.

Remand: When a case is sent back from the *appellate court* to the trial court for further action or *proceedings*.

Remedy: When a court decides a *criminal* or *civil* issue, it often issues an order so that a *right* recognized by the court may be enforced. For example, a court may find that a confession taken by the police was *coerced* in violation of a *defendant's* right. Under these circumstances, the remedy the court may order is to not allow the *defendant*'s confession to be used by the prosecution in its case to the *jury*. Remedies can consist of damages, injunctive relief, other orders, or solutions that a judge may use his or her *discretion* to create. See *relief*.

Reply: The *plaintiff's* answer to the *defendant's* case, either in a written brief or, at trial, orally.

Reprieve: Temporary delay in carrying out a *criminal* punishment.

Respondent: The person against whom a lawsuit or *appeal* is brought. This person "responds" to the claims of *petitioner*. See *Defendant.*

Retain (as in "to retain counsel"): To hire, usually used with respect to hiring a lawyer.

Reversed: When an *appellate court* changes the decision of a lower court, it reverses the lower court's decision. The party who lost in the trial court and then *appealed* to the appellate court is now the winner of the case.

Revoke (Revocation): To take back or cancel; the act of taking back or cancelling. For example, when the parole board revokes your parole, it cancels your parole and places you back in prison.

Right: A legal power that someone possesses. For example, if you are arrested, at the time of the arrest, you have the *right* to remain silent.

Right to an attorney: You have a *right* to the assistance of *counsel* (attorney) at any critical stage of your prosecution—meaning you have the *right* to *counsel* when adversarial *proceedings* have begun (in other words, after a formal charge has been *filed*, a preliminary *hearing* held, or during an *indictment* or an arraignment). This *right* to *counsel* is guaranteed by the Sixth *Amendment* to the Constitution, even if you cannot afford an attorney. In such cases, *counsel* is provided by the state. You also have the *right* to *counsel* during an interrogation, as guaranteed by the Fifth *Amendment* to the Constitution, which protects you from self-incrimination. You may also be *entitled* to an attorney in *proceedings* other than *criminal* prosecutions. See Chapter 9 on *criminal appeals* and Chapter 4 on finding a lawyer for more information.

Right to be free from arbitrary search and seizure: The Fourth *Amendment* to the Constitution provides this right. The police in many cases must have a search warrant (especially if police are going to search a person's home). However, there are many exceptions to the requirement of a search warrant. If police locate *evidence* as a result of an illegal search, a judge may exclude the *evidence* from being heard or presented at trial.

Right to be free from torture: The Eighth *Amendment* to the Constitution states that you have a *right* to be free from "cruel and unusual punishment." State constitutions have similar provisions. See Chapter 16 for more information on enforcing your civil *rights* in prison.

Right to freely practice your religion: You have the *right* to practice your religion even though you are in prison. Prison officials may restrict your *right* to practice your religion only if the restriction imposed reasonably relates to the requirements of running the prison system. See Chapter 27 for more information on your religious freedom.

Right to remain silent: After a *defendant* is arrested, he or she has the *right* to not say anything. Police officers are required to inform a *defendant* of this *right* as part of the *Miranda* warnings given to an accused.
Sentence: The punishment imposed by the court or a judge against a defendant after he or she has been convicted of a crime.

Sentencing hearing: After a trial is concluded and the *jury* has reached a *verdict* (the *jury's* decision), the *sentence* of the *defendant* is still to be decided. Prior to sentencing, a *hearing* is held and a judge may review any *relevant* material before deciding on a *sentence*. These materials usually include a pre-sentencing report that often contains information such as the circumstances of the crime, and the educational and employment background of a *defendant*, among other factors.

Service ("to serve"): As used in legal language, the physical act of handing something over, or delivering something to a person, as in serving legal papers on a person.

Session ("in session"): That period of time during any given year in which a legal body (for example, a court, or the state legislature) carries on its usual business.

Standard (of proof): How the court will judge your evidence and decide your case. Certain situations require meeting a higher standard. In a *criminal* case, for example, the prosecution must show the court that you are guilty "*beyond a reasonable doubt*" for you to be convicted. Some other common standards of proof besides "*beyond a reasonable doubt*" include by "*clear and convincing evidence*" and by "*a preponderance of the evidence*."

Statute: Laws passed by the U.S. Congress or state legislatures. *Criminal* offenses are defined by statues.

Statute of limitations: A law that sets out time limitations within which different types of lawsuits or *criminal* charges must be brought. After the *statute* of limitations has "run" on a particular type of lawsuit, a *plaintiff* can no longer bring that lawsuit. For example, if the *statute* of limitations on a *tort* action is five years, the *plaintiff* cannot wait for five years and one day after the cause of action arises to bring the lawsuit. If the *plaintiff* waits that extra day, he or she can no longer sue.

Stenographer: The person who makes the court *record* by writing it in shorthand; same as the court reporter.

Subpoena: An official court document that requires a person to appear in court at a specific time and place. A particular type of subpoena requires an individual to produce books, papers, and other things.

Suppress (motion to suppress): To prevent *evidence* from being introduced at trail.

Tort: A legal term that means a "wrong" or "injury" inflicted on someone for which a *remedy* may be obtained in a *civil* case. Someone who destroys your property or injures you may have committed a tort. See Chapter 17 for more information on tort actions.

Trial: A *proceeding* that takes place before a judge or a judge and a *jury*. In a trial, both sides present arguments and *evidence*, which the court examines.

United States Law Week *(U.S.L.W.)*: A reference book that contains newly-reported cases not yet printed in bound volumes.

v. (vs., versus): Means "against;" used to indicate opponents in a case, as in *Doe v. Smith*.

Vacate: To set aside, ignore, not give any merit. This term is used when an *appellate court* will vacate the *judgment* of a trial court if it concludes that the decision was wrong. It will ignore that decision so that the *appellate court* can decide the case as if they are seeing it for the first time, or so that it can send the case back to be looked at as if it is being viewed for the first time by the trial court.

Vague: Indefinite; not easy to understand; can be reasonably interpreted more than one way.

Verdict: At the end of a trial, a *jury* reaches a verdict (a decision) of not guilty or guilty based on the *evidence* presented at trial and in accordance with the legal questions presented to the *jury* by the court.

Verify: To confirm the authenticity of a legal paper by *affidavit* or oath.

Voir dire: Before selecting a *jury* for a *trial*, the court and attorneys for each side ask the *jury* questions to determine which people are suitable jurors in that case. This questioning of jurors is called voir dire.

Voluntary: An act that a person freely carries out and is not forced to do.

Waive (Waiver): To give up a certain right. For example, a waiver of the *right* to a *jury* trial or the *right* to be present at a *hearing* means to give up those *rights*.

Witness: A person a *party* in a legal *proceeding* calls upon to *testify* for or against a party. They can give factual *evidence* (like what they saw, felt, heard, etc.) or can be experts about the subject matter at issue.

Writ: An order written by a judge that requires a specific act to be performed, or gives someone the power to have the act performed. For example, when a court issues a *writ of habeas corpus*, it demands that the person who is detaining you release you.

A Jailhouse Lawyer's Manual

Appendix VI: Definitions of Latin Words Used in the *JLM*

Columbia Human Rights Law Review

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APPENDIX VI

DEFINITIONS OF LATIN[1] WORDS USED IN THE *JLM*[*]

Actus reus: The wrongful act or omission that is the physical component of a crime. This is one of the necessary elements of a crime in criminal law. *Actus reus* is the direct action used to commit a crime (compared with *mens rea*, which relates to the mental state of the accused and his criminal intent).

Amicus curiae: Latin for "friend of the court," an *amicus curiae* is someone who is not a party to the litigation, but who believes that the court's decision may affect his interest, and may therefore volunteer to offer information to assist a court in deciding a matter before it. This information is often provided in a legal opinion in the form of a brief (known as an *amicus* brief). The court has the discretion to decide whether or not to admit this information.

Certiorari, Writ of (cert.): An order by an appellate (higher) court declaring that it will review the decision of a lower court on appeal. "*Certiorari* granted" means that the appellate court decided to approve a petition for *certiorari* and review the trial court's decision. "*Certiorari* denied" means that the appellate court decided not to approve a *petition* for *certiorari* and, thus, not to review the lower court's decision. Some courts, such as those in New York, simply call *certiorari* "leave to appeal."

Coram nobis (writ of coram nobis): An order for a court to review its own earlier decision because of possible errors that were not obvious when the decision was made. These writs are usually used when no other remedy, such as direct appeal or *habeas corpus* is available, for instance when a prisoner has already been convicted and completely served his prison sentence.

Coram non judice: A legal term that is used to indicate a legal proceeding held without a judge, with improper venue, or without jurisdiction (meaning "not in the presence of a judge").

Corpus delicti: The fact of a crime having been actually committed. Latin for the "body of evidence," *corpus delicti* refers to the principle that there must be proof that a crime has taken place before a person can be convicted of committing that crime. For example, in a murder case, this can refer to the actual body of the victim or circumstantial evidence that prove death beyond a reasonable doubt.

De facto: An action occurring in practice but which is not necessarily established by law. *De facto* is commonly used in contrast to *de jure*: When discussing a legal situation, *de jure* refers to what the law itself states, while *de facto* refers to what actually happens in practice.

De jure: An action or regulation that is formally established by law. It is commonly used in contrast to *de facto*: When discussing a legal situation, *de jure* refers to what the law says, while *de facto* refers to what actually happens in practice.

De minimis: *De minimis* is a Latin phrase describing things that are insignificant or small. If something is *de minimis*, it is ignored by the law and the courts for lack of importance. For example, a driver experiences a *de minimis* injury if his car is only slightly bumped by another car, and he will not be successful if he tries to sue the person who bumped him for assault.

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[1] Latin phrases are italicized in legal writing. Therefore, if you submit any motions, briefs, complaints, etc. to the court, you should italicize any Latin phrases that you use.

[*] Words that are defined elsewhere in this Appendix are printed in *italics*.

De novo: A standard of review that a court uses for certain issues in a case on appeal. When a court reviews an issue with a *de novo* standard of review, it can decide the issue as though it was the court that heard the case for the first time. In other words, the appellate (higher) court does not give any deference to the way in which the trial (lower) court decided the issue.

Dictum (plural: Dicta): A statement in a judge's *opinion*, about a *question of law* suggested by the case, that is not critical to the case's *holding*. Dictum is not law and is not *binding* on later courts because it is not the legal basis for the judge's decision. In other words, later judges can choose to follow the legal analysis found in the dictum, but they do not have to. The plural form of the word dictum is dicta.

Ex post facto: A Latin phrase meaning "from a thing done afterward." *Ex post facto* describes the situation where a new law applies to acts committed in the past. The U.S. Constitution prohibits *ex post facto* criminal laws. This means that someone can only be punished under a law that was in effect at the time when he committed an offense, and his punishment cannot be increased if stricter laws are passed after he broke the law. While *ex post facto*, or retroactive, criminal law are not allowed, *ex post facto* civil laws are sometimes allowed.

Ex parte: A Latin phrase meaning "from (by or for) one party." An *ex parte* motion or petition is one brought by one person or party in the absence of, and without representation or notification of, other parties. An *ex parte* judicial proceeding is one where the opposing party has not received notice for the proceeding and is not present for the decision. The availability of *ex parte* orders is limited by the Fifth and Fourteenth Amendments of the U.S. Constitution, which provide that a person shall not be deprived of his liberty or property without sufficient notice. Because of the absence of parties from *ex parte* proceedings, *ex parte* orders are usually temporary orders, such as restraining orders, and any person(s) affected by the order are given an opportunity to contest it before it is made into a permanent order.

Ex rel. (ex relatione): A Latin phrase meaning "by or on the relation of." A lawsuit *ex rel.* is brought by the government if a private party (someone not acting as a government official) who is interested in the matter asks the government to bring suit and the government agrees. For example, if Smith asks the government to bring a lawsuit against Jones, the case would be written as "State *ex rel.* Smith v. Jones."

Guardian ad litem: A guardian appointed by a court to assist a minor or other incapable defendant or plaintiff in a particular legal matter. The *guardian ad litem* directs litigation in the best interests of the person that they assist, often in juvenile or domestic relations matters.

Habeas corpus (writ of habeas corpus): A Latin term referring to the form of relief that a court may *grant* in order to release a prisoner from unlawful imprisonment. The prisoner must prove that he is being held in violation of his rights, for instance because his trial was unfair due to ineffective assistance of counsel. The habeas writ can be sought in both state and federal courts. For more information on *habeas corpus*, see Chapters 13 and 21 of the *JLM*.

In forma pauperis: A Latin term, meaning "like a poor person." A court will allow someone without money to proceed *in forma pauperis* and avoid paying all filing fees and other court costs. A criminal defendant who proceeds *in forma pauperis* will also usually have a defense lawyer appointed free of charge.

In absentia: Meaning "in the absence," this term usually pertains to a defendant's right to be present in court proceedings in a criminal trial. U.S. courts have held that the Constitution protects a criminal defendant's right to appear in person at their trial, as a matter of due process; however, there are certain exceptions to the rule, including the defendant's waiver of his right to be present by voluntarily leaving the trial after it has started.

Malum in se: An offense that is *malum in se* is one which is seen as wrong in and of itself, such as murder or theft. While there are laws against *malum in se* crimes, they are viewed as wrong because of their inherent evilness, not because of the laws prohibiting them. *Malum in se* offenses are distinguished from *malum prohibitum* crimes, which are wrong only because they are prohibited by law.

Malum prohibitum: *Malum prohibitum* crimes are crimes that are wrong because they have been prohibited by law. These crimes can therefore vary from jurisdiction to jurisdiction depending on what the legislatures decide the law should be. An example of a *malum prohibitum* crime is speeding. Driving at 70 miles per hour is not a bad act by itself. It is only bad when the law has set a speed limit to be under 70 miles per hour, so that anyone exceeding the speed limit is breaking a law. As distinguished from *malum in se* crimes which are morally wrong, *malum prohibitum* crimes are not wrong on their own but are wrong because the law declares it to be wrong.

Modus operandi (M.O.): Meaning "method of operating," this term is used to describe someone's habits or manner of working and functioning. In a criminal context, *modus operandi* can be used to identify a culprit based on a characteristic pattern of methods of a repeated criminal act.

Mens rea: Latin for "guilty mind," *mens rea* is the mental state, or state of mind when a criminal act is committed. *Mens rea* is one of the necessary elements of a crime in criminal law. *Mens rea* relates to the mental state of the accused, as compared with *actus reus* relates to the direct physical action used to commit a crime.

Nolle prosequi: A declaration made before or during trial declaring that the case against a defendant is being dropped. This can be made in a criminal case by the prosecutor, or in a civil lawsuit by the plaintiff. A *nolle prosequi* declaration may be made for many reasons, including because the charges against the defendant cannot be proven, because the prosecutor no longer thinks that the accused defendant is guilty, and/or because the accused has died.

Nolo contendere: When a defendant pleads *nolo contendere*, he is stating "no contest," meaning that he does not deny responsibility for the charges; however, he is not explicitly admitting guilt either. A criminal defendant's *nolo contendere* plea differs from a guilty plea because it cannot be used against him in another cause of action. Because of this, some defendants plead *nolo contendere* to avoid civil suits that may arise from a criminal conviction.

Per curiam: A court decision made *per curiam* is one that refers to a decision handed down by the court as a whole acting collectively and anonymously, without identifying any individual judge as the author.

Per se: A Latin phrase meaning "by itself" or "in itself." For example, in considering a habeas petition, a court may consider that a violation was "*per se* prejudicial" and not require you to present further evidence to prove you were prejudiced (harmed) because the court has already assumed that you were prejudiced since the violation is considered to be "*per se* prejudicial."

Prima facie case: The facts sufficient to allow the judge or jury to find in a party's favor if everything he said were undisputed by the other side.

Pro se: A Latin phrase meaning "for oneself." Someone who appears in court *pro se* is representing himself without the services of a lawyer.

Res ipsa loquitur: A Latin phrase meaning "the thing speaks for itself." In tort claims of negligence, *res ipsa loquitur* describes certain situations where it can be assumed (without having to be proven) that an individual's injury was caused by the negligent action of another party because the accident was the sort that would not have occurred unless someone were negligent.

Res judicata: A legal concept that requires that, when issues have already been determined by a court, they are not allowed to be re-litigated, because the court's determination is final. This notion may also be called "collateral estoppel" and "issue preclusion."

Respondeat superior: Most commonly used in tort claims, *respondeat superior* is a legal doctrine which states that an employer or other 'principal' can be held to be legally responsible for the wrongful acts of his employee or agent, if such acts occur within the scope of the employment or agency. This vicarious liability rule may also be called the 'master-servant rule.'

Stare decisis: Latin for "to stand by things decided," *stare decisis* is the basic legal principle that a court should follow the rules, or 'precedent,' established by a court above it (a higher court) or by prior courts. This is so that judges and courts do not disturb settled matters and the law remains predictable and uniform in application. Courts cite to *stare decisis* when a particular issue has been previously brought to the court and a ruling already made on that issue. While courts will generally adhere to the previous ruling, this is not universally true.

Sua sponte: Meaning "of one's own will," this usually refers to a judge's order made without a request by any party to the case. Where grounds for dismissal exist, an action is subject to dismissal on a court's own motion. A trial court has the power to dismiss such an action *sua sponte*. An example of a situation where a trial court could dismiss an action *sua sponte* would be where there was a failure to comply with the rules of civil procedure or where the judge has determined that his court does not have jurisdiction over the case at issue.

Sub judice: Used to indicate that a particular case or matter is before the court and under judicial consideration.

Subpoena: A command that a person must appear before the court, subject to a penalty if they do not appear.

Subpoena duces tecum: Meaning "bring with you under penalty of punishment," a *subpoena duces tecum* is an order for the witness to appear before the court and to bring specified items.

A JAILHOUSE LAWYER'S MANUAL

IMMIGRATION AND CONSULAR ACCESS SUPPLEMENT

Columbia Human Rights Law Review

Ninth Edition 2011

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CHAPTER I

THE IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY*

A. Introduction

Immigration law has changed significantly in recent years and continues to change all the time. Therefore, you should not assume that everything you read in this Chapter is up-to-date or accurate. Instead, you should always make sure the laws mentioned here are correct by referring to the sources listed in Appendices A–D at the end of the Chapter. Because each ***immigration court*** case is different, it is always best to consult with an attorney because an attorney might better understand your particular situation and possibilities for relief and can help you with your case. If you do not have access to an attorney, you should ask a family member or trusted friend to consult one of the agencies listed in Appendix D at the end of this Chapter to help you get in touch with an attorney or some other professional who might be able to assist you with your immigration case. Many of the agencies listed provide free or low-cost legal services. This Chapter and its contents are not meant to replace the advice of an attorney.

Some of you may be prisoners who are still serving prison sentences for criminal ***convictions,*** or you may be detained[1] by the ***Department of Homeland Security*** (“***DHS”***).[2] If you are not a *citizen of the United States* (“*non-CUS*”) and you have not yet been approached by the United States (“U.S.”) government regarding your ***immigration status***[3] despite the fact that you are currently serving a prison sentence, this does not mean that it will not happen at a later time. It is very likely that you will be approached by an immigration officer, and you should read this Chapter to prepare yourself for when that day comes.

There are many reasons why the government might place someone in immigration court proceedings. We mention some of these reasons in this Chapter, but the Chapter’s primary focus will be prisoners who are facing or will face ***removal proceedings***[4] because of criminal convictions. It is important for you to realize that even if you are a ***legal permanent resident*** (“***LPR”***)[5] or have other legal status in the United States, you can still face removal proceedings and ***deportation***. Even if you have a child who is a ***citizen of the United States*** (“***CUS***”), you have been in the U.S. for many years, and you have worked legally and paid federal income taxes, you can still face removal proceedings if you have one or more criminal convictions. The only people in the U.S. who cannot be deported are CUSs or nationals.[6]

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* This Chapter was revised by James Concannon, based on a previous version by Cristina Quintero, with contribution from Kanika Chander and Laboni Rahman. Special thanks to Maria E. Navarro, Esq., The Legal Aid Society, Immigration Law Unit.

1. Immigration detention is not the same as imprisonment. Imprisonment is a criminal punishment, whereas immigration detention is not considered a criminal matter even though some immigration detainees are detained in prisons. Because immigration detention is a civil matter, immigration detainees do not have the same rights as criminal prisoners. *See* Part H of this Chapter, which describes detention in detail.

2. In March 2003, the U.S. Immigration and Naturalization Services (“INS”), which used to be part of the U.S. Department of Justice, was restructured. As a result, INS no longer exists. In 2003, the Department of Homeland Security (“DHS”) was created, as well as three new agencies within it. These agencies took over the functions of the former INS. The United States Citizenship and Immigration Services (“CIS”) is responsible for the administration of immigration services, including permanent residence, naturalization, asylum, and other duties. U.S. Immigration and Customs Enforcement (“ICE”) was created to serve the investigative and enforcement functions of the former INS (including investigations, deportation, and intelligence). The attorneys representing the government in immigration proceedings are part of ICE and are called assistant chief counsel. U.S. Customs investigators, the Federal Protective Service, and the Federal Air Marshal Service are all also part of ICE. The U.S. Customs and Border Protection (“CBP”) was created and took over the border functions of the INS, including border patrol and customs inspection.

3. Immigration status is whether you are legally or illegally in the U.S. Part B of this Chapter discusses how you can determine your immigration status.

4. This Chapter was written for people who have been or may be placed in removal proceedings. Removal proceedings were referred to as “exclusion” or “deportation” proceedings before April 1, 1997. Removal is the process by which the government forces a non-CUS to leave the U.S. For ease of reference, we will use the word “deportation” instead of “removal” throughout the text, but the legal proceedings are technically called “removal proceedings” and we will refer to them as such. So, keep in mind that if you face deportation, you will be placed in “removal proceedings.”

5. We will also refer to people who have LPR status as “LPRs.”

6. U.S. nationals are people born in American Samoa or Swains Islands.

For the purposes of this Chapter, "INA" refers to the Immigration and Nationality Act;[7] the corresponding "U.S.C." citations are also in the footnotes. U.S.C. citations refer to the United States Code, a collection of all United States federal laws. All cases are followed by their appropriate citation. This chapter is broken down into several Parts:

- **Part B** of this Chapter explains how to determine your immigration status in the U.S. and how this status may affect your ability to stay in the U.S.
- **Part C** describes how the government places non-CUSs in removal proceedings.
- **Part D** discusses the differences between ***inadmissibility*** and ***deportability*** and includes information about criminal convictions and their effect on your immigration status in the U.S.
- **Part E** details the process of removal proceedings from start to finish, including what you can expect during the proceedings and how the government initiates them.
- **Part F** outlines ***forms of relief*** from deportation (forms of relief are ways that you might be able to stay in the U.S.). Part F will explain the application for each form of relief, as well as what you must prove to the judge in order to be granted that form of relief and the types of ***evidence*** you should be ready to present.
- **Part G** explains how the immigration judge makes a final decision in your immigration case and what you can do to appeal or reopen your immigration case if you are dissatisfied with the result and meet the legal requirements to do so.
- **Part H** describes ***immigration detention***, including information about non-CUSs who are subject to ***mandatory detention***. Part H also illustrates the ***bond hearing*** process for those who are not subject to mandatory detention and are otherwise eligible for ***bond***.
- **Part I** provides an outline for applying for reentry into the U.S. after your deportation has been ordered and describes the serious consequences that result from ***illegal reentry*** into the U.S.

Following Part I are four Appendices:

- **Appendix A** provides a glossary that defines many key terms found in this text. These terms appear in ***bold italics*** the first time they are used.
- **Appendix B** has a list of various immigration forms and applications that you may have to fill out at some point in this process.
- **Appendix C** contains a list of useful websites that will help you research your particular immigration case.
- **Appendix D** has a list of providers of legal services (some free and others not) in and around the New York area.[8]

B. Determining Your Immigration Status

The first step in your immigration court proceedings is determining your immigration status in the U.S. If you already know your immigration status, you can skip this Part and move on to Part C of this Chapter, which describes how the government places you in removal proceedings.

1. Types of Legal Immigration Status

This section discusses five types of statuses: United States citizenship ("derivative" and "acquired"), legal permanent residency status, asylee/refugee status, *parolee status*, and *temporary protected status*. This section also explains *visas*.

(a) United States Citizenship[9]

If any of the following applies to you or if you think you might be a CUS, you should tell your immigration judge during your immigration court proceedings that you think you might be a CUS. You should also consult with an attorney or someone who may be able to help you with your citizenship claim

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7. Immigration and Nationality Act ("INA"), ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

8. A list of free or low-cost legal service providers can also be found on the U.S. Department of Justice Executive Office for Immigration Review ("EOIR") website, *available at* http://www.usdoj.gov/eoir/probono/states.htm (last visited January 10, 2010).

9. The law regarding U.S. citizenship can be complicated. You should definitely consult an attorney if you believe you might be a CUS. If you were born in the U.S. (and are not the child of a foreign diplomat), you are most likely a CUS.

and work with you to obtain the evidence you will need to prove that you are a CUS.[10] This is very important for immigration court proceedings because CUSs cannot be deported by the U.S. government.[11] If none of the below applies to you, then you are probably not a CUS, and you should determine whether you are an LPR or have another kind of legal status in the U.S.[12]

There are several kinds of U.S. citizenship including citizenship by birth, citizenship by naturalization (meaning you applied for and were granted U.S. citizenship by the government after fulfilling certain requirements), ***derivative citizenship***, and ***acquired citizenship***.

The following questions may help you determine whether you are a CUS:[13]

(1) Were you born in the U.S. or one of its possessions?[14]
(2) Was either of your parents born in the U.S.?
(3) Were any of your grandparents born in the U.S.?
(4) Was either of your parents a CUS before you turned eighteen (18) years old?

(i) Derivative Citizenship

Derivative citizenship means that you "derive" citizenship through your parent(s), who have been naturalized. The laws regarding derivative citizenship are complex and may result in different outcomes when you were born and when your parent(s) became CUSs.

You can obtain derivative citizenship if **all** of the following occurred on or after February 27, 2001:[15] (1) you turned eighteen years old, (2) you entered the U.S. as an LPR, and (3) one of your parents[16] became a naturalized CUS.

(ii) Acquired Citizenship

If you were born outside of the U.S. and either of your parents was a CUS when you were born, then you may have acquired U.S. citizenship at the time of your birth.[17]

(b) Legal Permanent Residency or "LPR" Status

People with LPR status have the right to live and work in the U.S. indefinitely and can petition for certain family members (such as spouses and children) to live in the U.S.[18] LPRs can also travel to and from the U.S. without permission, but they must apply for a reentry permit for trips that last longer than one year.[19] An LPR is entitled to apply to become a CUS after five years.[20] You can prove that you are an LPR by showing **any** of the following documentation:

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10. If you are not yet in removal proceedings, you should contact your deportation officer and tell him or her you think you might be a CUS.

11. Even if you make a claim that you are a CUS, you should still apply for other forms of relief. Just because you think you have a strong claim for citizenship, it does not mean that a judge will agree and decide in your favor. *See* Part F of this Chapter to determine the forms of relief for which you should apply.

12. According to the INA, everyone present in the U.S. is either a "national" as defined in INA § 101(a)(22); 8 U.S.C. § 1101(a)(22) (2006), or an "alien" as defined in INA § 101(a)(3); 8 U.S.C. § 1101(a)(3) (2006). Alien means "any person not a citizen or national of the U.S."

13. You are not necessarily a CUS even if you answer "yes" to any of these questions, but you should investigate each of the possibilities before making any assumptions about your immigration status.

14. You may also be a CUS if you were born on a ship or vessel while at a U.S. port, harbor, bay or sea, or if you were born within a certain number of miles from the U.S. in U.S. territorial waters or within U.S. airspace.

15. If you turned 18 years old before February 27, 2001, the new law does not apply to you. The law applies prospectively only. This means that the new law only applies in the future for people who turned 18 years old after the laws went into effect. Before February 27, 2001, the laws regarding derivative citizenship are much more complicated, and you may have to meet many more requirements. You should consult an attorney if you turned 18 years old before February 27, 2001, and believe you might be a CUS.

16. This parent must also live with and have legal custody of you.

17. This may still be true if neither of your parents was born in the U.S., but at least one of your grandparents was. This is a complicated area of immigration law. You should discuss the possibility that you have acquired citizenship with an immigration attorney if you suspect that any of this applies to you.

18. Note that under Title IV of the Adam Walsh Act, 42 U.S.C. §§ 16901–16962 (2006), any U.S. citizen or lawful permanent resident who has been convicted of a "specified offense against a minor" may not file a certain type of family-based immigration petition for any beneficiary, regardless of age. INA § 204(a)(1); 8 U.S.C. § 1154(a)(1) (2006).

19. If you are an LPR and leave the U.S. for more than a year, you may be deemed to have abandoned your immigration status.

(1) green card/resident alien card,
(2) I-551 stamp in foreign passport, or
(3) Form I-94 Arrival/Departure Record with a photo and stamp of "Temporary Evidence of Permanent Resident Status, I-551."

If you possess a green card[21] or a resident alien card, then you most likely have LPR status.[22] If you did not enter the U.S. as an LPR but have, at some point during your time in the U.S., adjusted your status to LPR status, you are now considered an LPR, and this Part applies to you. Even if the green card expires, your LPR status does not, but you should apply to renew your green card.[23] In other words, if you are an LPR and never commit a crime, then you always have the right to live, work, and travel in and out of the U.S.

Your LPR status is not secure, however. Your LPR status can be taken away. If you are an LPR and commit (or have committed) certain types of crimes, you may face deportation and your LPR status may be taken away.[24] However, even if you do face deportation because of a criminal conviction, you may be eligible for a form of relief and, as a result, may be allowed to remain in the U.S.[25]

(c) Asylee/Refugee Status

(i) Asylee/Refugee Status Defined

Asylee or ***refugee*** status is a legal status given by the U.S. government to you if you apply for it and show likelihood that your life or freedom would be threatened in your ***home country*** "because of ... race, religion, nationality, membership in a particular social group, or political opinion."[26] This means that you must show that you are being persecuted[27] because of your membership or participation in one or more of these categories.

If you applied for admission *before* entering the U.S., were granted a *visa*, and then were admitted into the U.S., you are a **refugee**. An ***asylee***, by contrast, first enters the U.S. either legally or illegally and is later granted ***asylum***.[28] Both refugees and asylees can apply for ***adjustment of status*** to LPR status after they have lived in the U.S. for one year.[29]

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20. If you obtained your LPR status through marriage to a CUS and were married for three years at the time your spouse petitioned for you, you may be eligible to apply for naturalization three years after obtaining your LPR status. Therefore, the waiting period may be shorter for LPRs who obtained their status through marriage.

21. Green cards are not actually green. They have been issued in many different colors in the past. It does not make a difference what color your green card is.

22. One exception applies to some non-CUSs who obtained their green card through marriage. If your marriage to a CUS occurred less than two years before you applied for your green card, you received a green card for conditional permanent residency, which was valid for only two years from the date it was issued. If you have one of these kinds of green cards and you never lifted the condition (if you did not apply for LPR status toward the end of the two year period), then you do not have LPR status and this section does not apply to you. However, if you are the immigrant spouse of a U.S. citizen and your spouse died during the conditional period, you may be eligible for LPR status. It used to be the case that if your spouse died before you were granted LPR status, you were no longer eligible for that status, but a new law has ended that practice.

23. In the past, green cards did not have expiration dates on them, but now they do. The expiration date is usually 10 years after the card is issued. Even after the card expires, your status as an LPR does not expire. If your green card has expired, you can file an application to renew it. However, if you have any criminal convictions, you should consult an attorney *before* you file the application to find out about any consequences you may face by filing the application. *See* Section C(3) of this Chapter, which explains the consequences of filling out immigration applications if you have criminal convictions.

24. Criminal convictions are not the only way to lose your LPR status. For example, extended periods of time outside of the U.S. may constitute abandonment of status. Assisting other immigrants to enter the U.S., using false documents or pretending to be a CUS are some of the other ways in which you can lose your LPR status.

25. *See* Part F of this Chapter for more information about applying for and obtaining relief from deportation.

26. INA § 241(b)(3)(A); 8 U.S.C. § 1231(b)(3)(A) (2006).

27. In immigration law, "'persecution" means punishment for political, religious, or other reasons that our country does not recognize as legitimate." Osaghae v. INS, 942 F.2d 1160, 1163 (7th Cir. 1991).

28. Asylum is granted under INA § 208; 8 U.S.C. § 1158 (2006).

29. INA § 209(a)(2); 8 U.S.C. § 1159(a)(1) (2006). Adjustment of status will be discussed as a form of relief from deportation in Part F of this Chapter, but for the purposes of this Part it means that refugees and asylees can apply for permanent status in the U.S. after one year. If you were once considered a refugee or asylee but have already adjusted your status to LPR status, you are now considered an LPR and should read Part B(1)(b) of this Chapter about LPR

Also note that you may be eligible for asylum even if the harm or threats to your safety come from non-government actors.[30] However, you may find it difficult to be successful with this claim, because violent crime occurs in all countries, even those with stable governments.

(ii) Application for Asylee Status

A non-citizen applies for asylee status by filing Form I-589, Application for Asylum and for Withholding of Removal, at the appropriate Immigration Service Center within one year of arrival in the United States. You may apply for asylum regardless of your immigration status and regardless of whether you are in the United States legally or illegally.[31] If you miss the one-year deadline, you may still be eligible to apply for asylum if new circumstances arise that greatly affect your eligibility for asylum or extraordinary circumstances directly affected your failure to file within one year. These may include certain changes in your ***home country conditions***, certain changes in your own circumstances, or other events.[32]

Keep in mind that the decision to grant asylum is a discretionary matter, meaning the judge has the power to decide whether or not to grant it. The applicant has the burden of proving a well-founded fear of persecution. The totality of circumstances and your actions will be considered.[33] The judge will also look to humanitarian concerns, such as your age or poor health.

(iii) Criminal Status and Eligibility

If you have been convicted of a crime, you may still be eligible to apply for asylum. However, depending on the crime, you may be barred from receiving asylum. You are barred from receiving asylee status if you have been convicted of an ***aggravated felony***[34] in the United States.[35] You must disclose any criminal history on Form I-589, Application for Asylum and for Withholding of Removal, and at the asylum interview. Failure to disclose such information may result in your asylum claim being referred to the Immigration Court or in a fine.

(d) Parolee Status

Parolees are people the U.S. government has allowed to physically enter the country for different humanitarian reasons, including, but not limited to, illness or because of home country conditions. Sometimes the government sets a specific time for parolees to remain in the U.S. Other times, the government allows parolees to stay in the U.S. indefinitely. In that case, a parolee's status would not expire, much like LPR status. But parolee status can be taken away for a variety of reasons, including criminal convictions.[36] Some parolees can apply for adjustment of status after one year.[37]

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status.

30. *See* Navas v. I.N.S., 217 F.3d 646, 655-656 (9th Cir. 2000) ("In order to establish eligibility for asylum on the basis of past persecution, an applicant must show ... [persecution that] is committed by the government or forces the government is either "unable or unwilling" to control."); McMullen v. I.N.S., 658 F.2d 1312, 1315 n.2 (9th Cir. 1981) (finding that fear of persecution by the Irish Republican Army, a group which is *not* part of any official government, met the requirement since the government could not control the non-governmental group).

31. INA § 208(a); 8 U.S.C. § 1158(a) (2006).

32. INA § 208(a)(2); 8 U.S.C. § 1158(a)(2) (2006). *See* 8 C.F.R. § 208.4 (2008) (listing some examples of circumstances that may be considered changed or extraordinary).

33. *See* Kalubi v. Ashcroft, 364 F.3d 1134, 1141 (9th Cir. 2004) (explaining that the court must consider discretionary factors such as likelihood of future persecution, separation from spouse, and disability and then explain the weight given to each); *In re* Pula, 19 I & N Dec 467, 471–72 (BIA 1987) (describing factors to be taken into consideration such as whether the alien passed through any other countries or arrived in the United States directly from his country and whether orderly procedures were available to help him in any country he passed through or any attempts to seek asylum before coming to the U.S.), *superseded by regulation in part*, 8 C.F.R. § 208.15 (2008), *as recognized in* Andriasian v. INS, 180 F.3d 1033, 1043–44 (9th Cir. 1999) (recognizing that neither asylum officers nor judges have discretion to grant asylum where a third country in which the applicant had "firmly resettled" has offered to accept the applicant and the applicant would not face fear of persecution in that country).

34. *See* INA §101(a)(43); 8 U.S.C. 1101(a)(43) (2006) for the definition of aggravated felony. *See* Part D of this Chapter for a discussion of what kinds of crimes are considered aggravated felonies.

35. INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii); 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (2006).

36. 8 C.F.R. 212.5(e)(2)(i) (2008); Ordaz-Machado v. Rivkind, 669 F.Supp. 1068, 1070 (S.D. Fla., 1987) (finding that parolee status could be revoked after parolee pled guilty to drug possession, even though parolee later challenged the legality of that guilty plea).

37. Adjustment of status will be discussed as a form of relief from deportation in Part F of this Chapter, but, for

(e) Temporary Protected Status ("TPS")[38]

TPS is a form of temporary lawful status granted by the President of the U.S. ("President") to people from certain countries[39] to which it would be dangerous to return. Examples of these dangerous situations are armed conflict, environmental disasters, or other extraordinary and temporary conditions. The President reviews the conditions for which TPS was granted on a yearly basis. If he determines that the basis for TPS no longer applies, the TPS of that country expires and people with TPS from that particular country may face deportation.

(f) Visas[40]

Visas are granted to non-CUSs by a U.S. consul, authorizing a person to come to a U.S. port or inspection point to apply to be admitted to the U.S.[41] Visas are given for a specific purpose and a specific period of time and grant a legal right to be in the U.S.[42] For example, non-CUSs who come into the U.S. with a non-immigrant visa may have a student or visitor visa for a specific period of time. Once either the purpose or time of your visa expires, you have overstayed your visa and no longer have legal status in the U.S.[43] For example, if you come to the U.S. with a student visa and you are no longer a student, then your status has expired and you are now illegally present in the U.S. You have no legal right to remain in the U.S., so the government can initiate removal proceedings against you. Therefore, if you are a ***visa overstay***, it does not matter whether you have been convicted of any crimes—the government can still deport you.[44]

2. Types of Illegal Status

(a) Entry Without Inspection ("EWI")[45]

If you have *not* been legally admitted into the U.S., which this Chapter refers to as ***entry without inspection*** ("*EWI*"), you are in the U.S. illegally and may be detained at one of the U.S. borders or other inspection points at any time. Many people who face removal proceedings have entered the U.S. without inspection and are therefore *removable* on that fact alone. Some examples of EWI include crossing one of the U.S. borders without being detected or using someone else's passport or other documentation to enter the U.S. Like visa overstays, EWIs can be deported simply because they have no legal status in the U.S.[46]

At this point, you should know your immigration status in the U.S. Next, you should determine whether the government placed you in removal proceedings. Even if you have not yet been placed in removal proceedings, you should read Part C of this Chapter. If you are serving a criminal prison sentence and are a non-CUS, you will most likely face removal proceedings at some point in the near future.

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the purposes of this Part, it means that a parolee can apply for permanent status in the U.S. after one year. If you were once considered a parolee but have already adjusted your status to LPR status, you are now considered an LPR and should read Part B(1)(b) about LPR status.

38. INA § 244; 8 U.S.C. § 1254a (2006).

39. Some countries that are currently designated for TPS as of 2010 include, but are not limited to, El Salvador, Honduras, Nicaragua, Somalia, Sudan, and Liberia.

40. Immigrant visas are defined in INA § 101(a)(16); 8 U.S.C. § 1101(a)(16) (2006).

41. INA § 221(a); 8 U.S.C. § 1201(a) (2006) (discussing the issuance of visas). Visas do not necessarily constitute permission to come into the U.S. Instead, they actually give a person permission to travel to the U.S. and apply for admission at the border. An immigration officer at the border who disagrees with the consular's determination that the visa-holder should be allowed into the U.S. can deny this person entrance into the U.S. This rarely happens but is nevertheless important to note.

42. INA § 221(c); 8 U.S.C. § 1201(c) (2006) (discussing the period of validity for visas).

43. Under INA § 222(g); 8 U.S.C. § 1202(g) (2006), a non-immigrant visa is void as soon as the non-immigrant alien "remain[s] in the United States beyond the period of stay authorized by the Attorney General." Aliens affected by this provision are precluded from seeking a new non-immigrant visa anywhere other than in their country of nationality, except under "extraordinary circumstances." This Chapter refers to these people as "visa overstays."

44. However, your criminal conviction or deportation can affect your ability to return to the U.S. in the future.

45. Note that EWI is not actually an official immigration status.

46. One difference between EWIs and visa overstays, however, is that EWIs were never legally admitted into the U.S., whereas visa overstays had legal status at some point.

C. How the Government Places You in Removal Proceedings

The government has the authority to place non-CUSs in removal proceedings because of criminal convictions, even if the non-CUS is in the U.S. legally, has worked, paid taxes, and has CUS family members (including children). You may wonder how the government finds out about the non-CUSs who have criminal convictions and places them in removal proceedings.

There are four main ways that people are placed in removal proceedings: (1) stopped at the airport after traveling abroad; (2) interviewed while in jail/prison; (3) immigration applications; and (4) ***prior deportation orders***.

1. Stopped at the Airport After Traveling Abroad

If you are a non-CUS and you travel abroad, you must go through a customs inspection conducted by DHS and attempt to reenter the U.S. In the past, many non-CUSs traveled to their *home countries* and returned to the U.S. without facing any immigration problems. However, DHS is now enforcing the laws much more strictly. The government now regularly updates its computers at inspection points, especially airports. These computers have access to criminal records and prior deportation orders, among other things. Therefore, if a DHS officer at the airport or other inspection point finds that you have a criminal conviction or prior deportation order, you may be *detained* or given a ***deferred inspection appointment***.[47] DHS will then likely start removal proceedings against you.[48]

Because there is no statute of limitations (time limit) under immigration laws, you may face serious immigration consequences for your criminal convictions or prior deportation orders, even if they occurred many years ago. If you are a non-CUS and have a criminal conviction, you should talk to an attorney before traveling abroad to make sure that you will be able to reenter the U.S. without facing any immigration consequences.

2. Interviewed While in Jail or Prison

There are DHS officers at most jails and state prisons. If you are a non-CUS serving a criminal sentence in a jail or state prison, you will likely be interviewed at some point during your imprisonment by a DHS officer who will ask you about your immigration status. You may not even realize that it is a DHS officer who is interviewing you. On the basis of this interview and other information they collect, the DHS officers may find a reason to initiate removal proceedings against you.

Once a DHS officer interviews you, he or she may place a "detainer" on you. Basically, a detainer is an order issued by a government agency saying that they will place you in their ***detention***, although they cannot take possession of you at the moment. For example, if DHS cannot take possession of you immediately because you are in prison, they will use a detainer to make sure that they can detain you in a DHS facility in the near future. If a detainer has been placed on you, you will not be released once your bail is paid or your prison sentence is complete, as would be the case if you were a CUS. Instead, the government will detain you, sometimes beyond your sentence, for immigration purposes.[49] In other words, you will either (1) complete your criminal sentence in a jail or prison, then be moved to a *DHS* ***detention center*** (a jail or prison that DHS uses[50]) to face deportation or (2) you will have to defend yourself at removal proceedings

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47. A deferred inspection appointment means that you will be allowed to enter the U.S. but are expected to appear at your immigration court date, which will be set at a later time. You will eventually receive your Notice to Appear ("NTA"). The NTA is discussed in greater detail in Section E(1) of this Chapter. If you do not receive the NTA, you should call 1-800-898-7180 and enter your *Alien Registration Number* (an eight- or nine-digit number preceded by an "A" found on your resident alien card or other documents related to immigration) to see if your court date has been set.

48. If you were in prison after October 1998 for your conviction, you may be subject to mandatory detention. This means you may be detained at the airport or point of inspection and be forced to defend your immigration case from inside the DHS detention center or a prison or jail that DHS uses. *See* Part H of this Chapter, which discusses detention in greater detail.

49. State and local law enforcement authorities may only hold persons on immigration detainers for 48 hours after the completion of their jail time. 8 C.F.R. § 287.7(d). This means that once you have completed your criminal sentence, DHS must take you into custody for immigration purposes within two days. DHS frequently violates this provision. Therefore, if DHS does not take you into custody within 48 hours after the completion of your prison sentence, you should contact your criminal defense attorney and ask him or her to file a writ of habeas corpus with the state court demanding your release from immigration detention.

50. At this point, you are no longer considered a prisoner. You are an immigration detainee. Although some

while you are completing your criminal sentence in a jail or prison. If you win your immigration case, you will then be released at the end of your criminal prison sentence. But if you lose your immigration case, DHS will detain you and then *deport* you to your home country. You should be aware that recently concern has arisen over the movement of detainees to remote out-of-state facilities without providing ***notice*** to the detainees, their families, or their lawyers.[51]

3. Immigration Applications

Most, if not all, applications[52] to the United States ***Citizenship and Immigration Services*** ("***CIS***") now require security clearances and/or fingerprints as part of the application process. Once CIS has received your immigration application, it determines whether you have any criminal convictions that occurred anywhere in the U.S., even if they occurred a long time ago. In other words, when you submit an application and your fingerprints to CIS, it is able to obtain a list of all your criminal convictions, regardless of when or where they occurred. If you have a criminal conviction that makes you ***deportable*** or ***inadmissible***,[53] your application will likely be denied and you may be placed in removal proceedings.

4. Prior Orders of Deportation

DHS also apprehends people who live in the U.S. and have prior deportation orders. Even if you do not know that the government has ordered you deported in the past or your deportation order was entered many years ago, it is still a problem for you. If you were ever in immigration court proceedings and you did not appear for your scheduled court date, you may have been ordered deported in your absence.[54] Persons with prior deportation orders have been entered onto a national absconder list. Local law enforcement officers (such as police) help immigration officers catch the people on this list. This can happen anywhere, even if you are stopped for a traffic violation.

Now that you have determined your immigration status and how you were placed in removal proceedings, you should find out whether you are removable under inadmissibility or deportability grounds, discussed in the next part, Part D of this Chapter.

D. Two Grounds for Removal: Inadmissibility and Deportability

Depending on the facts of your case, you may face removal proceedings under inadmissibility grounds or deportability grounds.[55] This means that if you are found either ***inadmissible*** or ***deportable***, you will be deported. You may still be ***deportable*** even if you are lawfully present in the U.S. at the time DHS initiates removal proceedings against you. If this is because of a criminal conviction (see below for more information on what counts as a criminal conviction), you may be deported. You may be **inadmissible** if you are found to be unlawfully present in the U.S., if you have entered without inspection, or if you are stopped while attempting to enter the U.S. (at a border, port, or inspection point).

People without any legal status (EWIs) are considered inadmissible. Although LPRs have legal status, they too can be considered inadmissible if they are stopped while attempting to reenter the U.S. after a trip abroad.[56] If you have been given a deferred inspection appointment[57] or are in a DHS detention center after

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detainees are held in regular prisons, immigration detainees have fewer rights than prisoners.

51. *U.S.: Remote Detainee Lockups Hinder Justice,* Human Rights Watch, Dec. 2, 2009 *available at* http://www.hrw.org/en/news/2009/11/30/us-remote-detainee-lockups-hinder-justice (last visited Jan. 10, 2010).

52. These include, but are not limited to, applications for U.S. citizenship, renewal of green cards, employment authorizations and petitions for family members.

53. Grounds for deportability and inadmissibility will be discussed in greater detail in Part D of this Chapter.

54. Part E of this Chapter describes the consequences of not appearing for your scheduled immigration court hearings. Part G of this Chapter explains how you may be able to file a motion to reopen your immigration case due to failure to appear.

55. The difference between deportability and inadmissibility may seem trivial, but the category you fall into will determine which forms of relief are available to you.

56. This may seem confusing, but every time you travel abroad and attempt to reenter the U.S., you are essentially asking the government for permission to be readmitted into the U.S.

57. A deferred inspection appointment is an appointment at your local DHS office in which DHS will continue the interview it began at the airport or inspection point. DHS usually takes your green card and passport from you in anticipation of your removal proceedings. At the deferred inspection appointment, DHS will generally give you the Notice to Appear ("NTA") that will begin the removal proceedings against you. See Section E(1) of this Chapter, which discusses the NTA in greater detail.

attempting to enter the U.S. illegally (or reenter the U.S. if you are an LPR), you may be inadmissible. Because most of the readers of this Chapter are prisoners, however, you are probably deportable because you were legally present in the U.S at the time DHS began removal proceedings against you.

Before we move on to discuss deportability and inadmissibility, you should understand how a conviction is defined for immigration purposes. The definition of ***conviction*** for immigration purposes is different from the definition in criminal law. In fact, the immigration definition is much broader and many more criminal acts may be considered convictions under immigration law even though they are not considered convictions in criminal law. Read the following section to find out what is considered a conviction for immigration purposes.

1. Criminal Convictions

(a) What Is a Criminal Conviction?

For the purposes of removal proceedings, the term conviction means that a court has entered a formal judgment of guilt in your case. If a formal judgment has not yet been entered, you may still be "*convicted*" if

(1) A judge or a jury has found you guilty, you have entered a plea of guilty or *nolo contendere*,[58] or you have admitted sufficient facts to warrant a finding of guilt, **and**
(2) The judge has ordered some form of punishment, penalty, fine, community service, or restraint on your liberty to be imposed.[59]

In other words, if you were found guilty or you admitted sufficient facts of your guilt and you somehow have been punished for your actions, you probably have a conviction for the purposes of your immigration court proceedings.

Since the definition of conviction changed in 1996, the courts have been determining which criminal convictions are considered convictions for immigration purposes. Some convictions are no longer considered convictions in criminal court but are still considered convictions for the purposes of removal proceedings. For example, the following are considered convictions for immigration purposes:

(1) "Deferred adjudications" are convictions that are given in "specialized courts" (such as drug courts and domestic violence courts) whereby a judge accepts the defendant's plea and orders treatment. Upon completion of this treatment, the judge vacates or reduces the defendant's original plea. Therefore, the conviction is vacated or reduced for criminal purposes. However, the initial plea combined with the judge's order to attend a program is still considered a conviction for immigration purposes.[60]
(2) The Second Circuit has held that an ***expungement*** of a non-drug offense may be a conviction for immigration purposes.[61]
(3) Convictions that are vacated for reasons solely related to ***rehabilitation*** or immigration hardships, rather than because of procedural or substantive defects in the underlying criminal proceedings, may still be considered convictions for immigration purposes.[62]

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58. *Nolo contendere* literally means "no contest." Black's Law Dictionary 1074 (8th ed. 2005). This plea is technically not an admission of guilt, but it is enough of an admission to subject the defendant to criminal punishment and to warrant immigration consequences.

59. INA § 101(a)(48); 8 U.S.C. § 1101(a)(48) (2006).

60. *See In re* Salazar-Regino, 23 I. & N. Dec. 223, 227–34 (BIA 2002) (deciding that state rehabilitative expungements shall be considered convictions for immigration purposes). Some state specialized courts have gotten around this harsh interpretation of "conviction" by developing "pre-plea diversion programs" that require the usual completion of treatment, but instead of vacating the original plea upon completion of treatment, the court does not require you to initially plead guilty, so the court's judgment is not enough to count as a "conviction" for immigration purposes. States with pre-plea diversion programs include Connecticut, New Jersey, and Vermont. Many cities and counties—such as Cook County, Illinois and Seattle, Washington—have their own pre-plea diversion programs.

61. Mugalli v. Ashcroft, 258 F.3d 52, 62 (2d Cir. 2001) (examining the effect of the New York State Certificate of Relief from Disabilities provision on the immigration consequences of a criminal conviction).

62. *In re* Christopher Pickering, 23 I. & N. Dec. 621, 624 (BIA 2003) (declaring that a Canadian court's order quashing a conviction still counts as a conviction for immigration purposes and distinguishing between convictions that are vacated for rehabilitative or immigration reasons and those that are vacated for procedural or substantive reasons; a conviction that was vacated for rehabilitative or immigration reasons remains a conviction for immigration purposes), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006); Sansui v. Gonzales, 474 F.3d 341, 347 (6th Cir. 2007) (holding that petitioner who committed property theft and then paid a fine in lieu of a court appearance could be removed as an alien

The following are **not** considered convictions for the purposes of removal proceedings:

(1) Youthful offender adjudications (as defined by Federal law).[63]
(2) A conviction that a trial or appeals court vacates because it was legally defective,[64] and
(3) A disorderly conduct violation.

(b) How Do I Know if I Have Any Criminal Convictions?

It is important that you know when and how many times you have been arrested because any arrest in your record needs to be analyzed to determine if it is a conviction according to the immigration definition of conviction set forth above. You, your attorney, or a trusted friend should obtain ***certificates of disposition***[65] or a comprehensive ***rap sheet***.[66] You can obtain certificates of disposition from the criminal courts in which you were convicted. These documents will give you information about what happened in your criminal court proceedings and will indicate what your convictions and punishments were. Once you know and understand this information, you can determine what immigration consequences you might face.

Your rap sheet and certificates of disposition will not only help you determine what immigration consequences you may face but also what forms of relief may be available to you, since some criminal convictions bar (or stop) you from getting certain forms of relief. The following may also play a role in determining the forms of relief available to you: (1) your particular criminal sentence or punishment (how much jail time the judge ordered you to serve, even if it was suspended); (2) the ***maximum penalty*** possible for your conviction (how much jail time the judge *could* have ordered you to serve, even if you received less); (3) and whether you were given a *suspended sentence* or *parole*.

If your criminal case is still pending, you should discuss the immigration consequences that may result from it with your criminal defense attorney. Make sure that he or she understands how the result of your criminal court case may affect your ability to remain in the U.S. Because criminal law is different from immigration law, some criminal defense attorneys are unaware of the severe consequences of criminal convictions on immigration court hearings.[67]

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convicted of a crime of moral turpitude within five years of his admission and could not have his theft conviction vacated through a writ of *coram nobis* without a "colorable legal basis"); Saleh v. Gonzales, 495 F.3d 17, 21 (2d. Cir. 2007) (holding that an alien remains convicted of a removable offense for federal immigration purposes when the conviction is vacated simply to aid the alien in avoiding negative immigration consequences).

63. *In re* Devison-Charles, 22 I. & N. Dec. 1362, 1368–73 (BIA 2000) (finding that declaration of juvenile delinquency does not count as a conviction for immigration purposes); *In re* Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (BIA 1981) (holding that juvenile adjudications do not count as convictions for immigration purposes). *But see* Wallace v. Gonzales, 463 F.3d 135, 139 (2d Cir. 2006) (finding that a youth's propensity to violate the law, demonstrated by multiple convictions, can be considered for immigration purposes when determining whether an alien merits discretionary relief in applying for a change of status); Garcia v. INS, 239 F.3d 409, 412–13 (1st Cir. 2001) (considering a theft offense four days before petitioner's 18th birthday as a conviction for immigration purposes).

64. *In re* Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (BIA 2000) (holding that a conviction vacated under Article 440 of the New York Criminal Procedure Law, which was not a state rehabilitative statute, was no longer a conviction for immigration removal purposes); *In re* Sirhan, 13 I. & N. Dec. 592, 599 (BIA 1970) (discussing the validity of the California Superior Court's vacating of narcotics convictions through a writ of *coram nobis*, thus terminating deportation proceedings because the underlying conviction no longer existed).

65. In New York, a *certificate of disposition* is an official court document that contains the Court Seal and indicates the disposition (or what determination the judge made) of a criminal case. This document may have a different name in other states. If your criminal court case occurred in a state outside of New York, you should obtain the equivalent court document that indicates the result of your case.

66. The Legal Action Center, *available at* http://www.lac.org/ (last visited January 10, 2010), can help you obtain your rap sheet if you are unable to do so on your own. The following website describes the process of obtaining and cleaning up a rap sheet in New York State: Legal Action Center, How to Get and Clean Up Your New York State Rap Sheet (7th ed. 2007), *available at* http://www.hirenetwork.org/pdfs/NYS_Rap_Sheet_Final.pdf (last visited January 10, 2010). Also, this website describes the process of obtaining all kinds of documentation, such as marriage certificates, social security cards, etc. that might be helpful in immigration proceedings: Legal Action Center, How to Obtain Important Documents (2003), *available at* http://www.hirenetwork.org/pdfs/ (last visited January 23, 2011) (follow link for "How to Obtain Important doc"). Appendix D at the end of this Chapter includes more resources and websites, most of which will be helpful nationwide.

67. It is also important for you to realize that anything you say during your immigration court proceedings can be used against you in your pending criminal case. Therefore, if you are in immigration court and your criminal court proceedings are not complete, you should discuss your case with your criminal defense attorney before making any admissions of guilt. If, however, you have already been convicted of a crime, you should not deny your guilt during your

2. Deportability[68]

A conviction in one of the following categories of crimes make you deportable, although you may avoid deportation if you qualify for one of the forms of relief described in Part F of this Chapter.

(a) Aggravated Felony

This is the worst category of crimes for immigration purposes because being convicted of an aggravated felony (1) makes you ineligible for most forms of relief and (2) subjects you to mandatory detention.[69] The term "aggravated felony" is a term created for the purposes of immigration law and has no connection to the definition of "felony" in state or federal criminal law. So, even if your criminal conviction was not called a "felony" under state law, it may still be considered an aggravated felony for purposes of your immigration proceedings. For example, some state misdemeanor convictions are considered aggravated felonies.[70] However, sometimes a state felony conviction is *not* considered an aggravated felony. Furthermore, many crimes become aggravated felonies if the sentence imposed is for one year or more, even if it is a suspended sentence. This is why it is important to know not only what your convictions are for and how long your sentence was.[71] Other crimes may be aggravated felonies regardless of what the sentence was.

(i) What is an aggravated felony?

An aggravated felony is defined in the INA.[72] Examples of aggravated felonies are

(1) ***Crimes of violence*** for which the penalty was at least one year;[73]
   (a) If physical force was used or most likely *could* have been used in committing the crime, the crime may be considered a ***crime of violence*** and, therefore, an aggravated felony.[74]

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immigration court proceedings. Judges are more likely to grant relief to people who admit that they have done wrong in the past but have improved their lives or have been rehabilitated. Part F of this Chapter discusses the importance of rehabilitation for obtaining certain forms of relief.

68. The burden is on the government to prove deportability. If you are facing removal as a lawful resident who has been admitted into the U.S., the burden is on the government to prove "by clear and convincing evidence" (meaning enough evidence to show that the thing is substantially more likely than not) that you are deportable. This is not a very difficult burden for the government to overcome, however. To establish deportability, the government can use any official criminal court records to prove that you have been convicted of criminal violations. *See* Santapaola v. Ashcroft, 249 F. Supp. 2d 181, 189–90 (D. Conn. 2003) for a list of documents that can be used as a record of conviction. If your crimes fall in the group of deportable crimes, the government will begin removal proceedings. For more information about the procedural steps of immigration court proceedings (especially removal proceedings), see Part E of this Chapter, which goes through the process from beginning to end.

69. Mandatory detention will be discussed in greater detail in Part H of this Chapter.

70. An example is United States v. Graham, 169 F.3d 787, 793 (3d Cir. 1999), which held that a state misdemeanor conviction for petit larceny, carrying a maximum sentence of one year, constituted an aggravated felony under INA § 101(a)(43)(G); 8 U.S.C. § 1101(a)(43)(G) (2006). Since the decision in *Graham*, other Circuit courts have come to similar conclusions. *See* United States v. Cordoza-Estrada, 385 F.3d 56, 58–59 (1st Cir. 2004) (holding that a misdemeanor assault conviction constituted an aggravated felony); Guerrero-Perez v. INS, 242 F.3d 727, 737 (7th Cir. 2001) (holding that a misdemeanor sexual abuse conviction constituted an aggravated felony); United States v. Saenz-Mendoza, 287 F.3d 1011, 1014 (10th Cir. 2002) (holding that a misdemeanor child abuse conviction constituted an aggravated felony).

71. It is important to note that the relevant sentence is not what could possibly have been imposed by the statute under which you were convicted, but instead the actual sentence you were given. *See* Ahmed v. Att'y Gen. of the United States, 212 Fed. Appx. 133, 135 (3d Cir. 2007) (instructing courts to look to the sentence imposed). However, in a case where you are originally sentenced to probation and then resentenced after a probation violation, the court will treat the modified sentence as the sentence originally imposed for immigration purposes.

72. INA § 101 (a)(43); 8 U.S.C. § 1101(a)(43) (2006).

73. Crimes of violence are offenses that have as an element the use, attempted use, or threatened use of physical force against another person or property of another. Vargas-Sarmiento v. United States Dep't of Justice, 448 F.3d 159, 165 (2d Cir. 2006). A crime of violence can also be any other offense that is a felony and by its nature involves a risk that physical force may be used against the person or property of another in the process of committing the offense.

74. A few recent decisions have offered additional indications of what is included in the definition of ***crimes of violence***. *See* United States v. Franco-Fernandez, 511 F.3d 768, 770–771 (7th Cir. 2008) (holding that the abduction of a child by a parent did not qualify as a "crime of violence" under Illinois law because the abduction of a child by a parent does not generally involve restraint against the child's will or involve violence or threat of violence); Estrada-Rodriguez v. Mukasey, 512 F.3d 517, 520–521 (9th Cir. 2007) (holding that resisting arrest under Arizona law was an "aggravated felony" because the elements for conviction included a component of physical violence or the threat of physical violence).

(2) Murder;
(3) Rape;
(4) Sexual abuse of a minor;[75]
(5) Drug trafficking;
  (a) The law on what counts as drug trafficking is still changing. A felony drug sale or a felony drug possession with intent to sell are both considered aggravated felonies. The Supreme Court recently held that a first-time state felony drug possession—without intent to sell—is not an aggravated felony.[76] A first-time misdemeanor possession is also not an aggravated felony.[77] The law is not clear yet on whether two or more misdemeanor possessions, or whether misdemeanor sales, can be considered aggravated felonies.[78]
(6) Firearms trafficking;[79]
(7) Theft or burglary for which the penalty imposed is imprisonment for at least one year;[80]
(8) Child pornography;
(9) Prostitution business;[81]

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75. Sexual abuse of a minor can be a felony or class A misdemeanor under criminal law but either one could be defined as an aggravated felony for immigration purposes. The Second, Third, Fifth, Seventh, and Eleventh Circuits have used the definition of "sexual abuse" found at 18 U.S.C. § 3509(a)(8) (2006), under which misdemeanors could be defined as aggravated felonies. The Ninth Circuit has rejected this approach, using the definition of "sexual abuse of a minor" found at 18 U.S.C. § 2243 (2006), which excludes indecent exposure offenses, includes a four-year age-span gap, and criminalizes only sexual contact with children sixteen years or younger. Estrada-Esponoza v. Mukasey, 546 F.3d 1147, 1152 (9th Cir. 2008) (finding that "it is more plausible that Congress intended the 'aggravated felony' of 'sexual abuse of a minor' to incorporate the definition of 'sexual abuse of a minor' in 18 U.S.C. § 2243 … rather than the definition of 'sexual abuse' found in 18 U.S.C. § 3509"). For example, under the Ninth Circuit approach, the fact that a 19 year old had sex with a 16 year old would not be enough, in and of itself, to be an aggravated felony for immigration purposes. Depending on the state statute, state sex offenses involving a minor may not be considered "sexual abuse of a minor." *See*, *e.g.*, Rebilas v. Keisler, 506 F.3d 1161, 1164–65 (9th Cir. 2007) (holding that the Arizona state offense of attempted public sexual indecency to a minor did not qualify as an "aggravated felony" because the defendant could be arrested and convicted for behavior the minor was unaware of and finding the Arizona definition overly broad compared to the federal definition of sexual abuse of a minor).

76. Lopez v. Gonzales, 127 S. Ct 625, 633, 166 L. Ed. 2d 462, 474 (2006) (holding that where the drug possession offense is a felony under state law but only a misdemeanor under the Federal Controlled Substances Act, the possession is not an aggravated felony). *But see* Storeby v. Unites States, No. 8:02-cr-65-T-24TBM, 2007 U.S. Dist. LEXIS 39494, at *5 (M.D. Fla. May 31, 2007) (*unpublished*) (holding that *Lopez* does not apply retroactively to cases on collateral review).

77. *See* Lopez v. Gonzales, 127 S. Ct 625, 633, 166 L. Ed. 2d 462, 474 (2006); *see also* Gonzales-Gomez v. Achim, 441 F.3d 532, 535 (7th Cir. 2006) (holding that states may not reclassify misdemeanors as aggravated felonies in order to banish immigrants); Arce-Vences v. Mukasey, 512 F.3d 167, 170 (5th Cir. 2007) (holding that a single charge of possession of marijuana is not an aggravated felony).

78. One District Court found that multiple misdemeanor possessions qualified as an aggravated felony for the purposes of sentencing. Though the question was not reached, the interpretation of an aggravated felony will most likely be the same in the removal context. United States v. Castro-Coell, 474 F. Supp. 2d 853, 864 (S.D. Tex. 2007) (holding that two state misdemeanor drug offenses could qualify as an aggravated felony). *See also* United States v. Lopez-Molina, 494 F.Supp.2d 517, 520 (W.D. Tex. 2007) (finding that under the Court's decision in *Lopez v. Gonzales*, 127 S. Ct. 625, 166 L. Ed. 2d 462 (2006), the crime at issue in this case, repeated drug possession, can be treated as drug trafficking for the purposes of immigration proceedings). *But see In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 393-394 (BIA 2007) ("[A]bsent controlling authority regarding the 'recidivist possession' issue, an alien's State conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism unless the alien's status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for that simple possession offense.") For more information or practical advice on how to defend yourself in removal proceedings involving this area of law, visit the New York State Defenders Association (NYSDA) website, which contains a variety of practice advisories. NYSDA Immigrant Defense Project, *available at* http://www.nysda.org/idp/webPages/LvGPressroom.htm (last visited January 10, 2010), or call the Immigrant Defense Project at 212-725-6422.

79. Both the sale and distribution of firearms are considered aggravated felonies.

80. Regardless of whether the conviction was a misdemeanor or a felony, both types of theft or burglary are considered aggravated felonies as long as the penalty imposed was at least one year of prison time. Additionally, the 9th Circuit has held that a theft offense, for the purposes of finding an "aggravated felony," does not require the intent to permanently deprive someone of property; the deprivation of property can be temporary or incomplete and still qualify as a theft offense. Arteaga v. Mukasey, 511 F.3d 940, 947 (9th Cir. 2007).

81. Prostitution business constitutes any crime related to owning, controlling, managing, or supervising a prostitution business. INA § 101(a)(43)(K)(i); 8 U.S.C. § 1101(a)(43)(K)(i) (2006).

(10) Crime of fraud or deceit[82] or tax evasion if the loss to the victim[83] exceeds $10,000;[84]
(11) Some types of money laundering in excess of $10,000;
(12) ***Failure to appear*** for service of sentence;[85]
(13) Crime related to commercial bribery;[86]
(14) Crime relating to obstruction of justice, perjury or subornation (encouragement) of perjury, or bribery of a witness, where the penalty imposed is one year or more in prison (felony or misdemeanor);
(15) Smuggling aliens;[87]
(16) Conviction related to failure to appear before a court on a felony charge that could result in a sentence of two or more years; or
(17) An attempt or conspiracy to commit any of the above.

(b) Other Offenses That Could Make You Deportable

The following are other crimes that could make you deportable, although they are not aggravated felonies.[88]

(i) Controlled Substance Offenses

If you have been convicted of a ***controlled substance offense***, other than a single offense involving possession of thirty grams or less of marijuana for your own use,[89] you may be deportable.[90] Conviction for a conspiracy or an attempt to possess, distribute, or manufacture a controlled substance is also a deportable offense.[91]

(ii) Crime Involving Moral Turpitude[92]

A ***crime involving moral turpitude*** ("***CIMT***") is a crime that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[93] CIMTs are not defined by statute but have been defined by case law (i.e., by the courts). Courts struggle to apply this definition, and identifying what is and what is not a CIMT is difficult. Therefore, you should do as much research as possible if you think you might have committed a CIMT.

There are various categories of CIMTs, which include, but are not limited to:

(1) Crimes in which an intent to steal or defraud is an element;
(2) Crimes in which bodily harm is caused or threatened by an intentional or willful act;
(3) Crimes in which serious bodily harm is caused or threatened by a reckless act; and
(4) Sex offenses.

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82. An offense may not be fraud or deceit unless fraud or deceit is a necessary or proven element of the crime.

83. For the purposes of tax evasion, the "victim" is the government.

84. However, a recent court decision held that a loss of over $10,000 is not required for the fraud or deceit to be an aggravated felony as long as the defendant intended to cause a loss of that size or greater. Eke v. Mukasey, 512 F.3d 372, 380–81 (7th Cir. 2008).

85. This is an aggravated felony if the underlying offense is punishable by a term of five years or more. INA § 101(a)(43)(Q); 8 U.S.C. § 1101(a)(43)(Q) (2006).

86. Some examples of this include counterfeiting, forgery, and trafficking in cars with altered vehicle identification numbers, where the penalty imposed is imprisonment for one year or more (felony or misdemeanor).

87. If you have not been *criminally* convicted of smuggling, you might be eligible for a waiver if it is your first offense and you assisted your spouse, child, or parent.

88. Other crimes besides the ones listed can make you deportable, such as failure to register and falsification of documents, INA § 237 (a)(3)(B); 8 U.S.C. § 1227(a)(3)(B) (2006), security and related grounds, INA § 237(a)(4); 8 U.S.C. § 1227(a)(4) (2006), and being a *public charge* or an unlawful voter. INA § 237(a)(5), (6); 8 U.S.C. § 1227(a)(5)–(6) (2006).

89. If you are currently in criminal proceedings and are able to prove that you possessed 30 grams or less of marijuana for your own use and this is your only crime, you should tell your criminal defense attorney that this should be reflected in the criminal court record. Otherwise, even if you prove in your criminal proceedings that you possessed 30 grams or less for your personal use, it will not automatically be reflected in the record and you may still face immigration consequences for the conviction.

90. INA § 237(a)(2)(B)(i); 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

91. INA § 237(a)(2)(B)(i); 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

92. INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

93. Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006).

To determine whether you have been convicted of a CIMT, the judge will look at the elements of the crime of which you have been convicted. These elements are found in the statute that defines the crime. If certain elements (such as the intent to steal or defraud mentioned above) are included in the definition of your crime, the judge will consider your crime a CIMT. Therefore, courts will not generally look to the particular facts of your case to determine whether you have been convicted of a CIMT, but instead to the criminal statute defining the crime and its elements.[94]

Some examples of CIMTs are voluntary manslaughter,[95] involuntary manslaughter,[96] tax evasion, aggravated assault,[97] sexual abuse, spousal abuse, breaking and entering, kidnapping, arson, and theft or fraud (including welfare fraud and student loan fraud). While drunk driving is not considered a crime involving moral turpitude, drunk driving without a license may be.[98] Because CIMTs have been defined by case law, it is important to get advice from your criminal defense attorney before taking a plea bargain. Remember that if you take a plea and confess to committing a crime that can be defined as a CIMT, you may face serious immigration consequences. By speaking to your attorney, you may be able to change your plea and avoid deportation in the future.

If you have been convicted of one CIMT within five years of the date of your admission to the U.S. and the judge *could have* sentenced you based on your crime to a prison term of one year or more, you may be deportable.[99] It does not matter what your actual sentence was, as long as the judge *could* have sentenced you to one year or more. If you are convicted of only one CIMT, but *more* than five years (ten if you are an LPR) have passed since you were admitted to the U.S., you cannot be deported. If, however, you have been convicted of *two* CIMTs that do not arise out of a single scheme *any time* after you were admitted into the U.S., you may also be deportable.[100]

(iii) Certain Firearms Offenses

If you have been convicted of certain firearms offenses, you may be deportable.[101]

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94. Immigration judges were generally considered to be prohibited from looking at the particular facts of your conviction, and could only look at the elements of the crime for which you are convicted to determine whether the crime qualified as a CIMT. *See* United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914) (finding that if a person can be convicted of a crime without having the level of depravity necessary to make the crime a CIMT, then anyone convicted of committing the crime cannot be said to have committed a CIMT, regardless of the facts of the particular case). *See also* Taylor v. United States, 495 U.S. 575, 599–603, 110 S. Ct. 2143, 2158–2161, 109 L. Ed. 2d 607 (1990) (finding that the "categorical approach" like that laid out in *Uhl* is a workable and appropriate approach, but also holding that immigration judges are allowed to inquire into the record when faced with "divisible statutes" like burglary statutes in which one "branch" of the statute might include elements that would lead to a crime being classified as one involving moral turpitude, and another branch would not). In 2008, the Attorney General issued a decision that greatly expands the immigration judge's ability to investigate the particular facts of a conviction. *In re* Silva-Trevino, 24 I. & N. Dec. 687, 704 (A.G. 2008) ("[I]f the record of conviction does not resolve the inquiry, [a judge should] consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."). The impact of this case is not clear at the time of this writing, and it is the subject of much debate. The new Attorney General may withdraw the opinion. If you have been convicted of a crime that you think might involve moral turpitude, you should discuss the issue with your attorney.

95. *See In re* Wojtkow, 18 I. & N. Dec. 111, 112 (BIA 1981) (holding that voluntary manslaughter can involve moral turpitude because "moral turpitude can lie in criminally reckless conduct").

96. *See In re* Franklin, 20 I. & N. Dec. 867, 870 (BIA 1994) ("[B]ecause the statute under which the respondent was convicted requires that she acted with a 'conscious disregard of a substantial and unjustifiable risk,' the conclusion necessary follows that she has been convicted of a crime involving moral turpitude.").

97. *See In re* Medina, 15 I. & N. Dec. 611, 612–614 (BIA 1976) (holding that a conviction for aggravated assault inherently involves moral turpitude where a statute requires either intent, knowledge, or recklessness).

98. *See* Marmolejo-Campos v. Gonzales, 503 F.3d 922, 926 (9th Cir. 2007) (holding that while drunk driving is not moral turpitude, drunk driving without a license is because "[d]riving while intoxicated is despicable, and when coupled with the knowledge that one has been specifically forbidden to drive, it becomes an act of baseness, violence or depravity in the private and social duties which a person shows to a fellowman or to society in general, contrary to the accepted and customary rule of right and duty."), aff'd, 588 F.3d 903, 914-917 (9th Cir. 2009) (en banc).

99. INA § 237(a)(2)(A)(i)(I)–(II); 8 U.S.C. § 1227(a)(2)(A)(i)(I)–(II) (2006).

100. INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii) (2006).

101. INA § 237(a)(2)(C); 8 U.S.C. § 1227(a)(2)(C) (2006). These firearms offenses include "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or attempting or conspiring to purchase, sell, offer for sale, exchange, use, own possess, or carry, any weapon, part, or accessory which is a firearm or destructive device … in violation of any law."

(iv) Domestic Violence Crimes

If you have been convicted of domestic violence crimes, including a violation of an order of protection, stalking, or crimes against children (including child abuse, child neglect, or child abandonment), you may be deportable.[102]

(v) High-Speed Flight

If you are convicted of high-speed flight from an immigration checkpoint, you may be deportable.[103]

3. Inadmissibility[104]

You are inadmissible if you do not have permission to enter the U.S. or if you entered the U.S. illegally at some point and are currently unlawfully present in the U.S. You may also be found to be inadmissible any time you seek permission to enter the U.S., even if you are an LPR returning from a trip abroad. Therefore, inadmissibility can apply without criminal convictions. The focus, however, of this Section will be individuals who are inadmissible because of criminal convictions. The following Subsection describes the criminal grounds (or reasons) for inadmissibility.

(a) Criminal Grounds for Inadmissibility

There are many grounds for inadmissibility.[105] Criminal grounds for inadmissibility[106] are usually raised when an LPR with criminal convictions travels abroad and is stopped at U.S. customs upon return. The LPR would have been deportable if already in the U.S., but attempting to reenter the U.S. subjects him to inadmissibility. Basically, if you are an LPR with criminal convictions who was stopped at an inspection point after a trip abroad, you are probably facing inadmissibility grounds in your removal proceedings.

The criminal grounds for inadmissibility are similar to those for deportability, although the forms of relief available to those who are subject to inadmissibility may be different. The following criminal convictions will make you subject to inadmissibility:

(i) CIMTs

For the purposes of inadmissibility, CIMTs are defined in the same way they are defined for deportability,[107] explained in Subsection D(2)(b)(ii) above. However, if you have only been convicted of one CIMT, you may qualify for one of the following ***petty offense exceptions*** and therefore may not be inadmissible:

(1) Petty offense exception 1: (a) the crime was committed when you were under eighteen (18) years old, (b) you were only convicted of one CIMT, **and** (c) the crime was committed more than five years before your application for admission.[108] If all three of these conditions apply to you, then you may qualify for the first exception.
(2) Petty offense exception 2: (a) you must have only been convicted of one CIMT **and** (b) the maximum possible penalty for the crime (the maximum amount of time the judge *could* have sentenced you to)

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102. INA § 237 (a)(2)(E); 8 U.S.C. § 1227(a)(2)(E) (2006).

103. INA § 237(a)(2)(A)(iv); 8 U.S.C. § 1227(a)(2)(A)(iv) (2006).

104. INA § 212; 8 U.S.C. § 1182 (2006).

105. INA § 212(a); 8 U.S.C. § 1182(a) (2006). You may be inadmissible if you have been convicted of certain crimes or acts (either outside or inside the U.S.) as discussed further in this Part. Here are some of the other reasons why you may be inadmissible: you have certain communicable diseases, like tuberculosis ("TB"); you have a controlled substance addiction; you have a mental illness; you have immigration violations such as unlawful presence in the U.S.; you lied about a material fact in order to obtain an immigration benefit (for example, you lied on your application); you have a past deportation order or entered the U.S. without valid documents; you are a public charge, meaning that you are likely to become dependent on public benefits as your main source of income (in other words, if you are likely to request government (public) assistance). It was the case that being infected with Human Immunodeficiency Virus (HIV) made you inadmissible, but this is no longer a ground of inadmissibility as of January 4, 2010.

106. INA § 212(a)(2); 8 U.S.C. § 1182(a)(2) (2006) (outlining inadmissibility due to a criminal conviction).

107. An alien "who admits having committed" a CIMT can also be found inadmissible. INA § 212(a)(2)(A)(i); 8 U.S.C. § 1182(a)(2)(A)(i) (2006).

108. *See* INA § 212(a)(2)(A)(ii)(I); 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (2006) (listing exceptions to inadmissibility).

cannot exceed one year in prison. Also, you must not actually have been sentenced to more than six months in prison.[109]

(ii) Two or More Criminal Convictions

Two or more criminal convictions (regardless of whether the crimes arose from a single scheme and regardless of whether the crimes were CIMTs) with a combined prison sentence of five years or more make you inadmissible.[110]

(iii) Any Controlled Substance Offense

If you are convicted of violating any controlled substance law, you are inadmissible. There is *no* exception for a single offense for thirty grams or less of marijuana for personal use, as there was under deportability.[111]

(b) Other Grounds for Inadmissibility

(i) Detained by Customs Officials During First Attempt to Enter the U.S.

If customs officials detained you during your first attempt to enter the U.S. because you did not have permission to enter the U.S., you are inadmissible.

(ii) You Have Entered the U.S. Without Inspection

If you ever ***entered the U.S. without inspection ("EWI")*** and did not have legal permission to enter the U.S., you are inadmissible.

If you are in removal proceedings under inadmissibility, the burden is on you to show, if applying to enter the U.S., that you are "clearly and without doubt entitled to be admitted" and not inadmissible or, if already present in the U.S., "by clear and convincing evidence" that you were lawfully admitted.

Now that you know your immigration status (Part B), how you were placed in removal proceedings (Part C), and under which grounds—deportability (Part D(2)) or inadmissibility (Part D(3))—you should read the following Part E to get an idea of what actually happens in immigration court, including the chronology of removal proceedings.

E. Removal Proceedings

This Part covers the step-by-step process of your actual removal proceedings. Your case will be heard in an administrative court with authority to hear only immigration cases, called an immigration court.[112] Removal proceedings must be conducted by an immigration judge,[113] except in the case of ***expedited removal***.[114] An attorney from U.S. ***Immigration and Customs Enforcement*** ("***ICE***"), part of DHS, referred to as ***assistant chief counsel***, will represent the government in your removal proceedings. These attorneys take immigration cases that involve criminal convictions very seriously and generally will vigorously fight these cases on the government's behalf.

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109. *See* INA § 212(a)(2)(A)(ii)(II); 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2006).

110. INA § 212(a)(2)(B); 8 U.S.C. § 1182(a)(2)(B) (2006).

111. INA § 212(a)(2)(C); 8 U.S.C. § 1182(a)(2)(C) (2006).

112. You can find a list of the various immigration courts (including their addresses and phone numbers) throughout the U.S. on the EOIR website, http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Jan. 10, 2010). If you are still serving your prison sentence, the ***Institutional Hearing Program ("IHP")*** may apply to you. The IHP was designed in order to expedite the deportation of non-CUSs with criminal convictions. Therefore, the IHP enables the government to ensure that you will be deported as soon as you are released from prison by conducting its investigations and hearings and even ordering you deported while you are still incarcerated.

113. INA § 240(a)(1); 8 U.S.C. § 1229a(a)(1) (2006). *See also* INA § 101(b)(4); 8 U.S.C. § 1101(b)(4) (2006) (defining "immigration judge").

114. If you attempt to enter the U.S. by fraud or without valid documentation, you may be deported without a hearing ("expedited removal"), unless you claim asylum, have a fear of persecution, or can show that you have been in the U.S. continuously for at least the previous two years. INA § 235(b)(1); 8 U.S.C. § 1225(b)(1) (2006).

1. Notice to Appear ("NTA")

Removal proceedings begin with a ***notice to appear (NTA)***, a document the government gives both you and the court. The NTA explains why the government thinks you should be deported from the U.S. and usually provides you with your first court date.[115] The NTA is sent to your last known address, even if you no longer live there, so make sure you provide an accurate mailing address to immigration officials.[116] If you are placed in a DHS detention center, DHS is supposed to give you the NTA within seventy-two hours of your detention.

The NTA is divided into two parts. The first part is called "Allegations" and includes your name, your home country, the date you entered the U.S., and how you entered the U.S. Here, the government gives the factual reasons for wanting to deport you. The second part of the NTA is called "Charges" and gives the legal reasons for your removal. In the NTA, the government must tell you all of the following:[117]

(1) The nature of the removal proceedings against you;
(3) The laws that you allegedly violated;
(4) What you did to violate the law(s);
(5) The consequences of not appearing at your hearing; and
(6) The time and place of your court proceeding.

Make sure to check the NTA carefully for accuracy. For example, you should make sure that all of the names, dates, and addresses are correct. You should also verify that your criminal convictions have been listed correctly. These may seem like unimportant details, but they can make significant differences in your removal proceedings, including whether you are subject to mandatory detention and the forms of relief for which you may be eligible.[118] If any of the facts in the NTA are not true, you should deny the charges or allegations and demand that the government provide proof of them.

2. Immigration Court

It is extremely important that you appear at all of your immigration court dates. You cannot send someone (even your attorney) to appear in your place. If you do not appear at your scheduled hearing, the hearing will take place *in absentia* (in your absence), and the judge will likely order you deported. In this situation, all the government has to do is prove (1) that the NTA was properly served on you[119] and (2) that you are removable.[120]

If you miss your court hearing, you may move to reopen the case, but only if you can (1) show "exceptional circumstances" for being absent; (2) prove that you did not receive notice; or (3) prove that you were in state or federal custody.[121]

3. Master Calendar Hearing

Removal proceedings begin with a ***master calendar hearing***, which is similar to an arraignment in criminal court. The master calendar hearing can take place in person, through video conference, or (with your permission) on the telephone.[122] The hearing is the first time you appear in front of the judge in immigration court (although you may appear at several master calendar hearings). In the master calendar

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115. Sometimes, you will be served with an NTA that says "to be calendared." This means that you will get a Notice of Hearing in the near future giving you a court date. You can also call 1-800-898-7180 and enter your Alien Registration Number to see if your court date has been set.

116. If you fail to provide an address, then the government does not have to give you notice. INA § 240(b)(5)(B); 8 U.S.C. § 1229a(b)(5)(B) (2006). Without notice, you will likely fail to show up to court and could be ordered deported in your absence. See Section 2 below.

117. INA § 239(a)(1); 8 U.S.C. § 1229(a)(1) (2006).

118. Mandatory detention is discussed in greater detail in Part H of this Chapter. Forms of relief are discussed in Part F of this Chapter.

119. The government properly serves you with an NTA when it either gives you the NTA in person, or, if personal notice is not possible, mails it to you or your lawyer. INA § 239(a)(1); 8 U.S.C. § 1229(a)(1) (2006).

120. INA § 240(b)(5)(A); 8 U.S.C. § 1229a(b)(5)(A) (2006).

121. INA § 240(b)(5)(C); 8 U.S.C. § 1229a(b)(5)(C) (2006). See Part G(3) of this Chapter for more information about motions to reopen. Motions to reopen are not necessarily easy to obtain, especially since "exceptional circumstances" usually means a serious illness that caused emergency hospitalization or death of a family member. INA § 240(e)(1); 8 U.S.C. § 1229a(E)(1) (2006).

122. INA § 240(b)(2); 8 U.S.C. § 1229a(b)(2) (2006).

hearing, the basic facts of your case will be reviewed briefly. The judge will *take the pleadings* (discussed below), confirm you are subject to deportation as the government has claimed,[123] and identify the forms of relief for which you are eligible to apply, if any. If the judge determines you are ineligible for any form of relief, the judge may order you deported at a master calendar hearing.

The judge will hear anywhere from a few to over fifty cases at the master calendar hearing. Therefore, these hearings are not usually very long. There are several reasons why a judge might adjourn (postpone) the hearing for another master calendar hearing. If you are eligible for a form of relief, the next court date after all of your master calendar hearings is the individual hearing, which will be discussed in more detail below.

(a) Reasons for Adjournment

(i) You Need Time to Find an Attorney

Although you are entitled to have an attorney represent you in your immigration court proceedings, you do not have the right to a free attorney provided by the government.[124] Instead, you must obtain an attorney on your own. You should ask the court for a list of organizations that provide low-cost or free legal services.[125] The judge will adjourn (postpone) your first master calendar hearing for another date to give you time to find an attorney. If you have not found an attorney by the second master calendar hearing, the judge may allow you more time to find an attorney or may proceed with your case, and you may have to represent yourself. If you are ineligible for any form of relief, the judge may order you deported at this second master calendar hearing.

(ii) You Need Time to Fill Out Your Application for Relief

At the master calendar hearing, the judge may tell you the forms of relief for which you may be eligible, but you should be ready to state which one of the forms of relief[126] you are seeking and bring the corresponding applications with you, if possible. Otherwise, you should ask for an adjournment, which will give you more time to fill out the necessary applications. The judge should adjourn your case for another master calendar hearing.

(iii) You Need Time to Appeal a Criminal Conviction

If you are currently appealing your criminal conviction, you should notify the immigration judge. In general, a conviction that is pending on ***direct appeal*** is not a final conviction.[127] This is important because the government can only rely on final convictions when it uses criminal convictions as the basis for deporting non-CUSs from the U.S. You must have exhausted all of your direct appeal rights for a criminal conviction before the U.S. government can deport you.

(iv) You Want a Change of Venue

If you are facing removal proceedings outside of your home state, you may apply for a ***change of venue*** to move your removal proceedings to a more convenient location. You can apply for a change of venue at any time during your case, but the judge is more likely to grant you your request if you apply early. If you plan to request a change of venue, you should do so at the master calendar hearing.

You may want to request a change of venue if moving to a court closer to your home would lessen the hardship of traveling to court. Distance can also be difficult if you are seeking a form of relief and would like to bring ***witnesses*** to testify in the court hearing on your behalf. In addition, official records are harder to obtain at great distances. The judge will consider these and other factors in determining whether to move your case. If you are detained by the government and subject to mandatory detention, which means you are

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123. This does not mean that the judge will decide whether or not you will be deported. He will just confirm that you are eligible for deportation. If, however, the judge finds that you are not eligible for any form of relief, he may order you deported at the master calendar hearing.

124. Unlike criminal court proceedings, the government will not assign a free attorney to you. If you cannot find one on your own, you will have to proceed without one.

125. Appendix D at the end of this Chapter includes a list of providers of legal services.

126. See Part F of this Chapter for more information regarding forms of relief and their applications.

127. If your case is on direct appeal, you should notify the immigration judge immediately and request that the immigration case against you be terminated.

ineligible for bond,[128] it is very unlikely that you will be transferred to another state unless the government agrees. The courts have given great weight to the government's right to detain you wherever there is detention space available, which may not be in or near your home state. So, if you are detained, it is highly unlikely that your request for a change of venue will be granted.[129]

Whether or not you have an attorney, the judge can still "take the pleadings," which is the next step in the master calendar hearing.

4. Pleadings

At the beginning of your master calendar hearing, the judge will "take the pleadings," or review the NTA with you. The judge will ask you (1) if the facts in the NTA are true, (2) if you admit you are removable, and (3) whether you will be applying for any forms of relief. If, in reviewing the NTA, you found any mistakes and/or discrepancies, you should mention them and deny false or incorrect allegations.

The government, however, must first prove two facts: (1) that you are an alien, meaning that you are a non-CUS;[130] and (2) if you are an LPR or were otherwise lawfully admitted into the U.S., that you are removable. This means that the government must show that you have done something to violate immigration law that permits the government to send you back to your home country.[131]

If the judge finds that you are not eligible for any form of relief discussed in Part F of this Chapter, the immigration judge will likely make a decision at your master calendar hearing and order you deported. Both the ***chief counsel*** and you can reserve the right to appeal this decision.[132] If you have applied for a form of relief and the immigration judge has found that you are eligible for that form of relief, he or she will schedule an individual hearing at the end of your final master calendar hearing. The individual hearing is discussed in greater detail below.

5. Individual Hearing

At the individual hearing, it is your burden to prove why you deserve the form of relief for which you have applied, which means you must convince the judge that you deserve to stay in the U.S. At this hearing, you, and your witnesses, if you have any,[133] will testify. The immigration judge and assistant chief counsel will also most likely question both you and your witnesses. A foreign language interpreter will be provided, if necessary.

(a) Evidence at the Individual Hearing

The Federal Rules of Evidence are loosely applied in immigration court proceedings. For example, in criminal trials, there are very strict rules of evidence. In immigration court proceedings, however, the government may be able to use evidence against you that would not be allowed in criminal court.

(b) Supporting Documents at the Individual Hearing

Supporting documents are any documents that you bring to your removal proceedings for the purpose of helping you prove that you should not be deported. Part F of this Chapter discusses what kinds of documents you may want to present to the court, which vary depending on which form of relief you are seeking. Before you read that Part, however, you should know that there are some expectations of how you present evidence in immigration court:

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128. See Part H Section 1 of this Chapter for more information on mandatory detention.

129. In fact, many immigration detainees are moved around the country more than once if DHS determines that this is necessary because of space concerns.

130. If you are an LPR, the government can prove you are a non-CUS by showing the judge a copy of your "visa face sheet"—the document that you received when you first entered into the U.S. If you ***entered without inspection*** ("EWI"), they may rely on any statements you made or any other evidence showing that you were not lawfully admitted into the United States. If the government cannot prove that you are an alien, then the case must be terminated.

131. For example, if the NTA states that you are removable for a criminal conviction, the government will need to produce a certificate of disposition or some other court record to verify that you were convicted of a crime. The government will also have to show that the crime you were convicted of is one that allows the government to deport you. It is generally fairly easy for the government to meet this burden by producing criminal records from the criminal court.

132. See Part G of this Chapter, which discusses decisions and appeals.

133. Part F of this Chapter discusses who should come to your individual hearing and what evidence you will need to present in order to convince the judge that you deserve to remain in the U.S.

(1) You should make three copies of all documents: one for the judge, one for the assistant chief counsel, and an extra set for you.
(2) You should request to keep the originals for your own records.
(3) You should punch two holes (using a "two-hole puncher") at the top-center of all of the documents you submit so that they can easily be inserted in the judge's and assistant chief counsel's files.
(4) ***Affidavits*** or letters of support should be *notarized* to prove that they were done under oath and contain only truthful information.
(5) You and your witnesses should dress in a clean and professional manner.
(6) Refer to the immigration judge as "Your Honor" and always maintain a respectful tone.

(c) Witnesses at the Individual Hearing

You are allowed to—and should, if you can—present witnesses to support your case at your individual hearing. These witnesses may include your spouse, children, siblings, friends, clergy, doctors, boss, co-workers, and neighbors. Your witnesses should have legal immigration status in the U.S.[134] If they do not, they risk being placed in removal proceedings also. Your witnesses should try to attend your removal proceedings in person. If they cannot, they should write *notarized* letters or affidavits for you.

Depending on which form of relief you are seeking, you will want to make sure your witnesses are prepared to discuss the ***discretionary factors*** that correspond to that form of relief.[135] Generally, your witnesses should be prepared to discuss your life in the U.S., your "good moral character,"[136] the nature of your relationship with them, and why they do not want you to be deported, especially if they will be directly harmed by your deportation. They should be prepared to discuss any financial or emotional support you provide for them. If your witnesses know anything about your criminal history, they should be prepared to discuss that as well.

Your attorney, the assistant chief counsel, and the immigration judge may ask your witnesses questions during the individual hearing. You or your attorney should prepare your witnesses by asking them some of the questions you think the judge or assistant chief counsel will ask. While it may seem easy for a friend or family member to discuss your life, your witnesses should still be thoroughly prepared because the judge and/or assistant chief counsel may ask questions that are more difficult than anticipated. If your witnesses are unprepared, they are more likely to say something that ends up hurting your case.

F. Forms of Relief

A form of relief is when the judge cancels or suspends your deportation. It is the method by which you can apply to remain in the U.S. even though you are deportable. There are several different forms of relief, each of which is explained below. A form of relief might also be called a ***waiver*** because it waives, or sets aside, the immigration consequences of your criminal activity. To have a judge grant you the form of relief that you request, you must

(1) Fill out the required application;
(2) Be eligible for that form of relief;
(3) Meet the standard for that form of relief; and
(4) Convince the judge that you deserve to stay in the U.S. because your positive discretionary factors outweigh any negative discretionary factors.

Each of these requirements is discussed below. If the judge grants you the form of relief that you request, you will not be deported, and you will be permitted to resume your life in the U.S.[137]

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134. Part B of this Chapter can help you determine whether your witnesses have legal U.S. immigration status.

135. Part F of this Chapter will discuss these discretionary factors in more detail.

136. Some of the reasons an immigration judge would think you do not have good moral character: you get drunk regularly; you committed a ***crime involving moral turpitude*** ("CIMT"); you engaged in prostitution. In addition, there are other characteristics that will cause a judge to find that you are not of good moral character. Some exceptions may also apply. *See* INA § 101(f); 8 U.S.C. § 1101(f) (2006 & Supp. 2008) (stating what bars a finding of good moral character).

137. The exception to this is voluntary departure, discussed later in this Chapter. With voluntary departure, you still must leave the U.S.

1. Applications for Forms of Relief

You must fill out an application for each of the forms of relief you seek. In the descriptions of each form of relief below, the corresponding required application is included.[138] Most applications also ask you to pay a fee. If you cannot afford this fee, you may request a ***fee waiver*** from the court.[139] To do this, you must explain in writing how much money you receive from income, government assistance (such as public assistance or disability benefits), and any other sources and why you cannot afford the fee.

2. Eligibility for Forms of Relief

Each form of relief has certain eligibility requirements, which are defined by statute. This means that each form of relief can only be given under certain circumstances. For example, certain forms of relief are only available if you are deportable; others are only available if you are inadmissible, if you have family in the U.S., or if you have lived in the U.S. for five years. To find out if you qualify for a form of relief, read the eligibility requirements section under each form of relief discussed below.

You should ask the judge at the master calendar hearing if you are eligible for any forms of relief. There are several forms of relief available for people facing deportation, and you may qualify for one or several of them depending on a variety of factors. If you qualify, the judge will give you the appropriate application materials. The judge will then set another court date to give you time to complete the application materials. You should bring the application and other supporting documents with you to this next court date, which will be either another master calendar hearing or an individual hearing (discussed above in Part E).

3. Standard

In addition to meeting the eligibility requirement for a form of relief, you must also meet the applicable standard. The standard is also defined and required by statute. Unlike the eligibility requirements, however, the standard is not a simple fact (as in, the simple fact that you have family in the U.S.). The standard is what you must prove to the judge. The judge will use the discretionary factors, explained below, to decide whether you meet the standard.

4. Discretionary Factors

To stay in the U.S., you must convince the judge that you meet the standard. To do that, you must convince the judge that you meet the discretionary factors for the form of relief you are seeking. Discretionary factors are facts or circumstances that the judge has the option of weighing when making a decision. Even if you meet all of the eligibility requirements for a particular form of relief, you will not automatically be permitted to stay in the U.S.—the final decision is at the judge's discretion. Therefore, the supporting documents you present to the immigration judge are extremely important because you will use them to convince the judge that you deserve to stay in the U.S.

Since the standard requires the judge to make a difficult and subjective decision, he or she probably will look to other court cases in which judges have weighed discretionary factors. Those cases will help the judge choose how to weigh the discretionary factors you present, and, ultimately, to decide whether you meet the standard and therefore are eligible to stay in the U.S.

Keep in mind that some forms of relief are harder to get than others because the discretionary factors are harder to prove.

5. Forms of Relief

This section discusses the eligibility requirements, standards, and discretionary factors for eight forms of relief: (a) Cancellation of Removal for Certain Permanent Residents; (b) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents; (c) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents: Special Rule for Battered Spouses and Children; (d) 212(c) Waiver; (e) 212(h) Waiver; (f) Adjustment of Status to Permanent Resident; (g) Asylum, Withholding of Removal, and Protection under the Convention Against Torture; and (h) Voluntary Departure.

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138. For each application, read all of the questions carefully and answer each of them as honestly as you can. If you do not know the answer to a question, write, "I don't know." If a question does not apply to you (for example, if you are not married and there is a question about your spouse), write "N/A" or "not applicable."

139. You must complete a Fee Waiver Request Form EOIR-26A to request a fee waiver, *available at* http://www.justice.gov/eoir/eoirforms/eoir26a.pdf (last visited Jan. 10, 2010).

(a) Cancellation of Removal for Certain Permanent Residents[140]

The application you must fill out to apply for ***cancellation of removal*** for certain permanent residents is called a **Form EOIR-42A** and can be found online at: http://www.usdoj.gov/eoir/eoirforms/eoir42a.pdf (last visited Jan. 13, 2010).

(i) Eligibility

You qualify for this form of relief if you meet all of the following requirements:

(1) You are an LPR and have been for at least five years;[141]
(2) You have resided in the U.S. continuously[142] for seven years after having been legally admitted to the U.S. under any immigration status;[143]
(3) You have not been convicted of an aggravated felony;
(4) You have had NO prior 212(c) waivers granted (see form of relief in Part F(5)(d) below for an explanation of a 212(c) waiver);[144] and
(5) You are NOT a terrorist, crewman, or exchange visitor.[145]

(ii) Standard

To obtain this waiver, you must convince the immigration judge that the positive discretionary factors in your life outweigh the negative factors.

(iii) Discretionary Factors[146]

These are examples of positive factors:[147]

(1) You can prove long-term residence in the U.S.[148] by showing some or all of the following: apartment leases or mortgages, letters from neighbors, utility bills (including telephone, cable and electric bills).

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140. INA § 240A(a); 8 U.S.C. § 1229b(a) (2006 & Supp. 2008).

141. This means that at least five years have passed since your green card was issued.

142. According to INA § 240A(d)(1); 8 U.S.C. § 1229b(d)(1) (2006 & Supp. 2008), continuous residence or continuous presence in the U.S. ends either when you were served with the NTA or on the day you committed crimes that either make you inadmissible under INA § 212(a)(2); 8 U.S.C. § 1182(a)(2) (2006 & Supp. 2008), or deportable under INA § 237(a)(2), (4); 8 U.S.C. § 1227(a)(2), (4) (2006 & Supp. 2008), whichever is earlier. An example of this "clock-stopping" provision is if you entered as an LPR in 1992 and committed a drug crime in 1995. The clock stops in 1995. So, your continuous presence in the U.S. would only be three years, and you would not be eligible for this form of relief.

143. The seven years of continuous residence begin if you were admitted to the U.S. under any lawful immigration status, including admission through a visa or parole, even if your legal status later expired. However, it is clear that continuous residence would never begin if you entered the U.S. illegally or without lawful immigration status. Section D(3)(a)(v) of this Chapter discusses what it means to enter the U.S. without inspection.

144. INA § 240A(c)(6); 8 U.S.C. § 1229b(c)(6) (2006 & Supp. 2008).

145. *See* INA § 240A(c); 8 U.S.C. § 1229b(c) (2006 & Supp. 2008) for a complete list of aliens who are not eligible for this form of relief. "Terrorist", as defined in INA § 501, is any alien described in § 241(a)(4)(B); 8 U.S.C. § 1231(a)(4)(B) (2006 & Supp. 2008). "Crewman" is defined in INA § 101(a)(10); 8 U.S.C. § 1101(a)(10) (2006 & Supp. 2008), and "exchange visitor" is defined in INA § 101(a)(15)(J); 8 U.S.C. § 1101(a)(15)(J) (2006 & Supp. 2008).

146. The standards you must meet to obtain the forms of relief mentioned above are defined by statute. However, the discretionary factors (or how you prove these standards to the judge) are defined by case law. The following cases describe the discretionary factors that judges will consider when deciding whether to cancel removal for certain permanent residents: *In re* C-V-T, 22 I. & N. Dec. 7, 11–13 (BIA 1998) (listing factors against removal, including: family ties within the U.S., long-term residency, potential hardship caused by deportation, military service, employment history, property or business ties, value to the community, proof of rehabilitation; also listing unfavorable factors, including significant violations of domestic immigration laws, nature and seriousness of criminal record, and other evidence indicating bad character); *In re* Edwards, 20 I. & N. Dec. 191, 195–96 (BIA 1990) (stating that a clear showing of rehabilitation is not absolutely required for persons with criminal records); *In re* Arreguin, 21 I. & N. Dec. 38, 39–42 (BIA 1995) (granting relief to an applicant convicted of a serious drug offense, but who had made efforts to reform, had dependent minor children, and was a long-term resident; emphasizing that judges should consider the totality of the circumstances); *In re* Burbano, 20 I. & N. Dec. 872, 875–76 (BIA 1994) (explaining that an applicant with a lengthy criminal record must show unusual or outstanding favorable factors, and finding that such favorable factors were not shown); *In re* Roberts, 20 I. & N. Dec. 294, 302 (BIA 1991) (explaining that an applicant convicted for the sale of cocaine must have unusual or outstanding favorable factors, because immigration judges may not reassess an applicant's guilt or evidence, and finding that such favorable factors were not shown).

147. This is not an exhaustive list; you, your witnesses, and your attorney should discuss any other positive factors you can think of that would be helpful to your case.

(2) You can prove a history of legal employment[149] by presenting letters from your employer, pay stubs, W-2 forms, and social security earnings.
(3) You can prove ownership of property in the U.S. by providing copies of your mortgages and bank statements or property deeds.
(4) You can prove payment of federal income taxes[150] by presenting copies of your yearly tax returns and/or a printout of your tax records from the Internal Revenue Service. If you have never paid taxes or did not pay for a particular year, you can remedy this by paying back taxes.[151]
(5) If you are a member of a church group, religious or civic organization, or if you perform some sort of community service, you should obtain letters from other members or participants, attesting to your contributions and personal values.
(6) Close family ties are also an indication that the positive factors outweigh the negative ones. For all of your family members in the U.S. who have legal status (LPR or CUS), you should obtain and copy their documents, including birth certificates, family photos, green cards, U.S. passports, naturalization certificates, and notarized letters or affidavits from family members.

(b) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents[152]

The application that you must fill out to apply for cancellation of removal and adjustment of status for certain nonpermanent residents is called a **Form EOIR-42B** and can be found online at http://www.usdoj.gov/eoir/eoirforms/eoir42b.pdf (last visited Jan. 10, 2010). If the immigration judge approves your application, he may adjust your status to that of an LPR.

(i) Eligibility

If you have no legal status in the U.S., you may qualify for this form of relief if you meet all of the following requirements:

(1) You are not an LPR;
(2) You have been physically present in the U.S. for a continuous period[153] of at least ten years before filing your application, and you have been a person of good moral character[154] during those ten years; and
(3) You have not been convicted of any crimes under INA §§ 212(a)(2); 8 U.S.C. § 1182(a)(2) (2006), INA § 237(a)(2); 8 U.S.C. 1227(a)(2) (2006), or INA § 237(a)(3); 8 U.S.C. § 1227(a)(3) (2006) (these do not include petty offenses; they do include CIMT*s*, **c**ontrolled substance violations, multiple convictions

148. There are several issues related to time in immigration proceedings. It is important that you have a clear understanding of the chronology (timeline) of your history in the U.S.—when you arrived, how many trips you have taken outside of the U.S. and to your home country, and when you have taken them.

149. The concept of a public charge is important in immigration proceedings. You may be deemed a public charge if you depend on the government for your income (in the form of public benefits). Immigration judges are more likely to grant relief to you if you have contributed to the U.S. economy and have been able to support yourself and your family. On the other hand, if you have received any public benefits or welfare, you should be honest about it because this is not the only factor that the judge will consider.

150. Immigration judges look favorably on someone who has paid taxes because that person has not been a public charge and has contributed to society as a whole.

151. If you have not filed taxes in the past, it is not too late to pay your back taxes. You will have to pay a fine, interest, and the taxes you owe, but the filing of taxes from previous years can seriously help your immigration case. For more information on how to file back taxes, visit http://www.irs.gov/pub/irs-pdf/p594.pdf (last visited Jan. 10, 2010). You can download tax forms for previous years at http://www.irs.gov/formspubs/article/0,,id=98339,00.html (last visited Jan. 10, 2010).

152. INA § 240A(b)(1); 8 U.S.C. § 1229b(b)(1) (2006).

153. According to INA § 240A(d)(1); 8 U.S.C. § 1229b(d)(1) (2006), continuous residence or continuous presence in the U.S. ends either when you were served with the NTA or on the day you committed crimes that either make you inadmissible under INA § 212(a)(2); 8 U.S.C. § 1182(a)(2) (2006) or deportable under INA § 237(a)(2), (4); 8 U.S.C. § 1227(a)(2), (4) (2006), whichever is earlier. For example, if you entered as an LPR in 1992 and committed a drug crime in 1995, the clock would stop in 1995. Therefore, your continuous presence in the U.S. would only be three years, and you would not be eligible for this form of relief.

154. The immigration judge uses his discretion in deciding whether you are a person of good moral character. He can deny you LPR status even though you otherwise qualify. See footnote 129 above which lists some activities and characteristics that may bar a finding of good moral character.

for which all of the sentences imposed add up to five years or more, prostitution, and ***commercialized vice*** offenses).[155]

(ii) Standard

You must establish that your deportation will result in "exceptional and extremely unusual hardship" on your CUS or LPR spouse, parent, child, or children.[156]

(iii) Discretionary Factors[157]

These are examples of positive factors:

(1) Proof of Spouse, Parent, Child, or Children in the U.S.[158]
   (a) Obtain and make copies of documentation that proves your spouse's, parent's, child's, or children's legal status in the U.S. These documents include, but are not limited to, birth certificates, family photos, green cards, U.S. passports or naturalization certificates, and letters or affidavits from family members.
(2) Proof of Hardship to Spouse, Parent, Child, or Children
   (a) Remember, it is your CUS or LPR family members, not *you*, who must suffer this hardship as a result of your deportation. This type of hardship must be "exceptional and extremely unusual" and, therefore, greater than what would normally be suffered by the family members of those who face deportation.
   (b) You should obtain records of any medical, psychiatric, or educational disabilities of family members who depend on you, especially elderly parents, children, or spouses.
   (c) You can also show financial and emotional support through letters, affidavits, and financial records (including bank statements).[159]

(c) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents: Special Rule for Battered Spouses and Children (Violence Against Women Act, also known as "VAWA")[160]

The form that you must fill out to apply for cancellation of removal and adjustment of status under the special rule for battered spouses and children is called a **Form EOIR-42B** and can be found online at http://www.usdoj.gov/eoir/eoirforms/eoir42b.pdf (last visited Jan. 10, 2010). If the immigration judge approves your application, he will also *adjust your status* to that of an LPR.

(i) Eligibility

You qualify for this form of relief if you meet all of the following requirements:

(1) You are not an LPR;

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155. *See* INA § 212(a)(2); 8 U.S.C. § 1182(a)(2) (2006), INA § 237(a)(2); 8 U.S.C. § 1227(a)(2) (2006) and INA § 237(a)(3); 8 U.S.C. § 1227(a)(3) (2006) for a complete list of offenses which make you ineligible for this form of relief.

156. INA § 240A(b)(1)(D); 8 U.S.C. § 1229b(b)(1)(D) (2006).

157. The standards you must meet to obtain the forms of relief mentioned above are defined by statute. The discretionary factors (or how you prove these standards to the judge), however, are defined by case law. The following cases describe the discretionary factors needed for cancellation of removal and adjustment of status for certain nonpermanent residents: *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 60–63 (BIA 2001) (finding that the hardship to an alien's relatives must be "substantially" beyond the ordinary hardship that would be expected when a close family member leaves the country, but the hardship does not need to be "unconscionable"; and the court will consider the ages, health, and circumstances of the alien's CUS and LPR relatives to determine the level of hardship); *In re* Recinas, 23 I. & N. Dec. 467, 471–72 (BIA 2002) (considering the alien's children's unfamiliarity with the language and life in the return country, the children's complete dependence on alien for financial support, and the lack of any family in the return country in assessing hardship to alien's children); *In re* Andazola, 23 I. & N. Dec. 319, 323 (BIA 2002) (considering the poor economic conditions of the return country and diminished educational opportunities in assessing hardship to the alien's children, though ultimately failing to find extreme hardship).

158. One of the reasons family ties in the U.S. are important for your case is because the judge and the government are reluctant to separate families. In other words, the judge will be more sympathetic to you if you have a lot of family members (especially if they are LPRs and/or CUSs) in the U.S. and have fewer family members in your home country.

159. If you are divorced, you should obtain any proof of child support or alimony payments. This will show the judge you are not only reliable but also that someone depends on your financial (and possibly emotional) support.

160. INA § 240A(b)(2); 8 U.S.C. § 1229b(b)(2) (2006).

(2) **Either** you have been "battered or subject to extreme cruelty" in the U.S. by a spouse or parent who is a CUS or LPR, **or** you are the parent of a child who has been "battered or subject to extreme cruelty" in the U.S. by his CUS or LPR parent;
(3) You have been physically present in the U.S. for a continuous period[161] of at least three years, and you have been a person of good moral character[162] during those three years;
(4) You have not been convicted of an offense under INA § 212(a)(2)–(3); 8 U.S.C § 1182(a)(2)–(3) (2006);
(5) You have not been convicted of marriage fraud[163] or any offenses under INA § 237(a)(2)–(4); 8 U.S.C. § 1227(a)(2)–(4) (2006);[164] and
(6) You have NOT been convicted of an aggravated felony.[165]

(ii) Standard

You must show that you or your children have been battered and/or are subject to "extreme cruelty."[166]

(iii) Discretionary Factors

These are examples of positive factors:

(1) Proof of Child in the U.S.[167]
   (a) Obtain and make copies of documentation that proves your child's legal status in the U.S. These documents include, but are not limited to, birth certificates, family photos, green cards, U.S. passports or naturalization certificates, and letters or affidavits from family members.
(2) Proof of Extreme Cruelty to You or Your Child
   (a) You can prove battery or extreme cruelty by submitting evidence of abuse, acts of violence, or threats of physical or mental abuse. These submissions can include, but are not limited to, reports or affidavits from police, judges and other court officials, medical personnel, school officials, clergy, Child Protective Services staff, or a counseling or mental health professional. You can also show any police reports or orders of protection to prove that there have been incidents of abuse in the past. If you have ever sought shelter in a safe haven for battered individuals, and you have proof that you have done so, you should also submit that proof. Lastly, you can submit letters or affidavits from other people who have evidence of abuse, including particular incidents.

(d) 212(c) Waiver[168] (Possible Waiver for LPRs)

The form that you must fill out to apply for a 212(c) waiver is called a **Form I-191** and can be found online at http://www.uscis.gov/files/form/i-191.pdf (last visited Jan. 10, 2010).

(i) Eligibility

You qualify for this form of relief if you meet all of the following requirements:

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161. The clock-stopping provision, discussed in footnotes 135 and 146, does not apply to this form of relief under the Special Rule for Battered Spouses and Children. *See* INA § 240A(d)(1); 8 U.S.C. § 1229b(d)(1) (2006).

162. *See* footnote 129, which lists what may bar a finding of good moral character.

163. INA § 237(a)(1)(G); 8 U.S.C. § 1227(a)(1)(G) (2006).

164. These include, but are not limited to, CIMT, multiple CIMTs, an aggravated felony, high speed flight, a controlled substance offense, certain firearms offenses, crimes of domestic violence, stalking, crimes against children, violation of orders of protection, failure to register or falsification of documents, document fraud, falsely claiming citizenship, terrorist activities, and torture.

165. See INA § 240A(c); 8 U.S.C. § 1229b(c) (2006) for a list of aliens who are ineligible for this form of relief.

166. "[T]he phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to, being a victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances." 8 C.F.R. § 204.2(c)(1)(vi) (2007).

167. One of the reasons family ties in the U.S. are important for your case is because the judge and the government are reluctant to separate families. In other words, the judge will be more sympathetic to you if you have a lot of family members (especially if they are LPRs and/or CUSs) in the U.S. and have fewer family members in your home country.

168. INA § 212(c); 8 U.S.C. § 1182(c) (1994) (repealed 1996). This statute was repealed in 1996 but remains available to LPRs subject to removal for convictions resulting from guilty pleas made prior to Apr. 24, 1996. I.N.S. v. St. Cyr, 533 U.S. 289, 326, 121 S. Ct. 2271, 2293, 150 L. Ed. 2d 347, 378 (2001).

(1) You are an LPR;
(2) You pled guilty to a crime before April 24, 1996;[169]
(3) You have lived in the U.S. for seven years; and
(4) You have NOT served a prison sentence of five years or more for one or more aggravated felony convictions.[170]

(ii) Standard

To obtain this waiver, you must convince the immigration judge that the positive discretionary factors in your life outweigh the negative factors.[171]

(iii) Discretionary Factors

These are examples of positive factors:[172]

(1) You can prove long-term residence in the U.S.[173] by showing some or all of the following: apartment leases or mortgages, letters from neighbors, or utility bills (including telephone, cable, and electric bills).
(2) You can prove a history of legal employment[174] by presenting letters from your employer, pay stubs, W-2 forms, and social security earnings.
(3) You can prove ownership of property in the U.S. by providing copies of your mortgages and bank statements or property deeds.
(4) You can prove payment of federal income taxes[175] by presenting copies of your yearly tax returns and/or a printout of your tax records from the Internal Revenue Service. If you have never paid taxes or did not pay for a particular year, you can fix this by paying back taxes.[176]
(5) If you are a member of a church group, religious or civic organization, or perform some sort of community service, you should obtain letters from other members of the group, attesting to your contributions and humanity.
(6) Close family ties are also an indication that the positive factors in your life outweigh the negative ones. For all of your family members in the U.S. who have legal status (LPR or CUS), you should obtain and copy their documentation, including birth certificates, family photos, green cards, U.S. passports or naturalization certificates, and notarized letters or affidavits from family members.

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169. This crime cannot be an aggravated felony or a firearms offense.

170. Peralta-Taveras v. Attorney General, 488 F.3d 580, 586 (2d Cir. 2007) (holding that aliens with a criminal conviction for an aggravated felony are not eligible for a 212(c) waiver).

171. The BIA decided in *In re* Buscemi, 19 I. & N. Dec. 628, 633 (BIA 1988) that a non-CUS who is convicted of a serious criminal offense must demonstrate "unusual or outstanding equities" in order to obtain relief under 212(c). This is a high standard to meet. This means that if you are eligible for a 212(c) waiver and have a very serious conviction or a number of serious convictions, simply showing that the positive factors in your life outweigh the negative factors may not be enough. Instead, you need to show that the positive factors in your life *greatly* outweigh the negative factors in your life. *See also In re* Edwards, 20 I. & N. Dec. 191, 196 (BIA 1990) (clarifying that the *Buscemi* inquiry is a case-by-case review of the facts and favorable factors, with rehabilitation a factor to be considered).

172. This is not an exhaustive list; you, your witnesses, and your attorney should discuss any other positive factors you can think of that would be helpful to your case.

173. There are several issues related to time in immigration proceedings. It is important that you have a clear understanding of the chronology (timeline) of your history in the U.S.—when you arrived, how many trips you have taken outside of the U.S. and to your home country, etc.

174. The concept of a public charge is important in immigration proceedings. You may be deemed a public charge if you depend on the government for your income (in the form of public benefits). Immigration judges are more likely to grant relief to you if you have contributed to the U.S. economy and have been able to support yourself and your family. On the other hand, if you have received any public benefits or welfare, you should be honest about it because this is not the only factor that the judge will consider.

175. Immigration judges look favorably on people who have paid taxes, again probably because they have not been public charges and instead have contributed to society as a whole.

176. If you did not file taxes in the past, it is not too late to pay your back taxes. You will have to pay a fine, interest, and the taxes you owe, but the filing of taxes from previous years can seriously help your immigration case. Visit this website for more information on how to file back taxes:
http://www.irs.gov/formspubs/article/0,,id=98339,00.html (last visited January 10, 2010).

(e) 212(h) Waiver ("Waiver of Inadmissibility")[177]

Under INA § 212(h); 8 U.S.C. § 1182(h) (2006), the Attorney General may waive inadmissibility due to the commission of certain types of crimes, including (1) CIMTs; (2) a single possession of thirty grams or less of marijuana for personal use; (3) two or more offenses for which the aggregate sentences were five years or more; and (4) prostitution or commercialized vice.[178] There are three different ways to qualify for this kind of waiver, which are defined in three subsections of the INA: § 212(h)(1)(A)–(C); 8 U.S.C. § 1182(h)(1)(A)–(C) (2006). The form that you must fill out to apply for any of these waivers is called an **I-601 Form** and can be found online at http://www.uscis.gov/files/form/i-601.pdf (last visited January 10, 2010).

In order to qualify for *any* of these waivers, you must meet the following requirements:

(1) The crime for which you are facing inadmissibility is not murder, a criminal act involving torture, or an attempt or conspiracy to commit either murder or a criminal act involving torture; and
(2) If you are an LPR:
  (a) You must have resided continuously in the U.S. for a period of at least seven years immediately preceding the date of initiation of your removal proceedings; and
  (b) You have not been convicted of an aggravated felony.

In addition to these threshold requirements, you will also have to meet the specific eligibility requirements for each subsection listed below. The requirements vary depending on under which subsection of the statute you fall: 212(h)(1)(A), 212(h)(1)(B), or 212(h)(1)(C).

(i) 212(h)(1)(A) Waiver (Rehabilitation)

1. Eligibility

You qualify for this form of relief under subsection 212(h)(1)(A) if you meet the following requirements: (1) you are inadmissible only under INA § 212(a)(2)(D)(i) or (ii); 8 U.S.C. § 1182(a)(2)(D)(i) or (ii) (2006)[179] or (2) the activities for which you are inadmissible[180] occurred more than fifteen years before the date of your application for a visa, admission, or adjustment of status.

2. Standard

You must convince the immigration judge that you have been ***rehabilitated***. This means that while you made mistakes in the past, you have improved your life and are no longer likely to make the same or similar mistakes. In addition, you must convince that judge that allowing you to enter the U.S. would not be against the national welfare, safety, or security of the U.S.

3. Discretionary Factors

A positive factor considered for this type of relief is proof of rehabilitation. You can prove that you have been rehabilitated by providing the judge with copies of certificates of attendance at drug or alcohol rehabilitation programs or letters from your counselors, therapists, or sponsors. Sometimes, proof of involvement in a religious or civic organization or church group may also prove that you have been rehabilitated. You should obtain letters or affidavits from other members of the group who can attest to your good moral character.[181]

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177. INA § 212(h)(1); 8 U.S.C. § 1182(h)(1) (2006).

178. This list is not exhaustive. The Attorney General can waive any offense listed in INA § 212(a)(2)(A)(i)(I); 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006), INA § 212(a)(2)(A)(i)(II); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2006) insofar as it relates to a single possession of 30 grams or less of marijuana, or in INA § 212(a)(2)(B), (D), and (E); 8 U.S.C. § 1182(a)(2)(B), (D), and (E) (2006).

179. Basically, these include crimes relating to, or engaging in or soliciting prostitution.

180. For the purposes of this form of relief, you may be inadmissible for any activity listed in INA § 212(a)(2)(A)(i)(I); 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006); INA § 212(a)(2)(A)(i)(II); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2006) insofar as it relates to a single possession of 30 grams or less of marijuana; or INA § 212(a)(2)(B), (D)–(E); 8 U.S.C. § 1182(a)(2)(B), (D)–(E) (2006). These include but are not limited to CIMTs; a single possession of 30 grams or less of marijuana for personal use; two or more offenses for which the aggregate sentences were five years or more; and prostitution or commercialized vice.

181. *See* footnote 129, which lists what may bar a finding of good moral character.

(ii) 212(h)(1)(B) Waiver (Extreme Hardship)

1. Eligibility

You qualify for this form of relief under subsection 212(h)(1)(B)if you are the spouse, parent, son or daughter of an LPR or CUS.

2. Standard

You must convince the judge that your deportation from the U.S. would result in "extreme hardship" to a CUS or LPR spouse, parent, child, or children.

3. Discretionary Factors

Examples of positive factors include

(1) Proof of CUS or LPR spouse, parent, child, or children in the U.S.[182]
   (a) Obtain and make copies of documentation that proves your spouse's, parent's, child's, or children's legal status in the U.S. These documents include, but are not limited to, birth certificates, family photos, green cards, U.S. passports or naturalization certificates, and letters or affidavits from family members.
(2) Examples of extreme hardship to CUS or LPR spouse, parent, child, or children
   (a) Mere inconvenience or sadness probably will not qualify for the kind of hardship required. You must show that your relatives will suffer more than the average family would because of your deportation. You can document financial and emotional support with the following items: letters, affidavits, and medical or financial records (including bank statements).[183]Proof that you are the parent of a child with disabilities might count as an extreme hardship. If your children have disabilities, obtain their medical, psychiatric, or educational records that show proof of disabilities.

(iii) 212(h)(1)(C) Waiver (Domestic Violence/Battery)

1. Eligibility

You qualify for this form of relief under subsection 212(h)(1)(C) if you meet the following requirement: you qualify for classification under INA § 204(a)(1)(A)(iii) or (iv); 8 U.S.C. § 1154(a)(1)(A)(iii) or (iv) (2006) or INA § 204(a)(1)(B)(ii) or (iii); 8 U.S.C. § 1154(a)(1)(B)(ii) or (iii) (2006).[184]

(f) Adjustment of Status to Permanent Resident[185]

Another way to avoid deportation is by adjusting your immigration status to that of an LPR.[186] Adjustment of status may be used without another form of relief. Frequently, however, when adjustment of status is used as a form of relief, it is used in conjunction with another form of relief (or waiver). This may apply to you if you have more than one criminal conviction. For example, if you have a gun possession conviction and one CIMT, the above forms of relief alone may not prevent your deportation. In such a case, in order to avoid deportation, you would have to apply for the "212(c) waiver" as a form of relief as part of an application for an adjustment of status. This is because the "212(c) waiver" waives the CIMT[187] and

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182. One of the reasons family ties in the U.S. are important for your case is because the government is reluctant to separate families. In other words, the judge will be more sympathetic to you if you have a lot of family members (especially if they are LPRs and/or CUSs) in the U.S. and have fewer family members in your home country.

183. If you are divorced, you should obtain any proof of child support/alimony payments. This will show the judge that you are not only reliable but also that someone is dependent upon your financial or emotional support.

184. Basically, you must be a victim (and/or child of a victim) of domestic violence or someone who has been battered or subject to extreme cruelty.

185. INA § 245(a); 8 U.S.C. § 1255(a) (2006). There are other ways in which non-CUSs can adjust their status. Some examples are the Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966), Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 (1997), and registry procedures in INA § 249; 8 U.S.C. § 1259 (2006). See the notes to INA § 245; 8 U.S.C. § 1255 (2006) for more information about these alternative methods of adjusting your immigration status.

186. You can even use this form of relief if you already *are* an LPR.

187. Remember that you are not eligible for a 212(c) waiver if you have been convicted of an aggravated felony. *See* footnote 163.

adjustment of status waives the gun possession. Courts have allowed the simultaneous use of two forms of relief or waivers.[188]

To begin the process of adjustment of status, you will generally need a sponsor (family member or employer) to petition for a visa on your behalf. Depending on whether your sponsor is a family member or employer, your sponsor will be required to complete a **Form I-130** ("Petition for Alien Relative") or a **Form I-140** ("Immigrant Petition for Alien Worker"), and you will have to submit proof of your relationship. These applications can be found online at http://www.uscis.gov/files/form/I-130.pdf and http://www.uscis.gov/files/form/i-140.pdf (last visited January 10, 2010). You must also submit an affidavit of support with your application. The affidavit of support is called a **Form I-864** and can be found online at http://www.uscis.gov/files/form/I-864.pdf (last visited January 10, 2010).[189] In this affidavit of support, your family member proves that he is capable of financially supporting himself, his other dependents, and you. He also promises to do so if it becomes financially necessary.[190] If you are eligible for this form of relief, you will be required to complete a **Form I-485** ("Application to Register Permanent Residence or Adjust Status"), which you can find online at http://www.uscis.gov/files/form/i-485.pdf (last visited January 10, 2010).

(i) Eligibility[191]

In order to obtain this form of relief in immigration court, you must be an LPR or a visa overstay[192] who either (1) is an ***immediate relative***[193] of a CUS or (2) qualifies for one of the family- or employment-based preferences (have an approved I-130) with a current priority date[194] (this means your visa is immediately available). Because immigration court proceedings move quickly, if your family member or employer has not yet petitioned for you (completed, filed, and received approval of the I-130) and your visa is not immediately available, the process may take too long and the immigration judge will probably not be willing to wait.

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188. *In re* Gabryelsky, 20 I. & N. Dec. 750, 754 (BIA 1993) (holding that a waiver under INA § 212(c) may be used in conjunction with an application for adjustment of status by an alien who is deportable for both drug and weapons offenses and that 8 C.F.R. § 245.1(e) (1993) permitted an alien to concurrently apply for adjustment of status and INA § 212(c) relief). *See also In re* Azurin, 23 I. & N. Dec. 695, 697 (BIA 2005) (reaffirming *In re Gabryelsky*). *But see* Powell v. Jennifer, 937 F. Supp. 1245, 1254 (E.D. Mich. 1996) (rejecting the *In re Gabryelsky* approach).

189. Your sponsor may instead be eligible to apply for the Form I-864EZ or the Form I-864W, which can be found online at http://www.uscis.gov/files/form/I-864EZ.pdf and http://www.uscis.gov/files/form/I-864W.pdf, respectively (last visited January 10, 2010). Also, the Form I-864P ("Poverty Guidelines") does not need to be filed but is used to assist people in completing their Form I-864. The Form I-864P can be found online at http://www.uscis.gov/files/form/i-864p.pdf (last visited January 10, 2010). For more information about who qualifies for these alternatives to Form I-864, you can refer to the USCIS website at www.uscis.gov or contact the USCIS Forms Line at 1-800-870-3676 or the National Customer Service Center ("NCSC") telephone line at 1-800-375-5283; TTY: 1-800-767-1833. A family member or attorney can also contact your local USCIS office by using Infopass, a web-based system allowing you to schedule appointments at USCIS offices.

190. The purpose of an affidavit of support is to prove that you will not become a public charge if lawfully admitted with permanent immigration status in the U.S. Your sponsor must maintain you at an annual income that is not less than 125% of the federal poverty line during the period in which the affidavit is enforceable. For more information about the eligibility, terms, and enforceability period for the affidavit of support, you should refer to INA § 213A; 8 U.S.C. § 1183a (2006) for the full text of the statute.

191. *See* INA § 245(c); 8 U.S.C. § 1255(c) (2006) for a complete list of aliens ineligible for adjustment of status.

192. If you are a non-LPR who entered the U.S. without inspection (EWI, for example), the only way you can adjust your status is if you have filed an approvable I-130 petition under INA § 245(i); 8 U.S.C. § 1255(i) (2006) on or before April 30, 2001.

193. Immediate relatives of CUSs, which include spouses, unmarried children under 21 years old, and parents (if the CUS is over 21 years old) have no quota or waiting time for approval of their visa. The government, however, does have quotas for all other family- and employment-based petitions. Therefore, if you are an immediate relative of a CUS who has completed an I-130 on your behalf, your visa would be immediately available to you and you would be eligible for this form of relief.

194. The priority date is the date on which the visa petition (for family-based petitions) is filed with USCIS or on which the labor certification (for employment-based petitions) is filed with the Department of Labor. In other words, it is the date on which your sponsor initiated the adjustment of status process on your behalf. The priority date is important because it is the date in which you are placed on the waiting line for your visa. Because the government has quotas for family- and employment-based petitions, there are many more applicants for these visas than there are available visas. This creates a backlog for these categories. If there is a backlog, your visa is not immediately available and you will not be eligible to obtain this form of relief in immigration court.

(ii) Standard

The statute does not define standards or discretionary factors required for adjustment of status, but the immigration judge may use some of the same or similar discretionary factors used for other forms of relief to determine whether you deserve to adjust your status and remain in the U.S. So, you should be prepared to prove that the following positive ***discretionary factors*** outweigh the negative factors.

(iii) Discretionary Factors

Examples of positive factors include[195]

(1) You can prove long-term residence in the U.S.[196] by showing some or all of the following things: apartment leases or mortgages, letters from neighbors, and utility bills (including telephone, cable and electric bills).
(2) You can prove a history of legal employment[197] by presenting letters from your employer, pay stubs, W-2 forms, and social security earnings statements.
(3) You can prove ownership of property in the U.S. by providing copies of your mortgages and bank statements or property deeds.
(4) You can prove payment of federal income taxes[198] by presenting copies of your yearly tax returns and/or a print-out of your tax records from the Internal Revenue Service. If you have never paid taxes or did not pay for a particular year, you can fix this by paying back taxes.[199]
(5) If you are a member of a church group, religious or civic organization, or perform some sort of community service, you should obtain letters from other members of the group, attesting to your contributions and humanity.
(6) Close family ties are also an indication that the positive factors in your life outweigh the negative ones. For all of your family members in the U.S. who have legal status (LPR or CUS), you should make copies of their documentation including birth certificates, family photos, green cards, U.S. passports, naturalization certificates, and notarized letters or affidavits from family members.

(g) Asylum, Withholding of Removal, and Protection under the ***Convention Against Torture*** ("CAT")

If you are eligible to apply for asylum, ***withholding of removal***, or protection under the ***Convention Against Torture*** ("***CAT***"), you should apply for all three of these forms of relief. This way, even if the judge does not grant you your first choice, you may still be eligible for one of the others. While the standards differ slightly for each one of these forms of relief, the discretionary factors are the same and you will likely be submitting the same kinds of evidence for all three forms of relief. The discretionary factors and evidence will be described at the end of this Section.

The standards and the consequences differ for each of these forms of relief. If the judge grants you asylum, he will not order your deportation and you will be able to apply to ***adjust your status*** within a year to that of an LPR. If the judge grants you withholding of removal, however, you will be ordered deported, but that deportation order will be withheld or stopped. As a result, you will not be eligible to adjust your status, but you will be able to get employment authorization. There are two possible outcomes in your

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195. This is not an exhaustive list; you, your witnesses, and your attorney should discuss any other positive factors you can think of that would be helpful to your case.

196. There are several issues related to time in immigration proceedings. It is important that you have a clear understanding of the chronology (timeline) of your history in the U.S.—when you arrived, how many trips you have taken outside of the U.S. and to your home country, etc.

197. The concept of a public charge is important in immigration proceedings. You may be deemed a public charge if you depend on the government for your income (in the form of public benefits). Immigration judges are more likely to grant relief to you if you have contributed to the U.S. economy and have been able to support yourself and your family. On the other hand, if you have received any public benefits or welfare, you should be honest about it because this is not the only factor that the judge will consider.

198. Immigration judges look favorably on people who have paid taxes, again probably because they have not been public charges but have instead contributed to U.S. society as a whole.

199. If you did not file taxes in the past, it is not too late to pay your back taxes. You will have to pay a fine, interest, and the taxes you owe, but the filing of taxes from previous years can seriously help your immigration case. Visit this website for more information on how to file back-taxes:
http://www.irs.gov/formspubs/article/0,,id=98339,00.html (last visited January 10, 2010).

immigration case if the judge grants you protection under CAT: (1) withholding and (2) deferral. Particularly serious crimes[200] are bars to withholding under the CAT, but they are not bars to deferral. You will not be eligible to adjust your status under either withholding or deferral, but you will be able to stay in the U.S. You will not be able to get employment authorization under deferral.

(i) Asylum[201]

The application that you must fill out to apply for asylum is called a **Form I-589** and can be found online at http://www.uscis.gov/files/form/I-589.pdf (last visited January 10, 2010). Asylum is a form of relief available to people who are unable to return to their *home countries* for certain reasons.

1. Eligibility

You qualify for this form of relief if you meet ALL of the following requirements:

(1) You apply for asylum within one year of your arrival in the U.S.;[202]
(2) You have **not** been convicted of a particularly serious crime; and
(3) You have **not** been convicted of an aggravated felony.

2. Standard

You must prove to the immigration judge you are unable or unwilling to return to your home country because you have been persecuted there or because you have a well-founded fear that you will be badly mistreated there because of your race, religion, nationality, membership in a particular social group, or political opinion.[203] Additionally, this persecution must either be done by part of your home country's government, by a group that is sanctioned (allowed or encouraged) by your home country's government or by a group or individual that your home country is unwilling or unable to stop. For an immigration judge to grant you asylum, he must be convinced there is a *possibility*[204] you will be persecuted.

It is not enough that your home country is in general political or social unrest. You must show how this will directly affect you or how you will be specifically targeted by this unrest.

(ii) Withholding of Removal[205]

The application that you must fill out to apply for this form of relief is called a **Form I-589** and can be found online at http://www.uscis.gov/files/form/I-589.pdf (last visited January 10, 2010).

1. Eligibility

You qualify for this form of relief if you meet ALL of the following requirements:

(1) You have **not** been convicted of a particularly serious crime; and
(2) You have **not** been convicted of an aggravated felony for which you received a sentence of five or more years in prison.[206]

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200. If you are convicted of an aggravated felony, then you have been convicted of a particularly serious crime. INA § 208 (b)(2)(B); 8 U.S.C. § 1158 (b)(2)(B) (2006). Some crimes can be considered particularly serious crimes even if they are not aggravated felonies. *See In re* Frentescu, 18 I. & N. Dec. 244, 247 (BIA 1982) ("While there are crimes which, on their face, are 'particularly serious crimes' or clearly are not 'particularly serious crimes,' the record in most proceedings will have to be analyzed on a case-by-case basis. In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community. Crimes against persons are more likely to be categorized as 'particularly serious crimes.' Nevertheless, we recognize that there may be instances where crimes (or a crime) against property will be considered as such crimes.") Additionally, the Attorney General may designate by regulation offenses that will be considered particularly serious crimes. INA § 208 (b)(2)(B)(ii); 8 U.S.C. § 1158 (b)(2)(B)(ii) (2006).

201. INA § 208; 8 U.S.C. § 1158 (2006).

202. See INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D) (2006) for a few limited exceptions to this rule.

203. INA § 241(b)(3)(A); 8 U.S.C. § 1231(b)(3)(A) (2006).

204. Recent court decisions have held that an applicant seeking asylum does not have to show that persecution is highly probable; instead, the applicant only needs to show as little as a 10% probability of persecution if he is sent back. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.")

205. INA § 241(b)(3)(A); 8 U.S.C. § 1231(b)(3)(A) (2006).

2. Standard

Withholding of removal is very similar to asylum, but it is more difficult to obtain. You must prove to the immigration judge that you are unable or unwilling to return to your home country because your life or freedom would be threatened because of your race, religion, nationality, membership in a particular social group, or political opinion. For a judge to grant you withholding of removal, he or she must be convinced that there is a *probability*[207] that you will be persecuted. If you are granted withholding of removal, the judge will still order you deported, but you will not have to return to your home country until it is safe for you to do so.

(iii) Convention Against Torture ("CAT")[208]

The CAT is an ***international treaty*** that prohibits the U.S. government from returning anyone to a home country where he may be subjected to torture.

1. Eligibility

You may seek protection withholding or deferral of a deportation under the CAT. You may not be eligible for withholding under the CAT if you are convicted of a particularly serious crime.

2. Standard

You must prove to the immigration judge that if you return to your home country, you will probably suffer severe pain and suffering that is intentionally done to you for an illicit (illegal) purpose. This pain and suffering must be caused or approved by a public official who has custody and control over you, and it must **not** arise out of a lawful sanction. For an immigration judge to grant you protection under the CAT, he must be convinced that it is *more likely than not* that you would suffer severe pain and suffering.[209]

(iv) Discretionary Factors for Asylum, Withholding, and CAT

If you are applying for asylum, withholding of removal, or protection under the CAT, you will need to present evidence about the current conditions in your home country and why you are afraid to return. This evidence may include country reports written by the U.S. Department of State and/or human rights organizations such as Amnesty International and Human Rights Watch. You can also use newspaper or magazine articles about the conditions in your home country related to human rights violations, the economy, or healthcare, if any of these apply to your situation.[210] Witness testimony may also support your claims.[211]

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206. If you were convicted of an aggravated felony and were sentenced to less than five years in prison, the government still has the discretion to classify it as a particularly serious crime.

207. This "probability" standard is higher than the "possibility" standard required for asylum. Once you prove the possibility in asylum, the judge still has the discretion to deny you asylum. If, however, you prove the probability standard for withholding, the judge no longer has discretion and must grant you that form of relief. Therefore, withholding is more difficult to prove than asylum, but once you prove it, the judge is required to grant you that form of relief. It is also important to note you cannot adjust your status with withholding but you can with asylum.

208. As was the case with withholding, you cannot apply to adjust your status after obtaining relief under CAT as you would be able to do after obtaining asylum as a form of relief.

209. This is a higher standard than is required for asylum. *In re* J-E-, 23 I. & N. Dec. 291, 302 (BIA 2002) (citing Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, art. 3 S. Treaty Doc. No 100–20, 1465 U.N.T.S. 85 (1987) and referring to 8 C.F.R. § 208.16(c)(2) (2003), which states what evidence satisfies this standard).

210. Some countries treat deportees like criminals, making their lives extremely difficult when they return to their home countries. You should do research to prove any situations in your home country that may be relevant to your case. Some information you obtain may also be helpful in proving extreme hardship to you if you were to be deported.

211. Although immigration judges are aware of country conditions worldwide, do not assume your particular judge knows anything about your home country. Part of convincing the judge you should remain in the U.S. is educating him or her on the effect of your deportation to your home country. You should not, of course, exaggerate conditions, but be honest about what your life would be like and how you would be affected if you were to return to your home country.

(h) Voluntary Departure[212]

Voluntary departure gives you the option of volunteering to leave the U.S. and return to your home country instead of being deported by the U.S. government. If you do not leave the U.S. by the date set by the immigration judge, you are subject to a penalty of $1,000 to $5,000 and are ineligible for relief under the sections providing for cancellation of removal, voluntary departure, adjustment of status, change of non-immigrant classification, and record of admission for permanent residence for certain aliens.[213] The benefit of voluntary departure is that you may be able to return much sooner than if you were deported from the U.S.[214] However, a voluntary departure order is much harder to reopen than a deportation order.[215] Because voluntary departure is irreversible, you should consider all the consequences before requesting it.

(i) Eligibility

You cannot get voluntary departure if you are an arriving alien, if you have been convicted of an aggravated felony, or you if have a prior deportation order.

(ii) Standard

The standard you must meet to obtain voluntary departure varies depending on when you request it. In other words, if you request voluntary departure at the master calendar hearing, you will need to show the judge that you have (1) a valid travel document and (2) the means to buy a one-way open ticket (a ticket without a departure date) to your home country. If you wait until the individual hearing to request voluntary departure,[216] in addition to showing (1) and (2) above, you will also have to show that you were physically present in the U.S. for one year before the NTA was filed and that you have good moral character.[217]

If the judge grants you voluntary departure, he will give you a certain period of time to get your documents and ticket. If you request voluntary departure before the end of the immigration court proceedings, the judge can give you a maximum of 120 days to leave. If you make your request at the end of proceedings, the judge can grant you a maximum of sixty days to depart. Thus, the earlier you request voluntary departure, the greater the chance the judge will grant it.

G. Decision and Appeals

1. Decision

The immigration judge will decide your case based on the evidence both you and the government present to the court. If the judge orders you deported, the judge must notify you of the consequences of failure to depart.[218] At the end of the hearing, the judge will ask both you and the assistant chief counsel whether you expect to appeal the decision. If either you or the assistant chief counsel decides to appeal, the immigration judge will issue a long decision to preserve the record for the next stage. If you win your case and the assistant chief counsel does not reserve appeal, your case is final. You are now allowed to remain in the U.S. and retain your lawful immigration status. If your green card, passport, or other documents were taken from you, they may be returned at the end of the hearing, but it is more likely that these documents will be returned at a later time.

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212. There is no formal application for voluntary departure as there is for each other form of relief. INA § 240B(d); 8 U.S.C. § 1229c(d) (2006).

213. INA § 240B(d); 8 U.S.C. § 1229c(d) (2006). If you have a ticket and travel document to leave by the date the judge sets and the only reason you do not leave is you are detained and DHS does not release you by that date, you should contact your immigration judge to inform him or the district director to extend your voluntary departure date.

214. *See* Part I of this Chapter, which discusses both legal and illegal reentry into the U.S.

215. Sometimes, at the time of your removal proceedings, you do not qualify for any forms of relief. You may anticipate, however, that you will qualify for a form of relief (such as adjustment of status) at a later date. At that later date, you may wish to reopen your immigration court proceedings. *See* Part G(3) of this Chapter, which describes the process of reopening immigration cases.

216. Sometimes people requesting other forms of relief listed in this Part will request voluntary departure as an alternative to those other forms of relief. This way, if they lose their case, they can still obtain voluntary departure.

217. *See* footnote 129, which lists what may bar a finding of good moral character.

218. INA § 240(c)(5); 8 U.S.C. § 1229a(c)(5) (2006).

If, however, you win your case and the assistant chief counsel appeals the judge's decision or you lose your case and you decide to appeal, your case is not over; you will have to wait until the appeal is decided to determine whether you will be able to remain in the U.S. If you lose and you appeal, you cannot leave the country while your case is pending without your case being deemed abandoned.

2. Appeals

(a) Appeals to the Board of Immigration Appeals ("BIA")

After the immigration judge gives his decision, both you and the government have the right to appeal the decision to the ***Board of Immigration Appeals*** **(*BIA*)**,[219] another type of administrative court. Because the BIA is located in Virginia, immigration appeals are essentially done on paper, and you do not have to be present at the time of your appeal. The BIA has very strict rules about how you file and prepare an appeal. Failure to follow these rules may result in your appeal being ***dismissed***.

(b) Filing Deadlines and BIA Addresses

To appeal, you must file a ***Notice of Appeal*** with the BIA. The BIA must *receive* notice within thirty days of the immigration judge's decision. Note that it is not good enough to mail the Notice of Appeal by the thirtieth day; the notice must actually *be in the clerk's office* of the BIA by that day.[220] If it arrives even one day late, the appeal will be dismissed, and you will not have another opportunity to appeal the immigration judge's decision.

The notice can be sent by regular first class mail to this address:[221]

Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, VA 22041

The notice can also be sent by courier or overnight delivery to this address:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

(c) Notice of Appeal

At the end of your hearing, the immigration judge should provide you with a Notice of Appeal on which you will state the reason for your appeal, giving all the legal claims you want to make. You must also indicate whether you plan to file a ***legal brief***.[222] There is also a required fee of $110 for an appeal, regardless of whether you file a legal brief or not.[223] Once the BIA receives your Notice of Appeal, the BIA will notify you by sending you a receipt. If you said that you wanted to file a legal brief, you will later receive a transcript of the immigration hearing and a ***briefing schedule***. The briefing schedule is a schedule that tells you and the government when your legal briefs are due. You can ask for an extension for more time, but generally the BIA only grants the first request for extra time by giving you an additional twenty-one days to file your legal brief. Any additional requests for more time are usually denied. You may also request oral

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219. 8 C.F.R. § 1003.1(b) (2007). The BIA is the highest administrative body for interpreting and applying immigration law. It is composed of 15 members and is located at EOIR headquarters in Falls Church, Virginia. Generally, the Board does not conduct courtroom proceedings but in rare instances has heard oral arguments of appealed cases.

220. At the end of your individual hearing, the judge will give you his or her decision on a piece of paper that contains the date by which you must file your appeal.

221. Before sending anything to this address, or any addresses within the context of this Chapter or the appendices that follow it, be sure to confirm that it has not changed.

222. The legal brief is your written account of your immigration court proceedings, including why you believe the case should have been decided in your favor. The purpose of the legal brief is to persuade the BIA that you should have won your immigration case.

223. You should always check what the current fee is. If you cannot afford to pay the fee, you can request a fee waiver. In order to do so, you must complete a Fee Waiver Request Form EOIR-26A, *available at* http://www.justice.gov/eoir/eoirforms/eoir26a.pdf (last visited January 10, 2010).

argument on the Notice of Appeal, which is the chance to explain in person why your case was improperly decided by the immigration judge.[224] If you say you are going to file a legal brief and you do not file one, your appeal may be dismissed.

(d) Legal Brief

Writing a legal brief is not easy. That is why you should try to obtain the help of an attorney.[225] When writing a brief, you should start with a statement of facts, which outlines the following: (1) the essential facts of the case, including when and how you came to the U.S., (2) when the government began removal proceedings against you, and (3) the specific charges the government made against you. You should then briefly state the evidence that you presented to the immigration court during your hearings. If you have any new evidence that you did not previously present to the court, you cannot refer to it in your brief. You can only refer to evidence that was shown or presented to the immigration judge during one of your hearings.

After your statement of facts, you should then state your specific legal claim or claims. The BIA knows that you are not an attorney, so it does not expect you to use legal terms in the writing of your legal brief. You should, however, refer to cases that support your argument. If, in your original Notice of Appeal, you claim that you will file a legal brief and later fail to do so, the BIA may dismiss your appeal on that basis alone.

(e) BIA Decision

The BIA can take several months or even years to make a final decision on your immigration case.[226] Appeals involving detainees tend to move more quickly than the appeals of non-CUSs who are not currently detained. Once the BIA has made a decision on your appeal, it sometimes issues a brief summary of the case along with its decision. The BIA recently adopted a policy of issuing ***summary affirmances***, which are one-page and usually one-line decisions simply stating that the immigration judge was correct without any discussion of the individual facts and circumstances of the case. With the use of summary affirmances, the BIA does not actually indicate why it is making its decision.[227]

3. Motion to Reopen or Reconsider

Under certain circumstances you may ask the immigration judge or the BIA to review your case again. There are two types of ***motions*** that accomplish this result, and both must be filed with the court that last decided your case. The motion to reopen is based on factual claims. The motion to reconsider is based on legal claims or changes in the law that are favorable to your case.

(a) Motion to Reopen

You can file one[228] motion to reopen,[229] which asks the court to reopen your immigration court proceedings. This motion must be filed within ninety days of the date of entry of the final administrative deportation order. If the basis for your motion to reopen is failure to appear in court due to exceptional circumstances and/or ineffective assistance of counsel,[230] the deadline for filing this motion is 180 days from

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224. Requests for oral argument are rarely granted.

225. *See* Appendices C and D for more resources and legal service providers.

226. You can check on the status of your case by calling the Automated Status Query line, toll-free, at (800) 898-7180. You will need your Alien Registration Number when you call.

227. Within another 30 days, you may have the right to appeal the BIA decision to one final court—the Circuit Court of Appeals in your district. This court is part of the federal court system. Not everyone has the right to appeal a BIA decision. Most cases involving criminal convictions cannot be appealed to the Court of Appeals. This will be discussed in greater detail below.

228. There is one exception to the limitation of one motion to reopen, which falls under the special rule for battered spouses, children, and parents. INA § 240(c)(7)(C)(iv); 8 U.S.C. § 1229a(c)(7)(C)(iv) (2006).

229. INA § 240(c)(7); 8 U.S.C. § 1229a(c)(7) (2006).

230. In 2009, the Attorney General issued an order in which he asserted that people in removal proceedings generally have no right to have their cases reopened on grounds of ineffective counsel. In re Compean, 24 I. & N. 710, 727–730 (A.G. 2009). Several months later, the new Attorney General vacated this order and announced his intention to initiate a new rulemaking proceeding for regulations to govern ineffective counsel claims in removal proceedings. At the time of this writing, the new rules have not been issued. Until the rules are issued, the procedures governing ineffective counsel claims are those that existed before *Compean*.

the date of the final deportation order.[231] If you do not file within 180 days, the judge may reopen as a matter of discretion.[232] If the deportation order was issued in removal proceedings that occurred before June 13, 1992, there is no deadline. There also is no deadline if you are applying for asylum as the basis of relief, as long as your motion is based on changed home country conditions.[233]

Motions to reopen based on lack of notice or failure to attend your hearing due to exceptional circumstances will automatically ***stay*** (stop) your deportation. Motions based on new evidence or changed circumstances in your home country do not automatically stay your deportation.[234] If you do not request a stay or your request is denied, you may be deported before you receive a decision on your motion. If you are deported, the BIA will automatically dismiss your motion.

(i) New Evidence

The motion to reopen must state the new facts that you will prove at the hearing if the motion is granted and that these facts will be supported by evidence or affidavits. You must show why this evidence was not available at the time of your prior hearing.[235] If the basis of the motion is failure to appear due to exceptional circumstances or new facts or evidence, a filing fee of $110 is required.[236]

(ii) Lack of Notice/Failure to Attend Hearing

If you were ordered deported in your absence, you may file a motion to reopen if there were exceptional circumstances that prevented you from appearing at your immigration court date or if you can prove that you did not receive your NTA.[237] If the motion to reopen or motion to reconsider is based on a lack of notice, no fee is required.

(iii) Ineffective Assistance of Counsel[238]

The requirements for a claim of ineffective assistance of counsel are[239]

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231. INA § 240(c)(7)(iii); 8 U.S.C. § 1229a(c)(7)(C)(iii) (2006). Some jurisdictions consider ineffective assistance of counsel an exceptional circumstance. *See* Lopez v. INS, 184 F.3d 1097, 1100–01 (9th Cir. 1999). *But see* Gunawan v. Gonzales, No. 04-3091, 2005 U.S. App. LEXIS 10502, at *9 n.4 (3d Cir. June 7, 2005) (noting that the Third Circuit has not joined the First, Sixth, and Ninth Circuits in holding that ineffective assistance of counsel is an exceptional circumstance).

232. In Lopez v. I.N.S., the court found that for cases in which deportation was ordered in your absence, the 180-day deadline for motions to reopen was tolled due to ineffective assistance of counsel. 184 F.3d 1097, 1100–01 (9th Cir. 1999). When a statute is tolled, the time for the statute of limitations is suspended, and the time you have to move to reopen is extended. In other words, although you may have 180 days to file the motion to reopen based on ineffective assistance of counsel, the clock may not start running until you know or should have known that you were a victim of ineffective assistance of counsel.

233. INA § 240(c)(7)(C)(ii); 8 U.S.C. § 1229a(c)(7)(C)(ii) (2006) ("[T]here is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections INA § 208 or 241(b)(3); 8 U.S.C. § 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.")

234. You must request a stay from the BIA in order to obtain one in this situation.

235. There is a very important difference between (a) evidence that you were unable to get despite your best efforts because it did not exist or was unavailable and (b) evidence that you could have gotten, but you neither obtained nor presented to the court for some reason. For the purposes of your motion to reopen, (a) would probably constitute a valid reason for reopening your immigration case whereas (b) would probably not be enough.

236. You should always check what the current fee is. If you cannot afford to pay the fee, you can request a fee waiver. In order to do so, you must complete a Fee Waiver Request Form EOIR-26A, *available at* http://www.justice.gov/eoir/eoirforms/eoir26a.pdf (last visited January 10, 2010).

237. INA § 240(c)(7); 8 U.S.C. § 1229a(c)(7) (2006). For the purposes of motions to reopen, the term "exceptional circumstances" is defined in INA § 240(e)(1); 8 U.S.C. § 1229a(e)(1) (2006) as "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child or parent of the alien, but not including less compelling circumstances beyond the control of the alien."

238. There is generally a fee of $110 associated with filing a motion to reopen based on ineffective assistance of counsel. You should always check whether there is an applicable fee. If there is and you cannot afford to pay the fee, you can request a fee waiver. In order to do so, you must complete a Fee Waiver Request Form EOIR-26A, *available at* http://www.justice.gov/eoir/eoirforms/eoir26a.pdf (last visited January 10, 2010).

239. *In re* Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988); *In re* Rivera-Claros, 21 I. & N. Dec. 599, 604–05 (BIA 1996); *In re* Grijalva, 21 I. & N. Dec. 472, 474 (BIA 1996).

(1) The motion must be supported by an affidavit (a sworn statement in which you attest to the relevant facts) that includes a statement of agreement between you and your attorney with respect to representation. In other words, you must explain the situation and how you developed a relationship with your former attorney, including any proof that you had an ***attorney-client relationship***. This may include evidence of any payments you made to your attorney, receipts, or a ***retainer agreement***.
(2) Before you file the motion to reopen, you must inform your former attorney of the claims you are going to make and allow him or her the opportunity to respond to you first. If you do receive a response from your former attorney, you should include that in the motion as well.
(3) The court may not consider a claim of ineffective assistance of counsel unless you also file a formal complaint against your former attorney with the bar association in the state where your attorney practices, or with another disciplinary authority. Each state has different requirements on how to file a complaint. Your motion should include any attempt you made to report this attorney and, if you have not done so, your motion should include the reasons for not doing so.
(4) You must also show that you were prejudiced (that you were hurt) because of your former attorney's actions. If, however, your attorney's incompetence actually resulted in a deportation order, you do not need to show prejudice.

(b) Motion to Reconsider

You can file one motion to reconsider, which asks the court to reconsider the decision that you are deportable in light of new case law or changes in the law. This motion must be filed within thirty days of the date of entry of the final administrative deportation order. It must specify the errors of law or fact in the previous order.[240]

4. Appeal to the Court of Appeals[241]

The REAL ID Act of 2005 ("REAL ID Act"),[242] which was passed in May 2005, purports to eliminate all reviews of final deportation orders and direct appeals by habeas corpus. This means that the REAL ID Act would prevent you from filing an appeal with the federal district court.[243] You may still file a ***petition for review*** if your claim is a question of law or a constitutional claim, which includes a claim that your criminal conviction is not a deportable offense[244] or that the government did not prove your alienage. If your case concerned asylum, withholding of removal, or protection under the CAT, you must file a petition for review with the Federal Circuit Court in the judicial district where your immigration court decision was made. Your petition for review must be filed within thirty days of the BIA decision you are appealing. It is not enough to mail your petition for review by the thirtieth day; it must be received by the thirtieth day. The REAL ID Act, however, does contain bars to judicial review, including bars of review of certain discretionary decisions.

H. Detention

Non-CUSs who are subject to deportation are now much more likely than previously to be detained by ***Immigration and Customs Enforcement ("ICE").*** You may be held in immigration detention while your case is pending or until your deportation is arranged. Immigration detention is not the same as criminal imprisonment. Although a criminal conviction may have started your immigration court proceedings, immigration law is not criminal law; it is civil law. Immigration detention might seem harsh, but it is technically not considered punishment. Both of these facts result in you having fewer rights as an immigration detainee than you do as a criminal prisoner. You do have the right, however, to contact the ***consulate*** of your home country. The ICE arresting agent must inform you of this right when he takes you into custody.

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240. INA § 240(c)(6); 8 U.S.C. § 1229a(c)(6) (2006).

241. The rules regarding review in federal courts are very complicated and are still evolving. You should consult an attorney when filing anything with a federal court.

242. REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231 (2005) (codified as amended in scattered sections of 8 U.S.C.).

243. This is a very controversial and complicated law, and efforts have been made—and are continuing to be made—to amend or repeal it. You should consult an attorney to find out how the Real ID Act could affect your case.

244. *See* Part D of this Chapter, which discusses grounds of deportability. *See also* INA § 237(a)(2); 8 U.S.C. § 1227(a)(2) (2006) (listing deportable offenses).

Immigration detention is seen as a way in which the government can temporarily "hold" you while your case and future are determined. The government's primary reason for detaining you is to ensure your deportation if the judge orders you deported.

1. Mandatory Detention

Depending on your immigration status and/or criminal record, you may be subject to mandatory detention. This means you will not be eligible for the bond discussed below. If you are in mandatory detention, you will have to fight your removal proceedings (i.e., make the requests for forms of relief discussed above) from inside the DHS detention center or the jail or prison contracting with DHS. You will not be released from the *detention center* until your removal proceedings are completed. If you win your immigration case, then you will be released. If, however, you lose and are ordered deported, you will remain in the detention center until you leave the U.S.

Non-CUSs who are deportable for certain crimes (including possession of a firearm) must be detained.[245] In 2000, the BIA held if you were released from physical custody after criminal arrest (regardless of whether you were sentenced to incarceration) after October of 1998, you are subject to mandatory detention.[246] In 2003, the Supreme Court decided the government is allowed to hold non-CUSs who have been convicted of any of the crimes listed below in mandatory detention without a bond hearing.[247] So, if you were convicted of any of the crimes listed below *and* released from physical custody after October of 1998, you are subject to mandatory detention and are ineligible for a bond.[248] If you are in this situation, you will have to defend your removal proceedings from within the detention enter.

(a) Mandatory Detention of Inadmissible Non-CUSs

If you are an inadmissible non-CUS, you may be subject to mandatory detention if you have committed any offense listed in INA § 212(a)(2); 8 U.S.C. § 1182(a)(2) (2006) or INA § 212(a)(3)(B); 8 U.S.C. § 1182(a)(3)(B) (2006).[249] Some of the grounds for inadmissibility that make you subject to mandatory detention include, but are not limited to: (1) one CIMT, although the petty offense exceptions apply; (2) a controlled substance offense; (3) a drug trafficking offense; (4) two or more offenses with aggregate sentences of five years; (5) prostitution; (6) or a domestic violence offense or violation of an order of protection.

(b) Mandatory Detention of Deportable Non-CUSs

If you are a deportable non-CUS, you may be subject to mandatory detention if you have committed any offense listed in INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) (2006) or 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i) (2006) if your prison sentence was at least one year or in INA § 237(a)(4)(B); or 8 U.S.C. § 1227(a)(4)(B) (2006).[250] Some of the grounds for deportability that make you subject to mandatory detention include, but are not limited to: (1) two CIMTs at any time; (2) an aggravated felony; (3) a controlled substance offense, with the exception of possession of thirty grams of marijuana for personal use; or (4) a firearms offense.

You may also be subject to mandatory detention if you are a suspected terrorist.[251]

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245. INA § 236(c); 8 U.S.C. § 1226(c) (2006).

246. *In re* West, 22 I. & N. Dec. 1405, 1407 (BIA 2000) (holding that only aliens released from criminal custody after October 8, 1998, are subject to mandatory detention); *In re* Roman Kotlair, 24 I. & N. Dec. 124, 135 (BIA 2007) (finding that an alien who is released from criminal custody after October 8, 1998, is subject to mandatory detention even if no jail term was served).

247. Demore v. Kim, 538 U.S. 510, 531, 123 S. Ct. 1708, 1722, 155 L. Ed. 2d 724, 734 (2003) (finding that a criminal alien can be held in detention without bond procedures).

248. However, if DHS does not pick you up and detain you immediately upon release, you may be able to argue that you are no longer subject to mandatory detention. *See* Boonkue v. Ridge, No. 04-556, 2004 U.S. Dist. LEXIS 9648, at *4 (D. Or. May 7, 2004) (finding that an alien taken into custody over five years after release was not subject to mandatory detention).

249. INA § 236(c)(1)(A); 8 U.S.C. § 1226(c)(1)(A) (2006) and INA § 236(c)(1)(D); 8 U.S.C. § 1226(c)(1)(D) (2006).

250. INA § 236(c)(1)(B); 8 U.S.C. § 1226(c)(1)(B) (2006) and INA § 236(c)(1)(C); 8 U.S.C. § 1226(c)(1)(C) (2006).

251. INA § 236A; 8 U.S.C. § 1226a (2006).

2. Bond[252]

If you are not subject to mandatory detention, but you are being detained in an immigration detention center (*not* the same as serving your criminal prison sentence), you may be able to request a bond hearing, sometimes referred to in immigration court as a "Joseph Hearing."[253] A bond is similar to paying bail for your release from prison. If you are released on an immigration bond, you may be able to defend your removal proceedings from outside of the detention center.[254]

(a) Eligibility

To prove eligibility for bond, you must demonstrate that (1) you do not meet the requirements for mandatory detention and that (2) you are not an arriving alien.[255]

If you think you may be eligible for one of the forms of relief listed in Part F of this Chapter, you should present evidence of why you think you may be granted that particular form of relief. A judge is less likely to release you from detention if there is little chance you will be able to get a form of relief.

(b) Standard

At a bond hearing, you must persuade the immigration judge that you are not a ***flight risk*** or a ***danger to society***.[256] A flight risk is someone who is likely to disappear and never return to immigration court to face removal proceedings. A danger to society is someone who the government believes is likely to commit crimes if released. Therefore, in order to prove that you are not a flight risk or a danger to society, you must show that you are responsible and that the government will be able to find you if it needs to find you.[257]

(c) Discretionary Factors

Examples of positive factors include

(1) Proof that you are not a flight risk or a danger to society
   (a) You should first show the judge where you will be living if you are released on an immigration bond. Leases, mortgages, and property deeds will prove that you own a home or have long-term residence in the same place. A letter from someone who agrees to let you stay with him or her can also be submitted. In any case, you should give the court the address of where it can reach you. A complete address has a street number and name, apartment number (if you live in an apartment), city, state, and zip code.

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252. INA § 236(a)(2); 8 U.S.C. § 1226(a)(2) (2006) states that an immigration judge is not allowed to set a bond below $1,500 but can release you on "conditional parole," which means the judge can let you go without any bond. This may also be referred to as "released on your own recognizance."

253. *See In re* Joseph, 22 I. & N. Dec. 799, 809 (BIA 1999) (finding that if the alien is not subject to mandatory detention, the alien "could be considered by the Immigration Judge for release" in a bond hearing).

254. A "bond" is an agreement you make with the government whereby the government releases you on the condition that you agree to appear for all of your hearings and will obey the judge's order at the end of your case. To secure this agreement, you must give the government a sum of money that will be returned at the end of the proceedings. A friend or family member may pay the bond for you. If your family pays the bond directly to the government, the bond money will be returned to your family only when your court case is completed and only if you have complied with the court's order, even if that order is to leave the country. If you are ordered deported and you do not comply with the order, you or your family member will not receive your bond money back.

255. You are an arriving alien if you are "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means…" 8 C.F.R. § 1001.1(q) (2007).

256. *See In re* Ellis, 20 I. & N. Dec. 641, 634 (BIA 1993) ("[T]he alien bears the burden of showing that he was lawfully admitted to the United States, that he is not a threat to the community, and that he is likely to appear before any scheduled hearings."). A bond hearing is a completely different hearing from both the master calendar hearing and the individual hearing discussed in Part E of this Chapter.

257. Although you may submit the same or similar evidence for your bond hearing as you would for your individual hearing (if you are applying for one of the forms of relief discussed in Part F of this Chapter), you must resubmit all relevant evidence for each of your hearings.

(b) If you have an employer willing to hire you once you are released from immigration detention, you should show the judge proof that this person will employ you. If you were enrolled or plan on enrolling in educational courses, you can also submit evidence of this.

(c) If in the past you have always appeared for your scheduled court dates and complied with court orders, you should present evidence of past court records. If, however, there has ever been a warrant issued for your arrest, you should be prepared to explain why you failed to appear in court.

(d) If you are married or have children, you should show proof of these relationships by presenting marriage or birth certificates.

(2) Proof of rehabilitation

(a) You can prove that you have been rehabilitated by providing the judge with copies of certificates of attendance at drug or alcohol rehabilitation programs and letters from your counselors, therapists, or sponsors. Sometimes proof of involvement in a religious or civic organization or church group may also prove that you have been rehabilitated. You should obtain letters or affidavits from other group members who can attest to your good moral character.[258]

(b) The immigration judge will also look to your criminal convictions, especially to determine whether you are a danger to society. If you have any convictions including, but not limited to, violent crimes or acts in which you put someone else's life or well-being in danger, you should be prepared to prove that you would no longer commit such acts.

3. Bond Appeal

If you disagree with the judge's determination in your bond request, you may file a bond appeal with the BIA.[259] The government may also appeal the judge's decision if the assistant chief counsel believes that the judge should not have set bond or set the bond too low.[260] In certain circumstances, when the assistant chief counsel appeals the bond, he or she invokes an automatic stay of your release, which prevents you from being released from detention even though the judge granted your request for bond.[261] This stay could last until the BIA has made its decision on the bond appeal.

I. Failure to Depart from the U.S. and Returning to the U.S. After Deportation

1. Departure

If you are ordered deported, you will most likely have to leave the U.S. within ninety days. These ninety days are referred to as your ***removal period***. The removal period begins either the moment your deportation order becomes administratively final or when you are released from detention, whichever occurs later. The government has the right to extend this ninety-day period and to detain you during your removal period. If you have not departed within ninety days and your deportation is still pending, the government can also release you under an order of supervision.[262]

You may be fined and imprisoned for up to four years if you have been ordered deported and do any of the following: (1) fail to depart within your removal period, (2) fail to make timely applications for travel or other documents necessary to depart the U.S., (3) attempt to prevent your departure from the U.S., or (4) fail to present yourself at the designated time and place pursuant to your deportation order.[263] Classes of aliens who fall under INA § 237(a)(1)(E), 237(a)(2), 237(a)(3), or 237(a)(4); 8 U.S.C. § 1227(a)(1)(E), 1227(a)(2),

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258. See footnote 129, above which lists what may bar a finding of good moral character.

259. When the judge decides your appeal, he or she will give you a form known as a "Notice of Appeal." You must complete and file the Notice of Appeal with the BIA within 30 days of the judge's decision. The BIA may take several months to decide your bond appeal, and the immigration judge may order you removed before you receive a decision from the BIA. You will be held in detention while your appeal is being decided. *See* generally Part G, which describes the appeals process in greater detail.

260. The government also has a limited time to file the appeal. If it does not file an appeal, the judge's bond decision becomes final. Again, the immigration judge may decide to order you deported before you receive a decision from the BIA on the question of your bond.

261. *See* 8 C.F.R. § 1003.19(i)(2) (2007).

262. The terms of supervision after the 90-day period are outlined in INA § 241(a)(3); 8 U.S.C. § 1231(a)(3) (2006).

263. INA § 243(a); 8 U.S.C. § 1253(a) (2006).

1227(a)(3), or 1227(a)(4) (2006) may face imprisonment of up to ten years for failure to depart after a final order of removal.[264]

2. Bars To Reentry

If you are deported from the U.S., you will be prohibited from returning to the U.S. Depending on the reasons why you were deported, you may be able to apply for reentry into the U.S. after a designated time period. The time periods listed below refer to how long you must wait before you *apply* for reentry to the U.S. Even if you wait the required amount of time, this does not mean that your application to reenter the U.S. will be approved.[265] Therefore, everyone who is deported from the U.S. faces the possibility of never being able to return.

(1) Failure to Appear. If you were deported because of failure to appear at your removal proceedings, you can apply for reentry to the U.S. after five years.
(2) Inadmissibility. If you were deported based on inadmissibility grounds (except controlled substance offenses), you can apply for reentry to the U.S. after five years.
(3) Deportability. If you were deported based on deportability grounds (except aggravated felonies), you can apply for reentry to the U.S. after ten years.
(4) Laws Prior to 1996. If you were deported based on the immigration laws prior to 1996, you can apply for reentry to the U.S. after ten years.
(5) Two Deportation Orders. If you were ordered deported because of two deportation orders, you can apply for reentry to the U.S. after twenty years.
(6) Controlled Substance Offense/Aggravated Felony. If you were deported because of a controlled substance offense or aggravated felony, then you will never be allowed to reenter the U.S.

You should discuss your possibilities for reentry with your attorney before attempting to reenter the U.S. because the consequences for illegal reentry are very serious.

3. Illegal Reentry

If you enter or attempt to reenter the U.S. illegally after being deported from the U.S., you may be fined or imprisoned in a federal prison for up to twenty years.[266]

J. Conclusion

This Chapter has given you an overview of immigration law. As immigration law is very complicated and changes frequently, you should now do additional research on any forms of relief that you think might apply to you. You should think about the arguments that you will make to convince the judge that you meet the positive discretionary factors and fulfill the standard for a form of relief. You should also collect documents that support your arguments.

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264. For the full statute, see INA § 243; 8 U.S.C. § 1253 (2006).

265. If you have unlawful presence in the U.S., you may face additional bars to reentry. If you have been unlawfully present in the U.S. between 180 days and one year, you must wait three years before applying for reentry. If you were unlawfully present for one or more years, you must wait 10 years before applying for reentry into the U.S.

266. For the full statute, see INA § 276; 8 U.S.C. § 1326 (2006). The fines are determined according to Title 18 of the U.S.C. The length and terms of imprisonment are determined according to the basis for your original deportation order from the U.S.

APPENDIX A

GLOSSARY

Acquired Citizenship
The U.S. citizen status of children born abroad (in another country) to parents who are already U.S. citizens (either by birth or naturalization).

Adjustment of Status
The process by which a non-CUS already in the U.S. may apply to change his status to a lawful immigration status. Non-CUSs admitted as non-immigrants, refugees, or parolees may adjust to become lawful permanent residents if they meet the requirements outlined in INA § 245; 8 U.S.C. § 1255 (2006). *See* Part F of this Chapter, which discusses adjustment of status as a form of relief from deportation in greater detail.

Affidavit
A written or printed statement of facts that is made voluntarily (freely) by a person who swears to the truth of the statement before a public officer, such as a notary public.

Aggravated Felony
A general term which includes the crimes listed at INA § 101(a)(43); 8 U.S.C. § 1101(a)(43) (2006) and includes murder, rape, sexual abuse of a minor, illegal drug trafficking, illegal trafficking in firearms or explosive material, theft or burglary if the punishment was a prison sentence of more than one year, child pornography, owning or managing prostitutes, some types of money laundering in excess of $10,000, fraud or tax evasion where the loss to the victim(s) is over $10,000, smuggling aliens, crimes of violence that receive a sentence of imprisonment for one or more years, and attempt or conspiracy to commit any of the above. A conviction for an aggravated felony will bar a non-CUS from most forms of relief.

Alien Registration Number (also known as "A number")
An eight- or nine-digit number preceded by the letter A (for example, "A00000000"), which can be found on a resident alien card (for LPRs) or other governmental documents relating to immigration. An "A number" will also appear on the top of an NTA and is used to identify a non-CUS in immigration court proceedings.

Assistant Chief Counsel
See Chief Counsel.

Asylum (Asylee)
Protection from persecution in one's home country offered by a foreign government. A person who entered the U.S. either legally or illegally may seek asylum if he fears returning to his country of origin due to past persecution or a well-founded fear of being persecuted based upon race, religion, nationality, political opinion, or membership in a particular social group. A person who has been granted asylum is called an "asylee." *See* INA § 208; 8 U.S.C. § 1158 (2006).

Attorney-Client Relationship
The formal and official representation of a person by a lawyer. This relationship is given certain protections by the court, such as the evidentiary privilege of attorney-client confidentiality, which means that a lawyer cannot be forced to testify about things told to him by his client.

Board of Immigration Appeals ("BIA")
The highest administrative body for interpreting and applying immigration laws. The BIA hears appeals from immigration courts, and its decisions are reviewed by the federal appellate courts. Generally, the BIA does not conduct courtroom proceedings (and instead decides cases based on a written record and briefs submitted by both sides), but it has heard oral arguments of appealed cases in rare instances. It is made up of eleven administrative judges and is located at Executive Office for Immigration Review headquarters in Falls Church, Virginia.

Bond
A payment made to the government to guarantee an agreement between a non-CUS and the government. The government agrees to release the non-CUS from immigration detention, and the non-CUS agrees to appear at all court proceedings and to follow the immigration judge's final order. Paying an immigration bond is like paying bail in criminal law.

Bond Hearing
An immigration court proceeding in which the non-CUS requests bond and attempts to convince the judge that he is not a flight risk or danger to society (for example, because he has strong family connections in the community). A non-CUS might present some of the same or similar evidence in his bond hearing as he would in other immigration court proceedings.

Briefing Schedule
A schedule issued by the BIA that tells a non-CUS appealing a decision in his removal proceedings and the government when briefs are due.

Cancellation of Removal
A form of relief from deportation available to LPRs under INA § 240A(a); 8 U.S.C. § 1229b(a) (2006) and to non-LPRs under INA § 240A(b); 8 U.S.C. § 1229b(b) (2006). *See* Part F of this Chapter, which discusses forms of relief in greater detail.

Certificate of Disposition
An official court document stating the final outcome of a criminal court proceeding, for instance acquittal or conviction. This document is useful in immigration court proceedings for proving if and how a prior criminal case against a non-CUS was resolved.

Chief Counsel
The lawyers from ICE that represent the government in immigration court proceedings. An attorney from ICE, referred to as assistant chief counsel, will represent the government in all removal proceedings. These attorneys take immigration cases that involve criminal convictions very seriously and will generally vigorously fight these cases on the government's behalf.

Citizen of the United States ("CUS")
A person who has the right to live, work, and travel in the U.S. without restrictions, to participate in the U.S. political system, and to be represented and protected abroad through U.S. embassies and consulates. *See also* "acquired citizenship" and "derivative citizenship."

Citizenship and Immigration Services ("CIS")
An agency within the Department of Homeland Security that handles the administrative processing of non-CUS petitions and documents, including citizenship applications, visa petitions, and asylum applications. The CIS conducts inspection interviews, and its decisions are reviewed by the Executive Office for Immigration Review (which includes the immigration courts and Board of Immigration Appeals).

Commercialized Vice
The unlawful promotion of or participation in sexual activities for profit (e.g. prostitution). Commercialized vice is a grounds for inadmissibility under INA § 212(a)(2)(D); 8 U.S.C. § 1182(a)(2)(D) (2006).

Consulate
The U.S. office of a foreign government. For example, Mexico has several consulates in the United States, located in various cities such as Chicago and New York.

Controlled Substance Offense
A crime involving possession or use of anything the government has prohibited from sale and use in society, for example illegal drugs and some kinds of weapons.

Convention Against Torture ("CAT")
An international treaty that prohibits member countries, including the U.S., from returning anyone to a country where he may be tortured. A non-CUS can seek protection under the CAT as a form of relief from deportation.

Conviction
With respect to non-CUSs and for the purposes of removal proceedings, a formal judgment of guilt entered by a court; or, if adjudication of guilt has been withheld, where (1) a judge or jury has found the non-CUS guilty or the non-CUS has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding a guilt, and (2) the judge has ordered some kind of punishment or penalty. *See* INA § 101(a)(48); 8 U.S.C. § 1101(a)(48) (2006).

Crime Involving Moral Turpitude ("CIMT")
A crime that is "inherently immoral" and reflects "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006). CIMTs are defined by case law. An example of a CIMT is prostitution.

Crime of Violence
A crime that has as an element the use, attempted use, or threatened use of physical force against another person or the property of another. A crime of violence can also be any other offense that is a felony and by its nature involves a risk that physical force may be used against the person or the property of another in the process of committing the offense, for instance, robbery.

Customs and Border Protection ("CBP")
An agency within the Department of Homeland Security that is responsible for controlling which people and things enter the U.S. For instance, the CBP keeps out not only illegal aliens and illegal drugs, but also harmful diseases that may be unknowingly transported in foreign food and pets. The customs officers who interview arriving travelers to the U.S. are part of the CBP.

Danger to Society
Someone who is likely to threaten the safety and well-being of others or society as a whole, for instance because he is likely to commit a violent crime again. In order for the judge to grant a non-CUS an immigration bond, which will release him from immigration detention, the non-CUS must prove that he will not be a danger to society (or a flight risk) if he is released.

Deferred Inspection Appointment
A continuation of the interview begun by U.S. customs officers at a U.S. inspection point. The deferred inspection appointment is used when customs officers need to get more detailed information than is possible at an inspection point. For instance, if an arriving alien is interviewed by customs officers at a U.S. airport, he may be given a deferred inspection appointment to continue the interview later at his local DHS office.

Department of Homeland of Security ("DHS")
A U.S. executive department, created in March 2003, which oversees the protection of the territory of the U.S. DHS includes the United States Citizenship and Immigration Services (CIS), the United States Immigration and Customs Enforcement (ICE), and the United States Customs and Border Protection (CBP).

Deportation (also known as "Removal Proceedings")
The legal process by which the government removes non-citizens from the U.S. Deportation is now officially referred to as removal proceedings in immigration court. *See also* "removal proceedings."

Deportation Order (also known as "Removal Order")
An order from an immigration judge to remove an alien from the U.S. A deportation order is now technically referred to as a removal order. A final removal order is one where the BIA has either affirmed the

immigration judge's removal order or reversed the immigration judge's grant of relief and issued a removal order instead. A prior deportation order is a removal order that was issued in the past.

Derivative Citizenship
The U.S. citizen status of children who become citizens as a result of their parent(s) being naturalized.

Detention
The holding of an alien at a DHS detention center (or a prison contracting with DHS) while his immigration case is pending. Because immigration is a civil matter, immigration detention is different from criminal imprisonment. An alien in a DHS detention center does not have the same rights as someone who is in prison serving a criminal sentence. *See also* "mandatory detention."

Detention Center (DHS Detention Center)
A place where non-citizens are held until their immigration court proceedings are complete. Technically, it is different from a prison because immigration is considered a civil matter, not a criminal matter. However, some immigration detainees are held in prisons that contract with DHS.

Direct Appeal
An appeal that skips the intermediate appellate court and goes directly from the trial court to the highest court.

Discretion
The power of a legal body, such as a court or agency, to act or decide something in the way it thinks best because the law provides no clear answers. For example, the judge may have discretion to grant forms of relief if the law does not say exactly how to do so.

Discretionary Factors
Individual facts about an alien's life, which a judge looks at to see if he should receive the forms of relief he has requested. The judge will decide based on these facts whether the form of relief would be positive for both the alien and the U.S.

Dismiss
To terminate (end) a case or an action without any further hearings or decisions. Sometimes, a dismissal can be appealed to the next highest court.

Entry Without Inspection ("EWI")
A term applied to people who come into the U.S. without proper authorization by the U.S. government. Examples of EWI include crossing a border without inspection or presenting false documents to border officials.

Evidence
Anything presented to a court that proves, or helps to prove, the claim of a party or the existence of a fact. Evidence can be presented orally by witnesses, or through documents, physical objects, or anything that will help prove a point.

Executive Office for Immigration Review (EOIR)
The part of the U.S. Department of Justice that handles immigration cases (for example, removal proceedings). The EOIR includes the immigration courts and the BIA.

Expedited Removal
Deportation without a hearing.

Expungement
The sealing of a criminal record so that it is not publicly available.

Failure to Appear
When a person is officially scheduled to go before a judge or a government agency at a certain time and does not do so.

Fee Waiver
Permission granted by a court or administrative body so that a person does not have to pay a fee that he would otherwise be required to pay. For instance, filing fees might be waived in a court case for a poor person.

Flight Risk
Someone who is likely to run from the law or fail to appear for future scheduled court dates. In order for the judge to grant an alien an immigration bond, he must prove that he is not a flight risk. *See also* "danger to society."

Forms of Relief (from deportation)
A legal excuse or waiver that cancels or suspends deportation for an alien facing removal proceedings. If a form of relief is granted by an immigration judge, the non-CUS will not be deported and will be allowed to remain in the U.S.

Green Card ("Resident Alien Card")
A US CIS I-551 Permanent Resident Card which is issued to non-CUSs who have permission to permanently live and work in the U.S. *See also* "Lawful Permanent Resident ("LPR")."

Home Country
The country in which an alien was born or the country to which he would be deported.

Home Country Conditions
The current state of political, social, economic, or healthcare conditions in an alien's home country. Some forms of relief, like asylum, require an alien to show his current home country conditions.

Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")
A set of changes to U.S. immigration laws that tightened immigration laws by expanding grounds for deportation, instituting mandatory deportation, detention, and lifetime bars to reentry, and removing judicial discretion in a lot of cases. These laws have been in effect since April 1, 1997.

Illegal Reentry
An attempt to reenter the U.S. after deportation.

Immediate Relative
For the purpose of adjustment of status, spouses and unmarried children under twenty-one years old of CUSs and parents of CUSs (if the CUS is over twenty-one years old).

Immigration and Customs Enforcement ("ICE")
An agency within the Department of Homeland Security that investigates and enforces immigration laws. The attorneys that represent the government in immigration court proceedings are part of ICE and are referred to as assistant chief counsels. U.S. Customs investigators, the Federal Protective Service, and the Federal Air Marshal Service are also part of ICE.

Immigration Court
A special court that deals only with immigration issues such as deportation.

Immigration Detention
See detention.

Immigration Status
The legal or illegal status an alien has in the U.S., for example legal permanent resident (LPR), visa-holder, or undocumented (illegal). Part B of Chapter 1 of the Immigration Supplement discusses how to determine immigration status in the U.S.

Inadmissibility (Inadmissible)
For immigration purposes, lack of permission to enter the U.S. or unlawful presence in the U.S. An alien may be found to be inadmissible any time he seeks permission to enter the U.S., even if he is an LPR returning from a trip abroad. He may also be inadmissible if he is found to be present in the U.S. without permission. *See* INA § 212; 8 U.S.C. § 1182 (2006) for more information about inadmissibility.

International Treaty
A formal agreement between two or more states (nations) in reference to some aspect of international relations including, but not limited to, peace, human rights, and commerce.

Legal Brief
A written summary (explanation), submitted by either an alien or the government, of the particular facts and arguments in an alien's immigration court proceedings. A brief can be submitted by either an alien or the government to the BIA if a case is appealed, and it includes why the particular side believes the case should have been decided in its favor. The purpose of the legal brief is to persuade the BIA to decide the case a certain way.

Legal (or Lawful) Permanent Resident Status ("LPR")
The immigration status possessed by most green card or resident alien card holders. The exception is that some green cards are issued for conditional permanent residency and are valid for only two years. If an alien has one of these kinds of green cards and never obtained permanent residency, then he does not have LPR status. All other green cards are valid indefinitely, even if they have an expiration date printed on them. LPR also refers to the people who have LPR status. *See also* "green card."

Mandatory Detention
A situation where the law requires that an alien be held until immigration proceedings are finished. The terms and conditions of mandatory detention are outlined in INA § 236(c); 8 U.S.C. § 1226(c) (2006) and INA § 236a; 8 U.S.C. § 1226a (2006) (mandatory detention of suspected terrorists). *See also* "detention."

Master Calendar Hearing
The first date for a removal hearing scheduled before an immigration judge in immigration court. An alien may have more than one master calendar hearing. If a judge finds that an alien is not eligible for any form of relief, she can order him deported at the master calendar hearing.

Motion
A request by one of the parties that the judge take a specific action or make a specific ruling.

Nicaraguan Adjustment and Central American Relief Act ("NACARA")
A law passed in 1997 that provides various forms of immigration benefits and relief from deportation to certain Nicaraguans, Cubans, Salvadorans, Guatemalans, nationals of former Soviet bloc countries, and their dependents. Individuals granted relief under NACARA will become LPRs and will be issued a green card. Those wishing to apply for relief under NACARA must complete and file Form I-881, which can be found online at http://www.uscis.gov/files/form/I-881.pdf (last visited January 10, 2010).

Notice (Notification)
Knowledge or information received. "Notice" has several meanings in the law. First, the law often requires that "notice" be given to an individual about a certain fact. For example, the government is required to provide "notice" to a defendant of the charges against him in criminal proceedings or in civil proceedings in which an individual's interests are involved. This means the government must give you a piece of paper explaining the charges. It also means that a civil plaintiff must tell the person he is suing about the lawsuit

through "notice" by service of process. Second, "notice" is used in cases to refer to whether an individual was aware of something. For example, a statute may require that before an individual can be held liable for damages, he had to have "notice" about a certain fact.

Notice of Appeal
An alert (notification) that an appeal is being filed with a higher court. Aliens are often required to provide the government with notice of appeal if they choose to challenge immigration court decisions. *See also* "notice."

Notice to Appear ("NTA")
The government document that begins a removal proceeding. The NTA contains basic information about the alien being removed, including his name, country of origin, and how he entered the U.S., as well as the grounds for his deportability and/or inadmissibility. *See* INA § 239(a); 8 U.S.C. § 1229(a) (2006).

Parolee Status
The immigration status of those the U.S. government has allowed to physically enter the country for different reasons, such as humanitarian reasons including, but not limited to, illness or home country conditions. Sometimes the government sets a specific time for parolees to remain in the U.S. Other times, the government allows parolees to stay in the U.S. indefinitely. Some parolees can adjust their status after one year. The most common parolees are Mariel Cubans.

Petition for Review
A document submitted to an appellate court that asserts a legal claim on appeal. For immigration appeals of BIA decisions, the petition for review to the federal Court of Appeals should include the alien's name, the reason he is requesting that the court review his case, why the court has jurisdiction, and that the petition was timely filed.

Petty Offense Exception
An exception to the usual rule that a single CIMT is grounds for inadmissibility. The CIMT cannot be used against an alien if he falls within one of the exceptions described in INA § 212(a)(2)(A)(ii); 8 U.S.C. § 1182(a)(2)(A)(ii) (2006): either because he committed only one CIMT when he was under eighteen years old and the crime was committed more than five years before the date of application for admission into the U.S.; or he committed one crime and the maximum sentence of that crime does not exceed one year of imprisonment and he was not sentenced to more than 6 months of imprisonment.

Prior Deportation Order
A deportation order that was issued in the past.

Public Charge
Someone who depends upon public benefits as his main source of income. In the case of a non-CUS facing removal proceedings, officials may consider age, health, family status, assets, education, and whether he receives (or has ever received) public benefits in the past to determine whether he is or will become a public charge.

Rap Sheet
The unofficial term for the record of a person's criminal history.

Refugee
A person who seeks entry and resettlement in the U.S. due to past persecution or a well-founded fear of being persecuted based upon race, religion, nationality, political opinion, or membership in a particular social group. *See* INA § 101(a)(42); 8 U.S.C. § 1101(a)(42) (2006).

Rehabilitation
The process of changing one's life for the better. For example, a drug addict who is rehabilitated has worked to overcome his addiction and stop using drugs. Rehabilitation is a positive discretionary factor that a judge may consider when evaluating certain applications for relief from removal.

Removal Period
The ninety days following a final deportation order or release from detention during which a deportable alien is supposed to leave the country. The government has the right to extend this 90-day period and to detain an alien during his removal period. If the alien has not departed within 90 days and his deportation is still pending, the government can also place him under an order of supervision, as defined in INA § 241(a)(3); 8 U.S.C. § 1231(a)(3) (2006).

Removal Proceedings
The legal process by which the government removes non-CUSs from the U.S. (formerly known as exclusion or deportation proceedings).

Retainer Agreement
A written contract for legal services between an attorney and client, which may or may not include an hourly rate or predetermined fee.

Stay
An order given by a judge to stop or postpone a proceeding or the carrying out of a legal order for a specific length of time or until a specific event occurs.

Summary Affirmance
Short (sometimes only one sentence) written decisions by an appellate court that agree with the lower court's decision.

Supporting Documents
Any documents presented by an alien to the court, immigration judge, and assistant chief counsel for the purposes of his immigration court proceedings (removal proceedings, master calendar hearing, individual hearing, and bond hearing). Supporting documents may also be referred to as documentary evidence.

Temporary Protected Status ("TPS")
An immigration status granted by the President to non-CUSs from certain countries if he finds that armed conflict, environmental dangers, or other extraordinary and temporary conditions in that country prevent people from returning there. The President reviews the conditions of the country on an annual basis to determine whether the TPS status is still necessary. If it is not, the TPS status will expire for the non-CUSs from that particular country.

Unlawful Presence
Describing any alien who is in the U.S. even though he has not been granted an official immigration status that gives him the right to be there.

Venue
The proper location at which a lawsuit can proceed. If venue is found improper at one location, the case will usually simply be brought again in the correct place. In addition, more than one venue may be proper, giving the person bringing a lawsuit or the government a choice. A change of venue is the transfer of a case from one court to another court in the same judicial system to fix a defect in venue, to lessen prejudice, or to secure a more convenient location for trial.

Visa
A document, issued by a U.S. Consul, authorizing non-CUSs to come to a U.S. port or inspection point to apply to be admitted to the U.S. Visas are given for a specific purpose. For example, non-CUSs who comes into the U.S. with a non-immigrant visa may have a student or visitor visa. Visas are not only given for a

specific purpose, but also for a specific period of time. Once either the purpose or time of the visa expires, the non-CUS has overstayed his visa and no longer has legal status in the U.S. For example, if you come to the U.S. with a student visa and you are no longer a student, then your status has expired and you are now illegally present in the U.S. You have no legal right to remain in the U.S., which is enough of a reason to put you in removal proceedings. Therefore, if a non-CUS overstays his visa, it does not matter whether he has been convicted of any crimes; the government can still deport him.

Visa Overstay
See "visa."

Voluntary Departure
An option available to some non-CUSs facing deportation in which the alien agrees to leave the U.S. within a specified period of time (usually thirty days) instead of being ordered deported by the U.S. government. Persons convicted of aggravated felonies and individuals who may pose security risks to the U.S. are not eligible for voluntary departure.

Waiver
A form of relief that a judge can grant at a removal proceeding that ignores the immigration consequences of criminal activity.

Withholding of Removal
A form of relief from deportation that is very similar to asylum, but more difficult to obtain. To qualify, a non-CUS must prove to the immigration judge that he is unable or unwilling to return to his country because his life or freedom would be threatened there due to race, religion, nationality, membership in a particular social group, or political opinion. For a judge to grant withholding of removal, he must be convinced that there is a probability that the non-CUS will be persecuted. If withholding of removal is granted, the judge will still order the non-CUS deported, but he will not have to return to his home country until it is safe to do so.

Witness
A person who is called upon by a party in a legal proceeding to verify the truth of an event or story. In immigration court, it is helpful to have witnesses appear to confirm the evidence submitted. Witnesses can include, but are not limited to, family members, co-workers, neighbors, and community members. At a hearing, the judge and/or assistant chief counsel may question witnesses.

APPENDIX B

FORMS

AR-11: Change of Address Form

G-28: Notice of Entry of Attorney (filed when dealing with DHS, not with the court)

G-325A: Biographic Information Form (this form is submitted with most applications and contains specific personal information about you)

I-90: Application to Replace Permanent Resident Card ("Green Card")

I-94: Arrival-Departure Record

I-130: Petition for Alien Relative (completed by the sponsoring relative in an adjustment of status application)

I-140: Immigrant Petition for Alien Worker (completed by the sponsoring employer in an adjustment of status application)

I-864: Affidavit of Support (alternatives to the affidavit of support are the Form I-864EZ and Form I-864W)

I-864P: Poverty Guidelines (not filed, but used only for assistance in completing I-864 forms)

I-191: Application for Advanced Permission to Return to Unrelinquished Domicile (used in 212(c) applications)

I-485: Application to Register Permanent Residence or Adjust Status (submitted by the individual wishing to obtain permanent residence; usually filed with supporting evidence and may be filed with other petitions or applications)

I-601: Application for Waiver of Ground of Inadmissibility

I-765: Application for Employment Authorization

I-881: Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to § 203 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) ("NACARA"))

I-246: Application for Stay of Deportation or Removal

I-589: Application for Asylum and Withholding of Removal (can also be used to seek relief under CAT)

N-400: Application for Naturalization

N-600: Certificate of Citizenship (used for those who acquire or derive U.S. citizenship)

These forms are found on the EOIR website:

EOIR-33/IC:	Alien's Change of Address
EOIR-26:	Notice of Appeal from a Decision of an Immigration Judge
EOIR-26A:	Fee Waiver Request
EOIR-27:	Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals
EOIR-28:	Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court
EOIR-42A:	Application for Cancellation of Removal for Certain Permanent Residents
EOIR-42B:	Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (including VAWA)

APPENDIX C

IMMIGRATION AND LEGAL RESOURCES

American Immigration Lawyers Association ("AILA")
www.aila.org

Amnesty International
www.amnesty.org

Asylum Law
www.asylumlaw.org

Benders Immigration Bulletin
www.bibdaily.com

Cornell Legal Information Institute
http://www.law.cornell.edu/wex/index.php/Immigration

Department of Homeland Security
www.dhs.gov

Department of Justice
www.usdoj.gov

Department of State
www.state.gov

Department of State—Human Rights
http://www.state.gov/g/drl/hr/

Detention facilities of ICE
www.ice.gov/pi/dro

Executive Office for Immigration Review
www.usdoj.gov/eoir

FindLaw
www.findlaw.com

Foreign Consular Offices in the U.S.
www.state.gov/s/cpr/rls/fco

Human Rights Watch
http://www.hrw.org/

International Gay and Lesbian Human Rights Commission
http://www.iglhrc.org/site/iglhrc

New York State Defenders Association: Immigrant Defense Project
www.nysda.org/idp/index.htm

National Immigration Forum
www.immigrationforum.org

National Legal Aid and Defenders Association
www.nlada.org/Defender/Defender_Immigrants

Summary of Resources for Home Country Conditions
http://www.law.yale.edu/library/immigration.asp#conditions

U.S. Attorneys Contact Information
www.usdoj.gov/usao/offices

U.S. Citizenship and Immigration Services
http://uscis.gov/

To order USCIS forms, you can contact the USCIS forms line at 1-800-870-3676. For information on immigration laws, regulations and procedures or for information about any forms or applications, you can call the National Customer Service Center ("NCSC") telephone line at 1-800-375-5283; TTY: 1-800-767-1833. A family member or attorney can also contact your local USCIS office by using Infopass, a web-based system that allows you to schedule appointments at USCIS offices. The website for Infopass is http://infopass.uscis.gov/.

U.S. Courts
www.uscourts.gov

U.S. Customs and Border Protection
www.cbp.gov

U.S. Embassies and Missions Abroad
http://usembassy.gov

U.S. Immigration and Customs Enforcement ("ICE")
www.ice.gov

United States Court of Appeals Second Circuit
www.ca2.uscourts.gov

United States Visas
www.unitedstatesvisas.gov

APPENDIX D

LIST OF LEGAL SERVICES PROVIDERS: NEW YORK

Buffalo Area

Michael Berger, Esq.
Berger & Berger, Attorneys
555 International Drive, Ste. 800
Buffalo, NY 14221
(716) 634-6500

Anne E. Doebler, P.C.
Statler Towers, Ste. 1480
107 Delaware Avenue
Buffalo, NY 14202
(716) 898-8568

Erie County Bar Association
Volunteer Lawyers Project
700 Statler Towers
Buffalo, NY 14202
(716) 847-0752

- Press 1 for English, 2 for Spanish, 3 for French, 5 for Arabic
- Will ONLY represent persons who are detained at the Buffalo Federal Detention Facility in Batavia, NY
- Provides "Know Your Rights" orientation presentations to Batavia detainees twice per week

Allen W. Farabee, Esq.
Immigration and Citizenship Law
Mailing address:
P.O. Box 139
Buffalo, NY 14213
Office address:
1271 Delaware Ave.
Buffalo, NY 14209
(716) 882-4981
(716) 882-4982, fax

F. Alejandro Gutiérrez, Esq.
1201 Colvin Blvd., Ste. 5
Buffalo, NY 14223
(716) 877-4276

- Be prepared to provide the contact information of a family member who is not incarcerated

International Institute of Buffalo
864 Delaware Ave.
Buffalo, NY 14209
(716) 883-1900

- May charge a nominal fee
- Will NOT represent Canadian citizens who do not have family ties in the U.S.
- Languages: English, Spanish, and Arabic

Legal Aid Society of Rochester, Inc.
One West Main Street, Room 800
Rochester, NY 14614
(585) 295-5745 (within Monroe County)
(800) 963-5604 (outside Monroe County)

- Represents aliens seeking asylum
- Representation limited to persons residing in Allegheny, Cattaraugus, Chautauqua, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Seneca, Steuben, Wayne, Wyoming, and Yates Counties
- Will NOT represent detained aliens

Parmanand L. Prashad, Esq.
259 Traders Blvd. East, Unit 13
Mississauga, Ontario
Canada L4Z2E5
(905) 712-1680
(416) 410-8721

Robert Kolken, Esq.
Gordon Sacks, Esq.
Eric Schultz, Esq.
Matthew Kolken, Esq.
Kolken & Kolken, Attorneys at Law
135 Delaware Ave., Ste. 101
Buffalo, NY 14202
(716) 854-1541

Stephen K. Tills, Esq.
P.O. Box 635
6413 West Quaker Rd.
Orchard Park, NY 14127
(716) 662-5080

<u>New York City Area</u>

Catholic Charities of New York
Department of Immigrant and Refugee Services
1011 First Ave., 12th Floor
New York, NY 10022-4134
(212) 419-3700

- Languages: Spanish, Haitian-Creole, Mandarin, Cantonese, French, Russian, Polish, Albanian, Greek, Macedonian, Serbo-Croatian, Arabic, Turkish, Bosnian, Amharic, Italian, Hindi, Urdu, Punjabi, Vietnamese, Portuguese, Thai
- Asylum cases accepted
- May charge nominal fee

Central American Legal Assistance
240 Hooper St.
Brooklyn, NY 11211
(718) 486-6800

- Language: Spanish
- Asylum cases accepted

City Bar Justice Center
42 West 44th St.
New York, NY 10036
(212) 382-6710

- Languages: Spanish, French
- Limited to individuals seeking asylum, domestic violence survivors seeking legal status, and human trafficking victims

Gay Men's Health Crisis, Inc.
119 West 24th St.
New York, NY 10011
(212) 367-1040 (Legal Services Department)
(212) 367-1125 (Client Advocacy Helpline)

- Languages: Spanish, French, Creole
- Asylum cases accepted
- Limited to HIV-positive individuals only
- Client Advocacy Helpline open Wednesdays from 2:00pm to 5:30pm

Hebrew Immigrant AIDS Society ("HIAS")
333 7th Ave.
New York, NY 10001
(212) 613-1419
(212) 613-1420 (for Wackenhut Detainees only)

- Languages: Spanish, French, Russian, Polish
- Asylum cases accepted
- May charge nominal fee

Human Rights First (formerly Lawyers Committee for Human Rights)
333 7th Ave., 13th Floor
New York, NY 10001
(212) 845-5200
(212) 845-5299 (fax)

- Languages: Spanish, French
- Limited to asylum cases
- Detained cases from Varick and Elizabeth detention centers only

Caribbean Women's Health Association—Immigrant Service Center
123 Linden Blvd.
Brooklyn, NY 11226
(718) 826-2942

- Languages: Spanish, French, Creole
- Asylum cases accepted
- May charge nominal fee

Bhanu B. Ilindra, Esq.
Pasricha & Patel, LLC
1794 Oak Tree Rd.
Edison, NJ 08820
(732) 593-6200
(732) 593-6201 (fax)

The Legal Aid Society—Immigration Law Unit
199 Water St., 3rd Floor
New York, NY 10038
(212) 577-3300
(212) 577-3456 (Immigration Detention Hotline)

- Languages: Spanish, French, Russian, Italian, Mandarin
- Represents detained and non-detained cases before New York City immigration courts (except Wackenhut), including persons with criminal convictions
- Also coordinates the Juvenile Immigration Representation Project for persons aged eighteen and under in removal proceedings
- Asylum cases accepted
- Immigration Detention Hotline will accept collect calls from detention facilities; open Wednesdays and Fridays from 1:00pm to 5:00pm

Nassau County Hispanic Foundation, Inc.
Immigration Law Service
233 7th St., 3rd Floor
Garden City, NY 11530
(516) 742-0067

- Language: Spanish
- Asylum cases accepted
- May charge nominal fee

New York Association for New Americans
17 Battery Place, 9th Floor North
New York, NY 10004-1102
(212) 898-4180

- Languages: Spanish, French, Haitian-Creole, Cantonese, Mandarin, Russian, Romanian, Tibetan
- Asylum cases accepted
- May charge nominal fee
- Priority given to survivors of domestic abuse, persecution, and/or torture

Northern Manhattan Coalition for Immigrant Rights
665 West 182nd St.
New York, NY 10033
(212) 781-0355, ext. 300
(212) 781-0943 (fax)

- Language: Spanish
- No asylum cases accepted
- May charge nominal fee
- Limited to non-detained cases

Safe Horizon (victim services/travelers' aid)
Immigration Legal Services
74-09 37th Ave., Room 308
Jackson Heights, NY 11372
(718) 899-1233, ext. 129 (lawyers)

- Languages: Spanish, Russian
- Asylum cases accepted
- Priority given to survivors of domestic abuse, persecution, and/or torture
- Can represent people with non-violent criminal offenses
- May charge nominal fee

Carmelia Taylor, Esq.
100 Broadhollow Rd., Ste. 206
Farmingdale, NY 11735
(631) 293-8300

For a list of legal services providers outside of the New York area, you or someone you know with internet access should visit the EOIR website at http://www.usdoj.gov/eoir/probono/states.htm:

Arizona: http://www.usdoj.gov/eoir/probono/freelglchtAZ.htm
California: http://www.usdoj.gov/eoir/probono/freelglchtCA.htm
Colorado: http://www.usdoj.gov/eoir/probono/freelglchtCO.htm
Connecticut: http://www.usdoj.gov/eoir/probono/freelglchtCT.htm
Florida: http://www.usdoj.gov/eoir/probono/freelglchtFL.htm
Georgia: http://www.usdoj.gov/eoir/probono/freelglchtGA.htm
Hawaii: http://www.usdoj.gov/eoir/probono/freelglchtHI.htm
Illinois: http://www.usdoj.gov/eoir/probono/freelglchtIL.htm
Louisiana: http://www.usdoj.gov/eoir/probono/freelglchtLA.htm
Maryland: http://www.usdoj.gov/eoir/probono/freelglchtMD.htm
Massachusetts: http://www.usdoj.gov/eoir/probono/freelglchtMA.htm
Michigan: http://www.usdoj.gov/eoir/probono/freelglchtMI.htm
Minnesota: http://www.usdoj.gov/eoir/probono/freelglchtMN.htm
Missouri: http://www.usdoj.gov/eoir/probono/freelglchtMO.htm
Montana: http://www.usdoj.gov/eoir/probono/freelglchtMT.htm
Nebraska: http://www.usdoj.gov/eoir/probono/freelglchtNE.htm
Nevada: http://www.usdoj.gov/eoir/probono/freelglchtNV.htm
New Jersey: http://www.usdoj.gov/eoir/probono/freelglchtNJ.htm
Ohio: http://www.usdoj.gov/eoir/probono/freelglchtOH.htm
Oklahoma: http://www.usdoj.gov/eoir/probono/freelglchtOK.htm
Oregon: http://www.usdoj.gov/eoir/probono/freelglchtOR.htm
Pennsylvania: http://www.usdoj.gov/eoir/probono/freelglchtPA.htm
Tennessee: http://www.usdoj.gov/eoir/probono/freelglchtTN.htm
Texas: http://www.usdoj.gov/eoir/probono/freelglchtTX.htm
Utah: http://www.usdoj.gov/eoir/probono/freelglchtUT.htm
Virginia: http://www.usdoj.gov/eoir/probono/freelglchtVA.htm
Washington: http://www.usdoj.gov/eoir/probono/freelglchtWA.htm

A JAILHOUSE LAWYER'S MANUAL

IMMIGRATION AND CONSULAR ACCESS SUPPLEMENT

Chapter 2:
The Right to Consular Access

Columbia Human Rights Law Review

Ninth Edition 2011

Legal Disclaimer

A Jailhouse Lawyer's Manual is written and updated by members of the *Columbia Human Rights Law Review*. The law prohibits us from providing any legal advice to prisoners. This information is not intended as legal advice or representation nor should you consider or rely upon it as such. Neither the *JLM* nor any information contained herein is intended to or shall constitute a contract between the *JLM* and any reader, and the *JLM* does not guarantee the accuracy of the information contained herein. Additionally, your use of the *JLM* should not be construed as creating an attorney-client relationship with the *JLM* staff or anyone at Columbia Law School. Finally, while we have attempted to provide information that is up-to-date and useful, because the law changes frequently, we cannot guarantee that all information is current.

CHAPTER II

THE RIGHT TO CONSULAR ACCESS*

A. Introduction

This Chapter is of special interest to you if you are a citizen[1] of a country other than the United States. Part B explains your right to consular access. Part C discusses the reasons why you might want to contact your consulate and why you might not want to do so. Consular officers may be able to help you in criminal cases; for example, they can gather mitigating evidence in death penalty cases. They may also help you if your rights have been violated, and they will often help in *deportation* proceedings. Part D gives some practical advice on when and how to contact your consulate. The Appendix to this Chapter lists contact information for certain consulates, organized by country.

B. The Right to Consular Access

If you are a foreign national, you have the right to consular access. You are a foreign national if you are either a citizen of a country other than the United States of America or a dual citizen (a citizen of both another country and the United States). Consular access means that you have the right to contact your local consulate or embassy, as well as the right to have regular communications with consular officers from your native country.

1. The Vienna Convention on Consular Relations

The right to consular access is guaranteed under the Vienna Convention on Consular Relations,[2] a multilateral treaty signed by over 100 countries, including the United States. You may also have this right under a bilateral (two-party) treaty between the United States and your country of nationality. Article 36(1) of the Vienna Convention reads as follows:

(1) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(2) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(3) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.[3]

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* This Chapter was revised by Manfred Gabriel based in part on a previous version written by Lara A. Ballard.

1. *See JLM Supplement* Chapter 1, "Immigration Law: The Immigration Consequences of Criminal Activity" for a definition of a citizen, as well as some of the other terms used throughout this Chapter. Defined words appear in *italics* the first time they are used in this chapter.

2. Vienna Convention on Consular Relations, *adopted* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America Dec. 14, 1967). *See generally* Logene L. Foster & Stephen Doggett, *Vienna Convention: New Tool for Representing Foreign Nationals in the Criminal Justice System*, Champion, Mar. 1997, *available at* http://www.nacdl.org/CHAMPION/ARTICLES/97mar02.htm (last visited Nov. 21, 2009) (describing the rights and obligations of consulates and domestic authorities under Article 36 of the Vienna Convention on Consular Relations and discussing the impact of the treaty on arrested foreign nationals); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565 (1997) (discussing the implications of the treaty and United States case law relating to the issue).

3. Vienna Convention on Consular Relations, *adopted* Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America Dec. 24, 1969).

This treaty has the same status as a federal law, and it is therefore binding on federal, state, and local law enforcement authorities—all police must comply with it.[4] United States Department of Homeland Security officials are also bound by federal law.[5]

If you are a foreign national, this means that: (1) the police *must* inform you of your right to consular access (just like they *must* inform you of your *Miranda* rights); and (2) if you want to talk to a consular officer, the consular officer must be allowed to call, write, or visit you in prison in order to answer your questions and may offer you whatever assistance he or she wishes. Also, if you request it, the official who is holding you in custody must ensure that the nearest consulate or embassy is notified of your arrest without delay. In some cases, depending on what country you are from, the nearest consular officials *must* be notified of your arrest or *detention*, even if you do not wish that to happen. See Part B(3) below for a list of these countries.

If you were not notified of your right to consular access, or if you were denied the right to communicate with a consular officer, then it is important to raise these violations of Article 36 of the Vienna Convention on Consular Relations in trial court and on appeal. You must do so in order to preserve this right when the court considers the issue on appellate and post-conviction review. **If you do not raise this violation at trial and on appeal**, you may lose the right to habeas corpus review on these issues in states that require you to first raise these issues at trial.[6]

2. Suing for Violations of the Right to Consular Access

If the police deny you access to a consular officer, they are violating federal law.[7] However, it is unclear whether individuals can bring a lawsuit against law enforcement agencies for

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4. The U.S. Department of State regularly sends letters to law enforcement agencies reminding them of these obligations and provides them with the phone numbers of consulates throughout the United States. *See*, *e.g.*, U.S. Dep't of State, Notice for Law Enforcement Officials on Detention of Foreign Nationals (1992). This notice is updated every two to five years. The most recent notice of this kind is U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, *available at* http://travel.state.gov/pdf/CNA_book.pdf (last visited Oct. 10, 2008).

5. "Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." 8 C.F.R. § 236.1(e) (2006). This is a regulation of the Bureau of Citizenship and Immigration Services in the Department of Homeland Security. The regulation is also followed by the FBI, DEA, U.S. Marshals Office, and all other Department of Justice agents. For more information on the legal grounds for consular notification, see U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, *available at* http://travel.state.gov/pdf/CNA_book.pdf (last visited Oct. 10, 2008).

There is some disagreement in the courts over the binding nature of international agreements when Congress has not passed laws to enforce them. In addition, it is not clear to what extent federal law can require state officials to take action. *See* Printz v. United States, 521 U.S. 898, 935, 117 S. Ct. 2365, 2384, 138 L. Ed. 2d 914, 944–45 (1997) (holding that the federal government may not require states to enact or implement federal regulatory programs and discussing federalism as concern for distribution of authority between the state and federal governments). Some courts, therefore, may not recognize the Vienna Convention as binding law. However, rights under international agreements have been recognized by the U.S. Supreme Court in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442, 109 S. Ct. 683, 692, 102 L. Ed. 2d 818, 833 (1989) (stating that the Foreign Sovereign Immunities Act of 1976 (FSIA) was adopted subject to international agreements to which the United States was a party at the time of the FSIA's enactment).

6. In *Medellin v. Texas*, the Supreme Court of the United States ruled that states could abide by their own procedural rules on filing habeas corpus petitions despite an International Court of Justice judgment giving force to appellants' rights under the Vienna Convention of Consular Relations and a presidential memorandum directing states to reconsider convictions in light of the International Court of Justice's ruling. 128 S. Ct. 1346, 1363, 170 L. Ed. 2d 190, 218 (2008). See Part (B)(3) of this Chapter, "The Effect of Violations of Rights to Consular Access on Convictions" for more information on the legal effect of *Medellin*. For information on state habeas corpus, see Chapter 21 of the main volume of the *JLM*, and for information on federal habeas corpus, see Chapter 13 of the main volume.

7. The Vienna Convention and other consular treaties to which the United States is a party "have the status of treaties for purposes of international law and Article VI, clause 2 of the Constitution of the United States ('all treaties made … shall be the supreme law of the land')." These treaties "are binding on federal, state, and local government officials to the extent that they pertain to matters within such officials' competence." U.S. Dep't of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, *available at*

violating their consular rights. Usually, courts find that international agreements, "even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."[8] This means that international agreements do not give you, an individual citizen, the right to sue a law enforcement agency for violating the agreement. Generally, only nations, *not* individual citizens, can sue for violations of the treaties that they sign, even if the individual citizens are harmed.

A few federal courts have held that there is a private right of action[9] for violations of the Vienna Convention on Consular Relations.[10] For example, in *Standt v. City of New York*, a civil case, a German citizen was arrested in New York for driving while intoxicated and without a license, and for failing to wear a seatbelt. Not only did the police fail to notify the German citizen of his right to contact the consulate, but the police also did not allow him to contact the German consulate when he repeatedly asked if he could. The German citizen filed an action against the City of New York and the police officers who arrested him for violating his rights under Article 36 of the Vienna Convention. The defendants alleged that the German citizen did not have standing, or was not the proper party, to bring suit before the court for the violations. They claimed the treaty did not provide a private right of action to him as an individual. However, the Second Circuit held that Article 36 of the Vienna Convention "was intended to provide a private right of action to individuals detained by foreign officials."[11]

The Seventh Circuit has also found that private parties do have a right under the Vienna Convention to be notified that they can contact their consulate if they are arrested, and can sue law enforcement officials if they are not notified. In *Jogi v. Voges*, an Indian citizen charged with aggravated battery with a firearm was never advised by a state official of his right under the Vienna Convention to contact the Indian consulate for assistance. He brought an action against the county law enforcement officials under the Alien Tort Statute (ATS), alleging that his rights were violated because officials did not inform him of his right under the Vienna Convention on Consular Relations to notify his consulate of his arrest. The Seventh Circuit held that the part of the Vienna Convention that instructed authorities of the receiving state to notify an arrested foreign national of "his rights" under the Convention "without delay" *did* give individually enforceable private rights to undocumented immigrants who were in the United States from countries that were parties to the Convention.[12]

Other courts, however, have refused to recognize a private right of action for violations of the Vienna Convention on Consular Relations. In *United States v. Jimenez-Nava*, a Mexican citizen was arrested in Texas for making fraudulent immigration documents.[13] He was informed of his right to consular access only after he was questioned about the crime. The Fifth Circuit rejected Jimenez-Nava's arguments that Article 36 of the Vienna Convention creates "judicially enforceable rights."[14] Instead, the court held that the presumption that international treaties do not create rights enforceable by private individuals in courts applies to the Vienna Convention.

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http://travel.state.gov/pdf/CNA_book.pdf (last visited Oct. 12, 2008). But, how a treaty gets implemented in your particular state will depend on your state's procedural rules. For instance, if your state requires that you file claims concerning violations of your Vienna Convention rights at trial or on direct review and not after, then that state rule will likely govern and you will lose your right to challenge the violation if you do not raise the violations at trial or on direct review. Medellin v. Texas, 128 S. Ct. 1346, 1363, 170 L. Ed. 2d 190, 218 (2008) (holding that, for a Mexican national under a Texas death sentence, neither an International Court of Justice judgment concerning his rights under the Vienna Convention of Consular Relations nor a presidential memorandum counts as directly enforceable federal law trumping state procedural rules on filing habeas corpus petitions).

8. Medellin v. Texas, 128 S. Ct. 1346, 1357 n.3, 170 L. Ed. 2d 190, 211 n.3 (2008) (citing Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a at 395 (1986)).

9. The right of an individual citizen to bring a suit in court to enforce a treaty, agreement, or law. *See* Black's Law Dictionary 1438 (9th ed. 2009).

10. *See*, *e.g.*, Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); Ulmann v. Anderson, No. 02-405-JD, 2003 U.S. Dist. LEXIS 874, at *15 (D.N.H. Jan. 21, 2003) (acknowledging that the First Circuit has not decided whether there is a private right of action, but holding that an individual's claim that he was improperly denied sufficient consular access could go forward).

11. Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

12. Jogi v. Voges, 480 F.3d 822, 834 (7th Cir. 2007) (citing Vienna Convention on Consular Relations, *adopted* Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America Dec. 24, 1969)).

13. United States v. Jimenez-Nava, 243 F.3d 192 (5th Cir. 2001).

14. United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001).

The Supreme Court has not directly resolved this disagreement among courts regarding whether there is a private right of action for Vienna Convention violations. The Supreme Court has stated that the Convention "arguably confers on an individual the right to consular assistance following arrest,"[15] but the presumption remains that treaties do not create private rights or private causes of action in domestic courts.[16] This does not mean that the Supreme Court has gone so far as to rule that the Vienna Convention does not allow for any individual right enforceable in the federal courts.[17]

3. The Effect of Violations of Rights to Consular Access on Convictions

What happens if your right to consular access is denied and you do not have access to your consulate until after you are convicted? In some capital cases, foreign countries have tried to stay (delay or stop) an execution order because the defendant's right to consular access was violated before *conviction*. They argue that if the consul had been able to get in touch with the defendant, the consulate might have been able to help the defendant to avoid the death penalty.[18] In the past, this argument has generally *not* worked in convincing a court to stay an execution.[19]

Although courts have been unwilling to stay executions, the International Court of Justice ("ICJ") has ordered courts to re-examine decisions in which a defendant's right to consular access has been violated. In *Mexico v. United States (Avena)*, the ICJ ordered the United States to review the death sentences of fifty-one Mexican prisoners because their right to speak with Mexican consular officials after their arrests had been violated.[20] Although the ICJ refused Mexico's demand that the United States annul all fifty-one convictions, the court did order that the United States re-examine each case in order to determine if the defendant suffered legal prejudice (unfair case outcome) by not having early access to a diplomat. The ICJ held that such re-examination must be conducted by a court, rather than in a clemency proceeding before a state governor.[21] The ICJ suggested that the ruling applied to "other foreign nationals finding themselves in similar situations in the United States."[22]

When it was first issued, the ICJ's determination that re-examination must be conducted by a court seemed like an important qualification to that court's earlier holding in the *LaGrand* case.[23] In *LaGrand*, the ICJ held that the United States' doctrine of procedural default, which prohibits defendants from raising issues on appeal if they did not raise such issues at trial, could not apply to Vienna Convention violations.

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15. Breard v. Greene, 523 U.S. 371, 376, 118 S. Ct. 1352, 1355, 140 L. Ed. 2d 529, 538 (1998).

16. Medellin v. Texas, 128 S. Ct. 1346, 1357 n.3, 170 L. Ed. 2d 190, 211 n.3 (2008); 2 Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a at 395 (1987).

17. *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, 543 F.3d 744 (5th Cir. 2008) (questioning whether the Supreme Court's dicta in Medellin v. Texas indicates only that the Convention's provisions on the enforcement of international arbitration tribunals' judgments are not self-executing or whether the Convention as a whole is not self-executing); De Los Santos Mora v. New York, 524 F.3d 183, 187 n.4 (2d Cir. 2008) (arguing the Supreme Court was unresolved in *Medellin* about whether the Vienna Convention is self-executing and whether individuals can sue in federal court); Gandara v. Bennett, 528 F.3d 823, 827–829 (11th Cir. 2008) (finding the Vienna Convention does not give individuals a judicially enforceable private right on the following grounds: the language in its preamble, the lack of private damages available, the general presumption against private rights, and domestic law).

18. *See* Breard v. Greene, 523 U.S. 371, 377, 118 S. Ct. 1352, 1355, 140 L. Ed. 2d 529, 538 (1998) (finding consul's advice might lead a defendant to elect plea bargaining and avoid the death penalty, although it did not in this case).

19. *See*, *e.g.*, LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998) (denying claim based on lack of consular notification on grounds of procedural default because the claim was not raised in state proceedings); Fed. Republic of Germany v. United States, 526 U.S. 111, 111–12, 119 S. Ct. 1016, 1017, 143 L. Ed. 2d 192, 194 (1999) (denying enforcement of an order to stay execution of German citizens issued by the International Court of Justice partly because, according to the 11th Amendment which codifies the idea of state sovereign immunity, federal courts do not have jurisdiction to enforce a claim against a state that did not consent to jurisdiction). *But see* Torres v. State, 120 P.3d 1184, 1186–87 (holding that defendant was prejudiced because he was not informed that he had the right to contact his country's consulate, but denying the defendant any relief because the governor had already granted clemency to the defendant by changing his sentence to life without parole).

20. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), *available at* http://www.icj-cij.org/docket/files/128/8188.pdf?PHPSESSID=df3b4135ad9bdc29003fe5449b033fbb (last visited Sept. 29, 2009).

21. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), *available at* http://www.icj-cij.org/docket/files/128/8188.pdf?PHPSESSID=df3b4135ad9bdc29003fe5449b033fbb (last visited Sept. 29, 2009).

22. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, 70 (Mar. 31), *available at* http://www.icj-cij.org/docket/files/128/8188.pdf?PHPSESSID=df3b4135ad9bdc29003fe5449b033fbb (last visited Sept. 29, 2009).

23. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org/docket/files/104/7736.pdf (last visited Sept. 29, 2009).

However, the *LaGrand* court left the decision of how and where defendants could bring up Convention violations to the United States. The ICJ decision in *Avena* attempted to narrow this ruling by holding that the manner in which defendants bring up Convention violations is not entirely up to the United States; re-examination must be conducted by a court, rather than in a clemency proceeding.

The Supreme Court, however, has specifically rejected the ICJ's *LaGrand* holding. In *Sanchez-Llamas v. Oregon*, a recent pair of Supreme Court cases, the Court held that state procedural default rules can be applied to Vienna Convention violations.[24] That is to say, if your state has established general rules of procedure that require you to raise certain claims about rights violations at certain times, then those state rules will also apply to violations of rights granted to you in the Vienna Convention.

In the past, in addition to being a party to the 1963 Vienna Convention on Consular Relations ("Vienna Convention"), the United States ratified the Vienna Convention Optional Protocol Concerning the Compulsory Settlement of Disputes, which gave the ICJ the power (jurisdiction) to settle disputes between the United States and other nations regarding alleged violations of the Convention. On March 7, 2005, however, the United States decided to withdraw from this Optional Protocol, meaning that the ICJ no longer has the power to settle disputes between the United States and other nations regarding the Convention as it did in the *Avena* case.[25]

The ICJ, even when it has power to hear cases, never had the power to enforce its decisions in the U.S. On February 28, 2005, President Bush issued a memorandum directing state courts to give effect to (recognize) the ICJ's ruling in *Avena* and to review the cases of the Mexican citizens on death row in the United States.[26] The President issued this memorandum because the courts had inconsistently enforced the rights granted by the Vienna Convention. The memorandum directed the state courts to review and give effect to (enforce) the *Avena* decision "in accordance with the general principles of comity [reciprocity] in cases filed by the fifty-one Mexican nationals addressed in that decision."[27] As one scholar put it, "[b]efore *Avena* was issued, the U.S. Supreme Court had already denied post-conviction relief for some of the Mexican nationals, which effectively meant these individuals were out of court. The President's memorandum, at a minimum, re-opened the state court doors for these inmates."[28] As discussed above, in 2006, the Supreme Court announced that a state court may apply its regular procedural default rules to consular claims, though it did not decide whether the Vienna Convention on Consular Relations gave defendants a judicially enforceable right to consular access.[29]

In 2008, the Supreme Court decided *Medellin v. Texas*.[30] In *Medellin*, the Supreme Court found that the ICJ's judgment in *Avena* was not binding on United States state or federal courts. The Court distinguished between self-executing treaties and non-self-executing treaties. Although the Court did not directly rule on whether the Vienna Convention itself is self-executing, the Court reasoned that non-self-executing international treaties do not preempt state limitations on the filing of successive habeas petitions.[31] A treaty

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24. Sanchez-Llamas v. Oregon, 548 U.S. 331, 355–357, 126 S. Ct. 2669, 2685–86, 165 L. Ed. 2d 557, 582–83 (2006).

25. U.S. Secretary of State Condoleeza Rice sent a letter to the U.N. Secretary General Kofi Annan, informing him that the United States "hereby withdraws" from the Optional Protocol. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, Wash. Post, Mar. 10, 2005, at A01. The letter stated in part: "This letter constitutes notification by the United States of America that it hereby withdraws from [Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes]. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol." *See* Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, Am. Soc'y of Int'l L., Mar. 2005, *available at* http://www.asil.org/insights050309.cfm (last visited Sept. 28, 2009).

26. *See* Memorandum from President George W. Bush to the Attorney General, Compliance with the Decision of the International Court of Justice in Avena (Feb. 28, 2005), *available at* http://www.unhcr.org/refworld/docid/429c2fd94.html (last visited Sept. 28, 2009).

27. *See* Memorandum from President George W. Bush to the Attorney General, Compliance with the Decision of the International Court of Justice in Avena (Feb. 28, 2005), *available at* http://www.unhcr.org/refworld/docid/429c2fd94.html (last visited Sept. 28, 2009).

28. Susan L. Karamanian, *Briefly Resuscitating the Great Writ: the International Court of Justice and the U.S. Death Penalty*, 69 Alb. L. Rev. 745, 759-60 (2006).

29. Sanchez-Llamas v. Oregon, 548 U.S. 331, 356–357, 126 S. Ct. 2669, 2685, 165 L. Ed. 2d 557, 582–83 (2006).

30. Medellin v. Texas, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

31. J. Scott Kohler, Note, *Interpretive Federalism and the Treaty Power Implications of Sanchez-Llamas v. Oregon*, 46 Colum. J. Transnat'l L. 468, 482 n.78 (2008) ("[T]he Court determined that neither the Optional Protocol nor the United Nations Charter is self-executing, that is, binding as a matter of domestic—as opposed to international—

is non-self-executing if it does not have automatic domestic effect as federal law upon its ratification by the Senate.[32] *Medellin* indicated that, for a treaty to be self-executing, either the treaty must contain language that plainly provides for domestic enforceability, or Congress must ratify the international law by passing separate legislation.[33]

In *Medellin*, the Court also considered the preclusive effect (legal weight) of President Bush's memorandum. The Supreme Court found that the President could not order states to comply with ICJ rulings. The Court explicitly refused to require states to reconsider the convictions of prisoners under the Vienna Convention if hearing such claims did not conform to their own state procedural default rules.[34] State courts have begun to follow *Medellin*'s invitation to deny petitions seeking review of convictions for failure to provide consular access.[35] States are still free to follow *Avena* if they choose.[36]

If you or the police have any questions about consular rights and obligations under the Vienna Convention, you or they should contact:

Office of Public Affairs and Policy Coordination for Consular Affairs
CA/P Room 4800
Bureau of Consular Affairs
U.S. Department of State
Washington, D.C. 20520
(202) 647-4415 (Monday through Friday, 9am to 5pm; closed for holidays)

After business hours, you can reach the State Department Operations Center at (202) 647-1512. If you ask to speak with your consulate and your request is denied, make sure to write down the date, time, and the name of the person who denied your request.

C. Why Contact the Consulate?

Under the Vienna Convention, it is up to you to decide whether or not you want to contact your consulate. You are not required to contact your home government. However, many countries have signed treaties with the United States requiring U.S. officials to automatically contact them if their citizens are arrested in the United States.[37] This means that even if you do not want your consulate to know that you

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law.").

32. Medellin v. Texas, 128 S. Ct. 1346, 1356 n.2, 170 L. Ed. 2d 190, 210 n.2 (2008); Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 738 (9th Cir. 2008).

33. Medellin v. Texas, 128 S. Ct. 1346, 1369, 170 L. Ed. 2d 190, 223–24 (2008).

34. *See* In re Fierro, No. 07-50336, 2008 U.S. App. LEXIS 11741, at *3 (5th Cir. June 2, 2008) (*unpublished*).

35. *See*, *e.g.*, Gikonyo v. State, 102 Ark. App. 223 (Ark. Ct. App. 2008) (affirming conviction because the Vienna Convention on Consular Relations was not domestically enforceable); Graham v. State, 982 So. 2d 43, 33 Fla. L. Weekly D 1001 (Fla. Dist. Ct. App. 2008) (affirming appellant's sentence where the non-self-executing ratifications of an international treaty (ICCPR) could not limit Florida's sentencing power); State v. Bonito, No. 8-144/06-1811, 2008 Iowa App. LEXIS 229 at * 7–8 (Iowa Ct. App. Apr. 9, 2008) (*unpublished*) (refusing to review appellant's motion claiming that he was not notified of his right to contact the Salvadoran consulate under the Vienna Convention where appellant failed to raise the issue in the district court); Medina v. State, No. 05-07-00330-CR, 2008 Tex. App. LEXIS 2694 (Tex. App. Apr. 16, 2008) (*unpublished*) (rejecting appellant's argument that failure to comply with the Vienna Convention undermined the voluntariness of his plea).

36. Valerie Epps, *Introduction: The* Medellin v. Texas *Symposium: A Case Worthy of Comment*, 31 Suffolk Transnat'l L. Rev. 209, 213 (2008).

37. As of October 2007, the countries with bilateral treaties, which should receive notification immediately upon your arrest, included Algeria, Antigua and Barbuda, Armenia, Azerbaijan, the Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, China (People's Republic), Costa Rica, Cyprus, Czech Republic, Dominica, Fiji, Gambia, Georgia, Ghana, Grenada, Guyana, Hong Kong, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Nigeria, Philippines, Poland (non-permanent residents only), Romania, Russia, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Slovakia, Tajikistan, Tanzania, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Tuvalu, Ukraine, United Kingdom, Uzbekistan, Zambia, and Zimbabwe. All successor states to the Soviet Union are still covered by an agreement the United States had with the U.S.S.R. British dependencies are covered by the agreement with the United Kingdom. These include Anguilla, the British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. For the most recent list of mandatory notification states, see Consular Notification and Access, Part 5: Legal Material, Agreements Pertaining to Consular Functions, *available at* http://travel.state.gov/law/consular/consular_744.html#agreements (last visited Oct. 20, 2008). The Department of State can provide more specific guidance in particular cases. "Foreign nationals subject to mandatory notification requirements should otherwise be treated like foreign nationals not subject to the mandatory notification

have been arrested, the police might tell them anyway. But, the police often forget or do not bother to call the consulate. If you want to talk to your consulate, you should always tell the police.

You should think carefully about whether or not you want to contact your consulate. Some consulates are more helpful than others. Based on what you know about your own government, you may already know whether it would be willing and able to help you. Some consulates will send someone to visit you immediately, contact your family, and help you find a lawyer. Others have only limited office hours and resources and cannot or will not visit prisoners at all. Some governments have allegedly used their consular officers to harass their political opponents.[38] If you are in the United States because you were fleeing persecution in your *home country*, contacting your home government may not be a good idea.

At the very least, you should try to discuss the idea of contacting your consulate with a lawyer. Many criminal defense lawyers do not know about the Vienna Convention, and they might not know consular assistance is available. Your lawyer may not even know that you are a foreign citizen unless you specifically mention it. If you choose not to contact the consulate, you may want to contact a private organization instead. Some organizations that you may want to contact are listed in *JLM* Appendix IV.

1. Consulate Assistance with Legal and Non-Legal Matters in Criminal Cases

Good consular officers would assist you in the following ways: visit you in prison (or even at the police precinct); explain to you what is going on; explain to you how the U.S. legal system works; contact your family members for you; help you find a lawyer; help locate your medical, military, or school records; provide you with emergency financial assistance; and make sure that you are being treated well in prison. They would put pressure on the local government to see that your rights are not violated and provide your lawyer with interpreters, consultants, or investigators.[39] Your consulate may be a good place to call if your lawyer

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requirement. Thus, for example, the foreign national should be informed that notification has been made and advised that he/she may also specifically request consular assistance from his or her consular officials." U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, *available at* http://travel.state.gov/pdf/CNA_book.pdf (last visited Oct. 20, 2008). The State Department adds, "Privacy concerns or the possibility that a foreign national may have a legitimate fear of persecution or other mistreatment by his/her government may exist in some mandatory notification cases. The notification requirement should still be honored, but it is possible to take precautions regarding the disclosure of information. For example, it may not be necessary to provide information about why a foreign national is in detention." Most importantly, "*under no circumstances should any information indicating that a foreign national may have applied for asylum in the United States or elsewhere be disclosed to that person's government.*" U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, *available at* http://travel.state.gov/pdf/CNA_book.pdf (last visited Oct. 20, 2008). The Department of State can provide more specific guidance in particular cases.

38. United Nations Conference on Consular Relations at 334, UN Doc. A/CONF.25/16, U.N. Sales No. 63.X.2 (1963) (remark of a delegate from the United Kingdom).

39. For example, when a U.S. citizen is arrested abroad, U.S. consular officers are expected to visit that person as soon as possible. U.S. Department of State, 7 Foreign Affairs Manual § 422.1-1 (Sept. 3, 2004), *available at* http://www.state.gov/documents/organization/86605.pdf (last visited Sept. 26, 2009). This visit provides an opportunity for the consular officer "to explain the legal and judicial procedures of the host government and the detainee's rights under that government at a time when such information is most useful." U.S. Department of State, 7 Foreign Affairs Manual § 422(f) (Sept. 3, 2004) *available at* http://www.state.gov/documents/organization/86605.pdf (last visited Sept. 26, 2009). The U.S. Embassy may also get local U.S. citizens to volunteer to visit the U.S. citizen in prison. U.S. Department of State, 7 Foreign Affairs Manual § 422.1-4 (Sept. 3, 2004), *available at* http://www.state.gov/documents/organization/86605.pdf (last visited Sept. 26, 2009). Each U.S. consular post is also required to maintain a list of defense attorneys and to exclude attorneys with bad reputations from the list. U.S. Department of State, 7 Foreign Affairs Manual §§ 991(a), 993 (Apr. 21, 2009), *available at* http://www.state.gov/documents/organization/86747.pdf (last visited Sept. 26, 2009). If the U.S. citizen's rights are being violated in the prison or in court, the U.S. consulate may make protests to the host government at the local level, and if necessary, at the state or federal level as well. U.S. Department of State, 7 Foreign Affairs Manual § 426.3 (Sept. 3, 2004), *available at* http://www.state.gov/documents/organization/86605.pdf (last visited Sept. 26, 2009). Throughout the pretrial period, the consular officer is expected to visit the prisoner regularly as a sort of case worker or "case officer." The manual states that the consular officer should become "thoroughly familiar with the specific facts and problems of the prisoner's situation." U.S. Department of State, 7 Foreign Affairs Manual § 436(1) (Aug. 26, 2004), *available at* http://www.state.gov/documents/organization/86606.pdf (last visited Sept. 26, 2009). This familiarity should help the officer to "become more efficient and responsive to the prisoner's needs" and a "more effective liaison with attorneys, court and prison officials, and prosecutors." U.S. Department of State, 7 Foreign Affairs Manual § 436(2)-(3) (Aug. 26,

tells you things that you do not understand, if you are not sure that your lawyer is good or trustworthy, or if you are trying to make an important decision such as whether to accept a plea bargain or whether to testify. For example, if you are not familiar with the plea bargaining system in the United States, your consulate may be able to explain how it differs from the legal system in your home country. If you are suspected of having committed a crime in the United States, the consulate cannot prevent you from being tried for it, but it can help to make sure that you receive a fair trial.

It is usually better to call the consulate with specific questions or simple requests than to call and say "I need help" or "I'm in trouble." Consular officers are not lawyers. They usually cannot give you money for a lawyer and may not take an interest in your case at all unless you are facing very serious charges. However, if you have a specific request—such as "Can you help me contact my mother back home?", "Can you recommend a good attorney?", "Can you help me get my medical records from my home city?", or "Can you find a priest who will visit me in prison?"—the consulate may be able to help you even if you are facing only minor charges.

2. Gathering Mitigating Evidence in Death Penalty Cases

Not all consulates can help all criminal defendants, but many of them are willing to help with death penalty cases. Many countries, particularly Latin American countries, have taken a strong stance against the death penalty and will assist your defense attorney considerably if you are facing a possible death sentence. One of the main services consulates can provide to your lawyer is help gathering mitigating evidence, especially in your country of origin. Mitigating evidence is evidence that can be presented during the sentencing phase of your trial to show why you should not receive the death penalty, either because of positive factors (for example, you care for your ailing grandmother, are a good student, or have never been in trouble before) or because of negative factors (for example, you were physically abused as a child or suffer from a mental disorder).

A consulate may assist defendants in many ways. For example, in various cases involving Mexican citizens, the Mexican Consulate has organized testimony, helped locate and produce *witnesses*, written letters to judges and prosecutors, submitted *affidavits* to courts, met with defendants' lawyers to discuss plea bargains, arranged consular visits, verified records and documented family history, and assisted with translation.[40] Mexico, Ecuador, Canada, Paraguay, Honduras, the Dominican Republic, and Germany have also shown a particular interest in death penalty cases and have all tried to assist defendants facing the death penalty during appeals in cases in which the police failed to contact the consulate before trial.[41]

3. Assistance When Your Rights Have Been Violated

Most consulates will help you if your rights are being seriously violated. For example, if you were beaten by the police or prison guards, most consulates will step in to assist you. When a Haitian immigrant was beaten and tortured by members of the New York City Police Department on August 9, 1997, the Haitian

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2004), *available at* http://www.state.gov/documents/organization/86606.pdf (last visited Sept. 26, 2009). Again, some consulates are better than others, and how your consular officer behaves will depend upon your home country's laws, not U.S. laws. Some countries do not have a foreign affairs manual like the one used by the U.S. State Department, and some have so few consular officers compared to the number of its nationals in the United States that it is impossible to visit all prisoners.

40. Application Instituting Proceedings Submitted by the Government of the United Mexican States, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), at 17–19 (Jan. 9, 2003), *available at* http://www.icj-cij.org/docket/files/128/1913.pdf (last visited Nov. 21, 2009).

41. *See*, *e.g.*, LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998) (German nationals who were not given consular access before their convictions for murder were assisted in their post-conviction appeals by German consulate); Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (Mexico filed an amicus curiae brief on behalf of Mario Murphy, a Mexican national); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) (Canada submitted a brief on behalf of its citizen Joseph Stanley Faulder); Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (appeal of suit brought by Republic of Paraguay to vacate Breard's conviction and sentence, challenging the dismissal of the original suit on subject matter jurisdiction grounds); Breard v. Greene, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998) (a separate civil suit brought by the Republic of Paraguay to overturn the conviction of Angel Francisco Breard, which the U.S. Supreme Court then considered along with Breard's habeas petition in the U.S. Supreme Court). In the death penalty case of Carlos Santana, a citizen of the Dominican Republic who was sentenced to death in Texas, the ambassador from the Dominican Republic attempted to meet with the governor of Texas to stop the execution. Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 Va. L. Rev. 1281, 1328 (1996).

Consulate helped bring public attention to his situation and helped put pressure on governmental authorities to bring charges against the police officers who were allegedly involved.[42]

4. Assistance with Deportation Proceedings

If you are to be "removed" (deported)[43] from the United States, consulates are usually notified of your status after the removal order becomes final so that they can process your travel papers.[44] If you are facing *removal proceedings*, you should be notified of your right to consular access and should be allowed to communicate with your consulate *before* your hearing. This right is guaranteed not only by treaties but also by a U.S. *Department of Homeland Security* ("*DHS*") regulation that implements the Vienna Convention and other treaties.[45] If the *DHS* fails to inform you of this right prior to the removal hearing, some federal courts will find the order of removal invalid. In a case of criminal conviction for *illegal reentry* into the United States, if the initial removal hearing was conducted in violation of these regulations, courts might even reverse the conviction due to "prejudice." This means that if having access to your consulate could have made a difference in your decision, the courts might reverse your conviction.[46] When you appeal a removal decision, you should always raise this claim of prejudice if your right to consular access was violated. If you do raise the claim, however, you will again probably have to show prejudice—that having access to your consulate could have made a difference in your removal proceeding.[47]

D. When and How to Contact Your Consulate

It is better to contact your consulate before you receive a criminal conviction because the consulate probably will not be able to help you as much if you contact it after you have already been convicted. Several countries have tried to get convictions reversed based on Vienna Convention violations, arguing that the Vienna Convention should work exactly like *Miranda*. So far, none of these attempts have succeeded. In 1998, a dual Paraguayan-Argentine national, who was convicted of capital murder in 1993, was executed in Virginia despite Virginia's open admission that it had failed to inform the defendant of his rights under the treaty when he was arrested.[48] This situation demonstrates that you should call your consulate sooner rather than later if you think that it can help you. After your conviction, the consulate may still be able to help you in small ways and ensure that your rights are not being further violated, but it probably will not be able to get your conviction reversed. However, it may be better to contact your consulate late rather than not at all.

If you cannot reach a consular office in an emergency, you might want to try your country's Permanent Mission to the United Nations in New York City, though it is not technically the job of a UN Permanent Mission to provide consular assistance. Not all countries listed in Appendix A are signatories to the Vienna Convention, and therefore follow it, or any other consular treaty with the United States, although most of them are.

All phone numbers and addresses listed in Appendix A refer to consulates and/or embassies (unless noted otherwise). Mail should be addressed to "Consulate [or Embassy] of [Your Country]," followed by the street address. If you decide to contact your consulate, it usually will not make a difference whether you

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42. Interview with consular officer, Haitian Consulate, in New York, N.Y. (Apr. 7, 1998).

43. See *JLM Supplement* Chapter 1, "The Immigration Consequences of Criminal Activity" for an explanation of these terms and of immigration law and procedure in general.

44. Interview with Jamaican Deputy Consul-General, Jamaican Consulate, in New York, N.Y. (Apr. 7, 1998).

45. DHS immigration agents are required to comply with 8 C.F.R. § 236.1(e) (2009), which states, "Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." It adds, "When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal." 8 C.F.R. § 236.1(e) (2009). For information on similar regulations governing the FBI, DEA, U.S. Marshals, and other Department of Justice officials, see footnote 5 of this Chapter.

46. *See*, *e.g.*, United States v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980) (finding prejudice resulting from the failure of the United States to advise appellant of his right to consult the Mexican Consulate).

47. *See*, *e.g.*, Waldron v. INS, 17 F.3d 511, 518–19 (2d Cir. 1993) (holding that though the INS had not followed its own regulations regarding the petitioner's right to communicate with diplomatic officers of his native country, this failure had not resulted in prejudice to the rights that the regulations were meant to protect); United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979) (holding that a regulatory violation by the INS would render a deportation unlawful only if the violation prejudiced the rights of the aliens who were protected by the regulation).

48. Breard v. Greene, 523 U.S. 371, 377, 118 S. Ct. 1352, 1355, 140 L. Ed. 2d 529, 538 (1998).

contact the embassy or the consulate; diplomats and consular officers will usually share information and assist each other, especially in emergencies.

Most countries maintain an embassy with both diplomatic and consular officers in Washington, D.C. in addition to the Consul General's main office (usually located in New York City) and your country's Permanent Mission to the UN. Some countries that have a large number of nationals living in the United States—for example Mexico—may also have regional consular offices in other cities. Some very small countries, such as Belize, may only have an embassy in Washington, D.C., with no other offices at all (except for the Permanent Mission to the UN). Other countries—namely Iran and Cuba—do not carry on diplomatic relations with the United States and, therefore, have neither an embassy nor a consulate. However, most countries do maintain a Permanent Mission to the UN.

There are also many private organizations that help people of particular nationalities, perhaps even more so than your consulate. You should keep in mind, however, that these private organizations (unlike your consulate) do not have any particular right to communicate with you or visit you under the Vienna Convention. They can certainly communicate with you in prison, just like any friend or relative, but they will probably not be able to visit you at the police station and will not have the same right of access as your lawyer. For further information about your right to communicate while in prison, see Chapter 19 of the *JLM*. For additional information about such organizations, check *JLM* Appendix IV.

E. Conclusion

If you are a foreign national, you have the right to contact your local consulate or embassy as well as the right to have regular communications with consular officers from your native country. Under the Vienna Convention, the police must inform you of your right to consular access. Also, if you request it, the official who is holding you in custody must ensure that the nearest consulate or embassy is notified of your arrest without delay. The consular officer must be allowed to call, write, or visit you in prison in order to answer your questions and offer you whatever assistance he or she wishes. If you chose to contact your consulate, you should do so as soon as possible. A list of embassies, consulates, and private organizations that assist foreign nationals can be found in Appendix A of this Chapter.

APPENDIX A

LIST OF CONSULATES, EMBASSIES, MISSIONS, AND PRIVATE ORGANIZATIONS

AFGHANISTAN
- Embassy: 2341 Wyoming Ave., NW, Washington, D.C. 20008; (202) 483-6410/6414; FAX (202) 483-6488
- Consulate – New York: 360 Lexington Ave., Floor 11, New York, NY 10017; (212) 972-2277; FAX (212) 972-9046
- Consulate – Los Angeles: 11040 Santa Monica Blvd., Suite 300, Los Angeles, CA 90025; (310) 473-6583; FAX (310) 473-6775
- Permanent Mission to the UN: 360 Lexington Ave., 11th Floor, New York, NY 10017 (212) 972-1212/1213; FAX (212) 972-1216
- Islamic Assoc. of Afghan Students: P.O. Box 1946, Los Angeles, CA 90078

ALBANIA
- Embassy: 2100 S St., NW, Washington, D.C. 20008; (202) 223-4942; FAX (202) 628-7342
- Permanent Mission to the UN: 320 E. 79th St. New York, NY 10021; (212) 249-2059/5654/5631/0842; FAX (212) 535-2917

ALGERIA
- Embassy: 2118 Kalorama Rd., NW, Washington, D.C. 20008; (202) 265-2800; FAX (202) 667-2174
- Permanent Mission to the UN: 326 E. 48th St., New York, NY, 10017; (212) 750-1960/1962/1965/1966; FAX (212) 759-5274/9538

ANGOLA
- Embassy: 2100-2108 16th St., NW, Washington, D.C. 20009; (202) 785-1156; FAX (202) 785-1258
- Consulate – New York: 866 United Nations Plaza, Suite 552, New York, NY 10017; (212) 223-3588

ANTIGUA and BARBUDA
- Embassy: 3216 New Mexico Ave., NW, Washington, D.C. 20016; (202) 362-5122; FAX (202) 362-5225
- Consulate – Miami: Ingraham Building, 25 Southeast 2nd Ave., Suite 300, Miami, FL 33131; (305) 381-6762; FAX (305) 381-7908
- Permanent Mission to the UN: 3 Dag Condominiums, 305 E. 47th St., 6th Floor, New York, NY 10017; (212) 541-4117; FAX (212) 757-1607

ARGENTINA
- Embassy: 1600 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 238-6400; FAX (202) 332-3171
- Consulate – New York: 12 West 56th St., New York NY 10019; (212) 603-0400; FAX (212) 541-7746
- Consulate – Los Angeles: 5055 Wilshire Blvd., Suite 210, Los Angeles, CA 90036; (323) 954-9155; FAX (323) 934-9076
- Consulate – Miami: 800 Brickell Ave., Penthouse 1, Miami, FL 33131; (305) 373-1889/4705/7794; FAX (305) 371-7108 and (305) 373-1598
- Consulate – Atlanta: 245 Peachtree Center Ave., Suite 2101, Atlanta, GA 30303; (404) 880-0805; FAX (404) 880-0806
- Consulate – Chicago: 205 N. Michigan Ave., Suite 4208/4209, Chicago, IL 60601-5914; (312) 819-2610; FAX (312) 819-2612
- Consulate – Houston: 2200 West Loop South, Suite 1025, Houston, TX 77027; (713) 871-8935
- Permanent Mission to the UN: One United Nations Plaza, 25th Floor, New York, NY 10017; (212) 688-6300; FAX (212) 980-8395

ARMENIA
- Embassy: 2225 R St., NW, Washington, D.C. 20008; (202) 319-1976; FAX (202) 319-2982
- Consulate – Los Angeles: 50 N. La Cienega Blvd., Suite 210, Beverly Hills, CA 90211; (310) 657-6102; FAX (310) 657-7419
- Permanent Mission to the UN: 119 E. 36th St., New York, NY 10016; (212) 686-9079; FAX (212) 686-3934

AUSTRALIA
- Embassy: 1601 Massachusetts Ave., NW, Washington, D.C. 20036; (202) 797-3000; FAX (202) 797-3168
- Consulate General: 150 E. 42nd St., 34th Floor, New York, NY 10017; (212) 351-6500; FAX (212) 351-6501
- Consulate – Los Angeles: Century Plaza Towers, 2029 Century Park East, 31st Floor, Los Angeles, CA 90067; (310) 229-2300; FAX (310) 229-2380
- Consulate – San Francisco: 575 Market St., Suite 1800, San Francisco, CA 94105; (415) 536-1970; FAX (415) 536-1982
- Consulate – Houston: 4623 Feagan St., Houston, TX, 7707; (713) 782-6009; FAX (713) 862-8364
- Consulate – Denver: 9200 West Cross Dr., Suite 100, Littleton, CO 80123; (303) 321-2234; FAX (303) 973-9938
- Consulate – Honolulu: 1000 Bishop St., Penthouse, Honolulu, HI 96813; (808) 524-5050; FAX (808) 531-5142
- Permanent Mission to the UN: 150 E. 42nd St., 33rd floor, New York, NY, 10017; (212) 351-6600; FAX (212) 351-6610

AUSTRIA
- Embassy: 3524 International Court, NW, Washington, D.C. 20008-3035; (202) 895-6700; FAX (202) 895-6750
- Consulate – Los Angeles: 11859 Wilshire Blvd., Suite # 501, Los Angeles, CA 90025; (310) 444-9310; FAX (310) 477-9897
- Consulate – Chicago: Wrigley Building, 400 North Michigan Ave., Suite 707, Chicago, IL 60611; (312) 222-1515; FAX (312) 222-4113
- Consulate – New York: 31 E. 69th St., New York, NY 10021; (212) 737-6400 FAX (212) 772-8926
- Permanent Mission to the UN: 600 Third Ave., 31st Floor, New York, NY 10016; (917) 542-8400; FAX (212) 949-1840

AZERBAIJAN
- Embassy: 2741 34th St., NW, Washington, D.C. 20008; (202) 337-3500; FAX (202) 337-5911
- Consulate – Los Angeles: 11766 Wilshire Blvd., Suite 1410, Los Angeles, CA 90025; (310) 444-9101; FAX (310) 477-4860
- Permanent Mission to the UN: 866 UN Plaza, Suite 560, New York, NY 10017; (212) 371-2559/2832/2721; FAX (212) 371-2784

BAHAMAS
- Embassy: 2220 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 319-2660; FAX (202) 319-2668
- Consulate – Miami: Ingraham Building, 25 Southeast 2nd Ave., Suite 818, Miami, FL 33131; (305) 373-6295; FAX (305) 373-6312
- Consulate – New York: 231 E. 46th St., New York, NY 10017; (212) 421-6420; FAX (212) 688-5926
- Permanent Mission to the UN: 231 E. 46th St., New York, NY 10017; (212) 421-6925; FAX (212) 759-2135
- The Bahamian consulate, if notified of your arrest, will immediately visit you at the police precinct, take down your name, contact your family back home, if desired, and provide you with other assistance if needed. The consulate encourages you to register with it and to notify it if you are in trouble.

BAHRAIN
- Embassy: 3502 International Dr., NW, Washington, D.C. 20008; (202) 342-1111; FAX (202) 362-2192
- Permanent Mission to the UN: 866 2nd Ave., 14th & 15th Floors, New York, NY 10017; (212) 223-6200; FAX (212) 319-0687

BANGLADESH
- Embassy: 3510 International Dr., NW, Washington, D.C. 20008; (202) 244-0183; FAX (202) 244-2771
- Consulate – New York: 211 E. 43rd St., Suite 502, New York, NY 10017; (212) 599-6767; FAX (212) 682-9211
- Consulate – Los Angeles: 4201 Wilshire Blvd., Suite 605, Los Angeles, CA 90010; (323) 932-0100; FAX (323) 932-9703
- Permanent Mission to the UN: 227 E. 45th, 14th Floor, New York, NY 10017; (212) 867-3434; FAX (212) 972-4038

BARBADOS
- Embassy: 2144 Wyoming Ave., NW, Washington, D.C. 20008; (202) 939-9200; FAX (202) 332-7467
- Consulate – Los Angeles: 3440 Wilshire Blvd., Suite 1207, Los Angeles, CA 90010; (213) 380-2198; FAX (213) 384-2763
- Consulate – San Francisco: 442 Post St., Suite 800, San Francisco, CA 94102; (415) 421-8789
- Consulate – New York: 800 2nd Ave., 2nd Floor, New York, NY 10017; (212) 551-4325/4327; FAX (212) 867-8899
- Consulate – Miami: 150 Alhambra Circle, Suite 1000, Coral Gables, FL 33134; (305) 442-1994; FAX (305) 567-2844
- Permanent Mission to the UN: 800 2nd Ave., 2nd floor, New York, NY 10017; (212) 551-4300; FAX (212) 986-1030

BELARUS, REPUBLIC OF
- Embassy: 1619 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 986-1604; FAX (202) 986-1805
- Consulate – New York: 708 3rd Ave., 20th Floor, New York, NY 10017; (212) 682-5392; FAX (212) 682-5491
- Permanent Mission to the UN: 136 E. 67th St., 4th Floor, New York, NY 10065; (212) 535-3420; FAX (212) 734-4810

BELGIUM
- Embassy: 3330 Garfield St., NW, Washington, D.C. 20008; (202) 333-6900; FAX (202) 338-4960
- Consulate – New York: 1065 Ave. of the Americas, 22nd Floor, New York, NY 10018; (212) 586-5110; FAX (212) 582-9657
- Consulate – Los Angeles: 6100 Wilshire Blvd., Suite 1200, Los Angeles, CA 90048; (323) 857-1244; FAX (323) 936-2564
- Consulate – Atlanta: 230 Peachtree St., NW, Suite 2710, Atlanta, GA 30303; (404) 659-2150; FAX (404) 659-8474.
- Permanent Mission to the UN: 885 2nd Ave., 41st Floor, New York, NY 10017; (212) 378-6300; FAX (212) 681-7618

BELIZE
- Embassy: 2535 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 332-9636; FAX (202) 332-6888
- Consulate – Los Angeles: 4801 Wilshire Blvd., Suite 250, Los Angeles, CA 90010; (323) 634-9900; FAX (323) 634-9903
- Permanent Mission to the UN: 675 3rd Ave., Suite 1911, New York, NY 10017; (212) 593-0999; FAX (212) 593-0932

BENIN, PEOPLE'S REPUBLIC OF
- Embassy: 2124 Kalorama Rd., NW, Washington, D.C. 20008; (202) 232-6656; FAX (202) 265-1996
- Permanent Mission to the UN: 125 E. 38th St., New York, NY 10016; (212) 684-1339; FAX (212) 684-2058

BHUTAN, the Kingdom of
- Permanent Mission to the UN: 343 E. 43rd St., New York, NY 10017; (212) 682-2268; FAX (212) 661-0551

BOLIVIA
- Embassy: 3014 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 483-4410; FAX (202) 328-3712
- Consulate – Los Angeles: 3701 Wilshire Blvd., Suite 1065, Los Angeles, CA 90010; (213) 388-0475; FAX (213) 384-6272
- Consulate – Atlanta (honorary): 1401 Peachtree St. NE, Suite 240, Atlanta, GA 30309; (404) 522-0777; FAX (404) 873-3335
- Consulate – New York: 211 E. 43rd St., Suite 702, New York, NY 10017; (212) 687-0530; FAX (212) 687-0532
- Consulate – Miami: 700 S. Royal Poinciana Blvd., Suite 505, Miami Springs, FL 33166; (305) 358-6303; FAX (305) 358-6305
- Permanent Mission to the UN: 801 Second Ave., New York, NY 10017; (212) 682-8132; FAX (212) 687-4642

BOSNIA AND HERZEGOVINA
- Embassy: 2109 E St., NW, Washington, D.C. 20037; (202) 337-1500; FAX (202) 337-1502
- Consulate – Chicago: 737 N. Michigan Ave., Suite 820, Chicago, IL 60611; (312) 951-1245; FAX (312) 951-1043
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 585, New York, NY 10017; (212) 751-9015; FAX (212) 751-9019

BOTSWANA, REPUBLIC OF
- Embassy: 1531-3 New Hampshire Ave., NW, Washington, D.C. 20036; (202) 244-4990; FAX (202) 244-4164
- Permanent Mission to the UN: 154 E. 46th St., New York, NY 10017; (212) 889-2277; FAX (212) 725-5061

BRAZIL
- Embassy: 3006 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 238-2805; FAX (202) 238-2827
- Consulate – Los Angeles: 8484 Wilshire Blvd., Suite 711, Beverly Hills, CA 90211; (323) 651-2664; FAX (323) 651-1274
- Consulate – San Francisco: 300 Montgomery St., Suite 900, San Francisco, CA 94104; (415) 981-8170; FAX (415) 981-3628
- Consulate – Miami: 80 SW 8th St., 26th Floor, Miami, FL 33130; (305) 285-6200; FAX (305) 285-6240
- Consulate – Boston: 20 Park Plaza, Suite 1420, Boston, MA 02116; (617) 542-4000; FAX (617) 542-4318
- Consulate – New York: 1185 6th Ave., 21st floor, New York, NY 10036; (917) 777-7777; FAX (212) 827-0225
- Consulate – Houston: 1233 West Loop South, Park Tower North, Suite 1150, Houston, TX 77027; (713) 961-3063; FAX (713) 961-3070
- Permanent Mission to the UN: 747 3rd Ave., 9th Floor, New York, NY 10017; (212) 372-2600; FAX (212) 371-5716

BRUNEI
- Embassy: 3520 International Court, NW, Washington D.C. 20008; (202) 237-1838; FAX (202) 885-0560
- Permanent Mission to the UN: 771 United Nations Plaza, New York, NY 10017; (212) 697-3465; FAX (212) 697-9889

BULGARIA, PEOPLE'S REPUBLIC OF
- Embassy: 1621 22nd St., NW, Washington, D.C. 20008; (202) 387-0174; FAX (202) 234-7973
- Permanent Mission to the UN: 11 E. 84th St., New York, NY 10028; (212) 737-4790; FAX (212) 472-9865

BURKINA FASO
- Embassy: 2340 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 332-5577; FAX (202) 667-1882
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 326, New York, NY 10017; (212) 308-4720; FAX (212) 308-4690

BURMA [See MYANMAR]

BURUNDI, REPUBLIC OF
- Embassy: 2233 Wisconsin Ave., NW, Suite 212, Washington, D.C. 20007; (202) 342-2574; FAX (202) 342-2578
- Permanent Mission to the UN: 336 E. 45th St., 12th Floor, New York, NY 10017; (212) 499-0001; FAX (212) 499-0006

CAMBODIA
- Embassy: 4530 16th St., NW, Washington, D.C. 20011; (202) 726-7742; FAX (202) 726-8381
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 420, New York, NY, 10017; (212) 223-0676/0435/0530; FAX (212) 223-0425

CAMEROON, UNITED REPUBLIC OF
- Embassy: 2349 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 265-8790; FAX (202) 387-3826
- Permanent Mission to the UN: 22 E. 73rd St., New York, NY, 10021; (212) 794-2295; FAX (212) 249-0533

CANADA
- Embassy: 501 Pennsylvania Ave., NW, Washington, D.C. 20001; (202) 682-1740; FAX (202) 682-7726
- Consulate – Los Angeles: 550 S. Hope St., 9th Floor, Los Angeles, CA 90071; (213) 346-2700; FAX (213) 346-2767
- Consulate – San Francisco: 580 California St., 14th Floor, San Francisco, CA 94104; (415) 834-3180; FAX (415) 834-3189
- Consulate – Denver: 1625 Broadway, Suite 2600, Denver, CO 80202; (303) 626-0640; FAX (303) 572-1158
- Consulate – Miami: 200 S. Biscayne Blvd., Suite 1600, Miami,FL 33131; (305) 579-1600; FAX (305) 374-6774
- Consulate – Atlanta: 1175 Peachtree St., N.E., 100 Colony Square, Suite 1700, Atlanta, GA 30361; (404) 532-2000; FAX (404) 532-2050
- Consulate – Chicago: Two Prudential Plaza, 180 North Stetson Ave., Suite 2400, Chicago, IL 60601; (312) 616-1860; FAX (312) 616-1877
- Consulate – Boston: 3 Copley Pl., Suite 400, Boston, MA 02116; (617) 262-3760; FAX (617) 262-3415
- Consulate – Detroit: 600 Renaissance Ctr., Suite 1100, Detroit, MI 48243-1798; (313) 567-2340; FAX (313) 567-2164
- Consulate – Minneapolis: 701 4th Ave. S., Suite 900, Minneapolis, MN 55415-1899; (612) 333-4641; FAX (612) 332-4061
- Consulate – Buffalo: 1 HSBC Centre, Suite 3000, Buffalo, NY 14203; (716) 858-9500; FAX (716) 852-4340

- Consulate – New York: 1251 Ave. of the Americas, New York, NY 10020; (212) 596-1628; FAX (212) 596-1790
- Consulate – Dallas: 750 N. St. Paul Pl., Suite 1700, Dallas, TX 75201; (214) 922-9806; FAX (214) 922-9815
- Consulate – Seattle: 1501 4th Ave., Suite 600, Seattle, WA 98101; (206) 443-1777; FAX (206) 443-9662
- Consulate – San Francisco: 580 California St., 14th Floor, San Francisco, CA 94104; (415) 834-3180; FAX (415) 834-3189
- Permanent Mission to the UN: One Dag Hammarskjold Plaza, 885 2nd Ave., 14th Floor, New York, NY 10017; (212) 848-1100; FAX (212) 848-1128/1192/1195
- John Howard Society of Canada, 809 Blackburn Mews, Kingston, ON K7P 2N6 Canada; (613) 384-6272; FAX (613) 384-1847
- The John Howard Society of Canada is a support group that provides social services for prisoners in Canada and ex-offenders returning to Canada from U.S. prisons. Although they do not provide legal services, they will provide referrals.
- Elizabeth Fry Society of Ottawa, 311-211 Bronson Ave. Suite 301, Ottawa, ON K1R 6H5 Canada; (613) 237-7427; FAX (613) 237-8312
- The Canadian Association of Elizabeth Fry Societies is a nonprofit social service agency that provides a wide range of programs including direct services for and about women in conflict with the law.

CAPE VERDE, REPUBLIC OF

- Embassy: 3415 Massachusetts Ave., NW, Washington, D.C. 20007; (202) 965-6820; FAX (202) 965-1207
- Consulate – Boston: 607 Boylston St., 4th Floor, Boston, MA 02116; (617) 353-0014; FAX 617-859-9798
- Permanent Mission to the UN: 27 E. 69th St., New York, NY 10021; (212) 472-0333; FAX (212) 794-1398

CENTRAL AFRICAN REPUBLIC

- Embassy: 1618 22nd St., NW, Washington, D.C. 20008; (202) 483-7800/7801; FAX (202) 332-9893

CHAD, REPUBLIC OF

- Embassy: 2002 R St., NW, Washington, D.C. 20009; (202) 462-4009; FAX (202) 265-1937
- Permanent Mission to the UN: 211 E. 43rd St., Suite 1703, New York, NY 10017; (212) 986-0980; FAX (212) 986-0152

CHILE

- Embassy: 1732 Massachusetts Ave., NW, Washington, D.C. 20036; (202) 785-1746; FAX (202) 887-5579
- Consulate – Los Angeles: 6100 Wilshire Blvd., Suite 1240, Los Angeles, CA 90048; (323) 933-3697; FAX (323) 933-3842
- Consulate – San Francisco: 870 Market St., Suite 1058, San Francisco, CA 94102; (415) 982-7662; (415) 982-2384
- Consulate – Miami: 800 Brickell Ave., Suite 1230, Miami, FL 33131; (305) 373-8624; FAX (305) 379-6613
- Consulate – Chicago: 1415 N. Dayton St., 2nd Floor, Chicago, IL 60642; (312) 654-8780; FAX (312) 654-8948
- Consulate – New York: 866 United Nations Plz., Suite 601, New York, NY 10017; (212) 980-3707, (212) 980-3366, (212) 980-3504, (212) 355-0612; FAX (212) 888-5288
- Consulate – Houston: 1300 Post Oak Blvd., Suite 1130, Houston, TX 77056; (713) 621-5853, (713) 963-9066; FAX (713) 621 8672
- Permanent Mission to the UN: 885 2nd Ave., 40th Floor, New York, NY 10017; (917) 322-6800; FAX (917) 322-6891

CHINA, PEOPLE'S REPUBLIC OF
- Embassy: 3505 International Pl., NW, Washington, D.C. 20008; (202) 495-2266; FAX (202) 495-2138
- Consulate – Los Angeles: 443 Shatto Pl., Los Angeles, CA 90020; (213) 807-8088; FAX (213) 807-8091
- Consulate – San Francisco: 1450 Laguna St., San Francisco, CA 94115; (415) 674-2900; FAX (415) 563-0494
- Consulate – Chicago: 100 W. Erie St., Chicago, IL 60654; Tel: (312) 803-0095; FAX (312) 803-0110
- Consulate – New York: 520 12th Ave., New York, NY 10036; Tel: (212) 244-9456, (202) 244-9392; FAX (212) 465-1708
- Consulate – Houston: 3417 Montrose Blvd., Houston, TX 77006; ; Tel: (713) 520-1462; FAX (713) 521-3064
- Permanent Mission to the UN: 350 E. 35th St., New York, NY, 10016; (212) 655-6100; FAX (212) 634-7626

COLOMBIA
- Embassy: 2118 Leroy Pl., NW, Washington, D.C. 20008; (202) 387-8338; FAX (202) 232-8643
- Consulate – Los Angeles: 8383 Wilshire Blvd., Suite 420, Beverly Hills, CA 90211; (323) 653-9863/4299; FAX (323) 653-2964
- Consulate – San Francisco: 595 Market St., Suite 2130, San Francisco, CA 94105; (415) 495-7195/96; FAX (415) 777-3731
- Consulate – Miami: 280 Aragon Ave., Coral Gables, FL 33134; (305) 448-5558/4179, (305) 441-1235; FAX (305) 441-9537
- Consulate – Atlanta: 5901 B Peachtree Dunwoody Rd., Suite 405, Atlanta, GA 30328; (770) 668-0451/0512/0552; FAX (770) 668-0763
- Consulate – Boston: 535 Boylston St., 11th Floor, Boston, MA 02116; (617) 536-6222; FAX (617) 536-9372
- Consulate – New York: 10 E. 46th St. New York, NY 10017; (212) 798-9000; FAX (212) 972-1725
- Consulate – Houston: 5851 San Felipe, Suite 300, Houston, TX 77057; (713) 527-8919/9093; FAX (713) 529-3395
- Permanent Mission to the UN: 140 E. 57th St., New York, NY 10022; (212) 355-7776; FAX (212) 371-2813

COMOROS, FEDERAL AND ISLAMIC REPUBLIC OF
- Embassy: 420 E. 50th St., New York, NY 10022; (212) 972-8010; FAX (212) 983-4712
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 418, New York, NY 10017; (212) 750-1637; FAX (212) 750-1657, 715-0699

CONGO, DEMOCRATIC REPUBLIC OF
- Embassy: 4891 Colorado Ave., NW, Washington, D.C. 20011; (202) 726-5500; FAX (202) 726-1860
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 511, New York, NY 10017; (212) 319-8061; FAX (212) 319-8232

CONGO, REPUBLIC OF [CONGO-BRAZZAVILLE]
- Embassy: 4891 Colorado Ave., NW, Washington, D.C. 20011; (202) 726-5500; FAX (202) 726-1860
- Permanent Mission to the UN: 14 E. 65th St., New York, NY 10021; (212) 750-1637; FAX (212) 750-1657, 715-0699

COSTA RICA
- Embassy: 2114 S St., NW, Washington, D.C. 20008; (202) 234-2945/2946; FAX (202) 265-4795
- Consulate – Los Angeles: 1605 West Olympic Blvd. Suite 400, Los Angeles, CA 90015; (213) 380-7915/6031; FAX (213) 380-5639.
- Consulate – San Francisco: P. O. Box 7643, Fremont, CA 94537; (510) 790-0785; FAX (510) 792-5249
- Consulate – Miami: 1101 Brickell Ave., Suite 401-N, Miami, Florida 33131; (305) 871-7487/7485; FAX (305) 871-0860.
- Consulate – Chicago: 203 N. Wabash Ave., Suite 702 , Chicago, IL 60601; (312) 263-2772; FAX (312) 263-5807

- Consulate – New York: 225 West 34th St. Penn Plaza Building, Suite 1202, NY 10122 ; (212) 509-3066/3067; FAX (212) 509-3068
- Consulate – Puerto Rico: 1413 Avenida Fernández Junco, Suite 2-D, San Juan, Puerto Rico 00909; (787) 723-6227; FAX (787) 723-6226
- Consulate – Houston: 3000 Wilcrest, Suite 112, Houston, TX 77042; (713) 266-0484; FAX (713) 266-1527
- Consulate – Atlanta: 1870 The Exchange, Suite 100, Atlanta, GA 30339; (770) 951-7025; FAX (770) 951-7073
- Permanent Mission to the UN: 211 E. 43rd St., Room 903, New York, NY 10017; (212) 986-6373; FAX (212) 986-6842

CÔTE D'IVOIRE
- Embassy: 2424 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 797-0300
- Permanent Mission to the UN: 46 E. 74th St., New York, NY 10021; (212) 717-5555; FAX (212) 717-4492.

CROATIA
- Embassy: 2343 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 588-5899; FAX (202) 588-8936
- Consulate – New York: 369 Lexington Ave. #11, New York, NY 10017; (212) 599-3066; FAX (212) 599-3106
- Croatian Center, 502 W. 41st St., New York, NY 10036; (212) 563-3395
- Permanent Mission to the UN: 820 2nd Ave., 19th Floor, New York, NY 10017; (212) 986-1585; FAX (212) 986-2011

CUBA
- Cuban Interests Section: 2630 16th St., NW, Washington, D.C. 20009; (202) 797-8518; FAX (202) 797-8521
- Consular Section: 2639 16th St., NW, Washington, D.C. 20009; (202) 769-8609/8610/8615; FAX (202) 986-7283
- Permanent Mission to the UN: 315 Lexington Ave., New York, NY, 10016; (212) 689-7215/7216/7217; FAX (212) 779-1697

CYPRUS, REPUBLIC OF
- Embassy: 2211 R St., NW, Washington, D.C. 20008; (202) 462-5772/0873; FAX (202) 483-6710
- Consulate – New York: 13 E. 40th St., 5th Floor, New York, NY 10016; (212) 686-6016/6017; FAX (212) 447-1988
- Permanent Mission to the UN: 13 E. 40th St., New York, NY 10016; (212) 481-6023/6024/6025; FAX (212) 685-7316

CZECH REPUBLIC
- Embassy: 3900 Spring of Freedom St., NW, Washington, D.C. 20008; (202) 274-9100; FAX (202) 966-8540
- Permanent Mission to the UN: 1109-1111 Madison Ave., New York, NY 10028; (646) 981-4000; FAX (626) 981-4099;
- Consulate – Los Angeles: 10990 Wilshire Blvd., Suite 1100, Los Angeles, CA 90024-4879; (310) 473-0889; FAX (310) 473-9813; E-mail: losangeles@embassy.mzv.cz

DENMARK
- Embassy: 3200 Whitehaven St., NW, Washington, D.C. 20008; (202) 234-4300; FAX (202) 328-1470
- Consulate – Baltimore: Redwood Tower, 217 E. Redwood St., Baltimore, MD 21202-3316; (410) 685-6711; FAX (410) 625-3801
- Consulate – Boston: 60 State St., Boston, MA 02109; (617) 542-1415, FAX (617) 482-6201
- Consulate – Chicago: 211 East Ontario, Chicago, IL 60611; (312) 787-8780; FAX (213) 787-8744
- Consulate – Dallas: 2100 McKinney Ave., Suite 700, Dallas, TX 75201; (214) 661-8399; FAX (214) 661-8036
- Consulate – Los Angeles: 10877 Wilshire Blvd., Suite 1402, Los Angeles, CA 90024; (310) 481-0391; FAX (310) 481-0390

- Consulate – Miami: 3107 Stirling Rd., Suite 101, Fort Lauderdale, Fl 33312-8500; (954) 322-0065; FAX (954) 322-0064
- Consulate – New Orleans: 400 N. Peters St., #203, New Orleans, LA 70130; (504) 586-8300; FAX (504) 523-1967
- Consulate – San Juan, Puerto Rico: 360 San Francisco St., San Juan, PR 00901; (787) 725-2532; FAX (787) 724-0339
- Permanent Mission to the UN: 1 Dag Hammerskjold Plaza, 885 2nd Ave., 18th Floor, New York, NY 10017; (212) 308-7009; FAX (212) 308-3384

DJIBOUTI, REPUBLIC OF

- Embassy: 1156 15th St., NW, Suite 515, Washington, D.C. 20005; (202) 331-0270; FAX (202) 331-0302
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 4011, New York, NY 10017; (212) 753-3163; FAX (212) 223-1276

DOMINICAN REPUBLIC

- Embassy: 1715 22nd St., NW, Washington, D.C. 20008; (202) 332-6280; FAX (202) 265-8057
- Consulate – San Francisco: 1516 Oak St., Suite 321, Alameda, CA 94501; (510) 864-7777; FAX (510) 864-2222
- Consulate – Miami: 1038 Brickell Ave., Miami, FL 33131; (305) 358-3220; FAX (305) 358-2318
- Consulate – Chicago: 8700 West Bryan Maur, President's Tower Suite 81, Chicago, IL 60631; (773) 714-4924; FAX 773) 714-4926
- Consulate – New Orleans: World Trade Center, 2 Canal St., Suite 2100, New Orleans, LA 70130; (504) 522-1843; FAX (504) 522-1007
- Consulate – Boston: The Statler Building, 20 Park Plaza, Suite 601, Boston, MA 02116; (617) 482-2168; FAX (617) 482-8133
- Consulate – New York: 1501 BRd.way, Suite 410, New York, NY 10036; (212) 768-2480/81/82/83; FAX (212) 768-2677
- Consulate – Puerto Rico: Calle Mckinley #30 Oeste, 2nd Piso, Mayagüez, Puerto Rico 00680; (787) 833-4756 / 757-3170; FAX (787) 832-4066
- Permanent Mission to the UN: 144 E. 44th St., 4th Floor, New York, NY, 10017; (212) 867-0833/34; FAX (212) 986-4694

EAST TIMOR

- Embassy: 4201 Connecticut Ave., NW, Washington, D.C. 20008; (202) 966-3202; FAX (202)966-3205
- Permanent Mission to the UN: 866 2nd Ave., 9th Floor, New York, NY, 10017; (212) 759-3675; FAX (212) 759-4196

ECUADOR

- Embassy: 2535 15th St., NW Washington, D.C. 20009; (202) 234-7200; FAX 202) 667-3482
- Consulate – Los Angeles: 8484 Wilshire Blvd., Suite 540, Beverly Hills, CA 90211; (323) 658-5146/1068; FAX (323) 658-1198
- Consulate – San Francisco: 235 Montgomery St., Suite 944, San Francisco, CA 94104; (415) 982-1819/1821; FAX (415) 982-1833
- Consulate – Miami: 1101 Brickell Ave., Suite M-102, Miami, FL 33131; (305) 373 8520/8536; FAX (305) 539-8313
- Consulate – Chicago: 30 S. Michigan Ave. Suite 204, Chicago, IL 60603; (312) 338-1002/1003; FAX (312) 338-1502
- Consulate – New York: 800 2nd Ave., Suite 600, New York, NY 10017; Phone(212) 808-0170 /0214; FAX (212) 808-0188
- Consulate – Houston: 4200 Westheimer Rd., Suite 218, Houston, TX 77027; (713) 572-8731; FAX (713) 572-8732
- Permanent Mission to the UN: 866 United Nations Plaza, Room 516, New York, NY 10017; (212) 935-1680/1681; FAX (212) 935-1835

EGYPT, ARAB REPUBLIC OF
- Embassy: 3521 International Ct., NW, Washington, D.C. 20008; (202) 895-5400; FAX (202) 244-4319
- Consulate – San Francisco: 3001 Pacific Ave., San Francisco, CA 94115; (415) 346-9700/9702; FAX (415) 346-9480
- Consulate – New York: 1110 2nd Ave., Suite 201, New York, NY 10022; (212) 759-7120; FAX (212) 308-7643
- Consulate – Houston: 1990 Post Oak Blvd., Suite 2180, Houston, TX 77056; (713) 961-4915; FAX 713) 961-3868
- Consulate – Chicago: 500 N. Michigan Ave., Suite 1900 Chicago, IL 60611; (312) 828-9162; FAX (312) 828-9167
- Permanent Mission to the UN: 304 E. 44th St., New York, NY 10017; (212) 503-0300; FAX (212) 949-5999

EL SALVADOR
- Embassy: 1400 16th St., NW, Suite 100, Washington, D.C. 20036; (202) 265-9671/9672; FAX (202) 232-3763
- Consulate – Chicago: 104 South Michigan Ave., Suite 816, Chicago, IL 60603; (312) 332-1393; FAX (312) 332-4446
- Consulate – Los Angeles: 3450 Wilshire Blvd., Suite 250, Los Angeles, CA 90010; (213) 383-5776/8580/8364/6134; FAX (213) 383-8599
- Consulate – San Francisco: 507 Polk St., Suite 280, San Francisco, CA 94102; (415) 771-8524/8530/8531; FAX (415) 771-8522
- Consulate – Miami: 2600 Douglas Rd., Suite 104 (Douglas Centre), Coral Gables, FL 33134; (305) 774-0840; FAX (305) 774-0850
- Consulate – New York: 46 Park Ave., New York, NY 10016; (212) 889-3608; FAX (212) 679-2835
- Consulate – Houston: 1702 Hillendahl Blvd., Houston, TX 77055; (713) 270-6239; FAX (713) 270-9683
- Permanent Mission to the UN: 46 Park Ave., New York, NY 10016; (212) 679-1616/1617; FAX (212) 725-3467

EQUATORIAL GUINEA
- Embassy: 2020 16th St., NW, Washington, D.C. 20009; (202) 518-5700; FAX (202) 518-5252
- Permanent Mission to the UN: 242 East 51st St., New York, NY 10022; (212) 223-2324; FAX (212) 223-2366

ERITREA
- Embassy: 1708 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 319-1991; FAX (202) 319-1304
- Permanent Mission to the UN: 800 2nd Ave., 18th Floor, New York, NY, 10017; (212) 687-3390; FAX (212) 687-3138

ESTONIA
- Embassy: 2131 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 588-0101; FAX (202) 588-0108; e-mail info@estemb.org
- Consulate – New York: 600 3rd Ave., 26th Floor, New York, NY 10016; (212) 883-0636; FAX (212) 883-0648
- Permanent Mission to the UN: 600 3rd Ave., 26th Floor, New York, NY 10016; (212) 883-0640; FAX (212) 883-0648

ETHIOPIA
- Embassy: 3506 International Dr., NW, Washington, D.C. 20008; (202) 364-1200; FAX (202) 587-0195
- Permanent Mission to the UN: 866 Second Ave., 3rd Floor, New York, NY 10017; (212) 421-1830; FAX (212) 754-0360
- Consulate – Los Angeles: 3460 Wilshire Blvd., Suite 308, Los Angeles, CA 90010; (213) 365-6651
- Consulate – New York: 866 2nd Ave., Floor 3, New York, NY 10017; (212) 421-1830

FIJI
- Embassy: 2000 M St.., NW, Suite 710, Washington, D.C. 20036; (202) 466-8320; FAX (202) 466-8325
- Permanent Mission to the UN; 630 Third Ave., 7th Floor, New York, NY 10017; (212) 687-4130; FAX (212) 687-3963

FINLAND
- Embassy: 3301 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 298-5800; FAX (202) 298-6030
- Consulate – Los Angeles: 1801 Century Park East, Suite 2100, Los Angeles, CA 90067; (310) 203-9903; FAX (310) 203-9186
- Consulate – New York: 866 UN Plaza, Suite 250, New York, NY, 10017; (212) 750-4400; FAX (212) 750-4418

FRANCE
- Embassy: 4101 Reservoir Rd., NW, Washington, D.C. 20007; (202) 944-6000; FAX (202) 944-6166
- Permanent Mission to the UN: 245 E. 47th St., 44th Floor, New York, NY 10017; (212) 308-5700; FAX (212) 421-6889
- Consulate – Los Angeles: 10990 Wilshire Blvd., Suite 300, Los Angeles, CA 90024; (310) 235-3200; FAX (310) 479-4813
- Consulate – San Francisco: 540 Bush St., San Francisco, CA 94108; (415) 397-4330; FAX (415) 433-8357
- Consulate – Miami: Espirito Santo Plaza, Suite 1050, 1395 Brickell Ave., Miami, FL 33131; (305) 403-4150; FAX (305) 403-4151
- Consulate – Atlanta: 3475 Piedmont Rd., NE, Suite 1840, Atlanta, GA 30305; (404) 495-1660; FAX (404) 495-1661
- Consulate – Chicago: 205 North Michigan Ave., Suite 3700, Chicago, IL 60601; (312) 326-5200; FAX (312) 327-5201
- Consulate – Boston: 31 St. James Ave., Park Square Building, Suite 750, Boston, MA 02116; (617) 832-4400; FAX (617) 542-8054
- Consulate – New York: 934 5th Ave., New York, NY 10021; (212) 606-3600; FAX (212) 606-3620
- Consulate – Houston: 777 Post Oak Blvd., Suite 600, Houston, TX 77056; (713) 572-2799; FAX (713) 572-2911
- Consulate – New Orleans: 1340 Poydras St., Suite 1710, New Orleans, LA 70112; (504) 523-5772

GABON
- Embassy: 2034 20th St., NW, Washington, D.C. 20009; (202) 797-1000; FAX (202) 332-0668
- Permanent Mission to the UN: 18 E. 41st St., 9th Floor, New York, NY 10017; (212) 686-9720; FAX (212) 689-5769
- Consulate – New York: 18 E. 41st St., 9th Floor, New York, NY 10017; (212) 683- 7371

GAMBIA
- Embassy: 1156 15th St., NW, Suite 905, Washington, D.C. 20005; (202) 785-1399; FAX (202) 785-1430
- Permanent Mission to the UN: 800 Second Ave., Suite 400F, New York, NY 10017; (212) 949-6640; FAX (212) 856-9820

GEORGIA
- Embassy: 2209 Massachusetts Ave., NW, Washington D.C. 20008; (202) 387-2390; FAX (202) 387-0864
- Permanent Mission to the UN: One United Nations Plaza, 26th Floor, New York, NY 10017; (212) 759-1949; FAX (212) 759-1832
- Consulate – New York: 144 E. 41st, 5th Floor, New York, NY 10017; (212) 867-3617/3272; FAX (212) 867-3654

GERMANY
- Embassy: 4645 Reservoir Rd., NW, Washington, D.C. 20007-1998; (202) 298-4000; FAX (202)298-4249
- Consulate – Los Angeles: 6222 Wilshire Blvd., Suite 500, Los Angeles, CA 90048; (323) 930-2703; FAX (323) 930-2805
- Consulate – San Francisco: 1960 Jackson St., San Francisco, CA 94109; (415) 775-1061; FAX (415) 775-0187
- Consulate – Miami: 100 N. Biscayne Blvd. Suite 2200, Miami, FL 33132; (305) 358-0290; FAX (305) 358-0307
- Consulate – Atlanta: Marquis Two Tower, 285 Peachtree Center Ave., Suite 901, NE, Atlanta, GA 30303; (404) 659-4760; FAX (404) 577-2719
- Consulate – Chicago: 676 N. Michigan Ave., Suite 3200, Chicago, IL 60611; (404) 577-2719; FAX (312) 202-0466
- Consulate – Boston: 3 Copley Pl., Suite 500, Boston, MA 02116; (617) 369-4900; FAX (617) 369-4940
- Consulate – Houston: 1330 Post Oak Blvd., Suite 1850, Houston, TX 77056; (713) 627-7770; FAX (713) 627-0506
- Permanent Mission to the UN: 871 UN Plaza, New York, NY 10017; (212) 940-0400; FAX (212) 940-0402

GHANA
- Embassy: 3512 International Dr., NW, Washington, D.C. 20008; (202) 686-4520/21/22/23/24/25/26; FAX (202) 686-4527
- Permanent Mission to the UN: 19 E. 47th St., New York, NY 10017; (212) 832-1300; FAX (212) 751-6743

GREECE
- Embassy: 2217 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 939-1300; FAX (202) 939-1324
- Permanent Mission to the UN: 866 Second Ave., 13th Floor, New York, NY 10017; (212) 888-6900; FAX (212) 888-4440
- Consulate – New York: 69 E. 79th St., New York, NY 10021; (212) 988-5500; FAX (212) 734-8492
- Consulate – Chicago: 650 North St. Clair St., Chicago, IL 60611; (312) 335-3915; FAX (312) 335-3958
- Consulate – Los Angeles: 12424 Wilshire Blvd., Suite 800, Los Angeles, CA 90025; (310) 826-5555; FAX (310) 826-8670
- Consulate – San Francisco: 2441 Gough St. San Francisco, CA 94123; (415) 775-2102; FAX (415) 776-6815
- Consulate – Atlanta: 3340 Peachtree Rd., Suite 1670, NE, Atlanta, GA 30326; (404) 261-3313; FAX (404) 262-2798
- Consulate – Boston: 86 Beacon St. Boston, MA 02108; (617) 523-0100; FAX (617) 523-0511
- Consulate – Tampa: 601 Bayshore Bl., Suite 800, Tampa, FL 33606; (813) 865-0200; FAX (813) 865-0206
- Consulate – Houston: 520 Post Oak Blvd., Suite 450, Houston, TX 77027; (713) 840-7522; FAX (713) 840-0614
- Permanent Mission to the UN: 866 2nd Ave., 13th Floor, New York, NY 10017; (212) 888-6900; (212) 479-1300; FAX (212) 888-4440

GRENADA
- Embassy: 1701 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 265-2561; FAX (202) 265-2468
- Permanent Mission to the UN: 800 2nd Ave., Suite 400-K, New York, NY 10017; (212) 599-0301

GUATEMALA
- Embassy: 2220 R St., NW, Washington, D.C. 20008; (202) 745-4952; FAX (202) 745-1908
- Consulate – Los Angeles: 1625 W. Olympic Blvd., #1000, Los Angeles, CA 90015; (213) 365-9251/9252/1886; FAX (213) 365-9245
- Consulate – San Francisco: 785 Market St. #400, San Francisco, CA 94103; (415) 896-9181; FAX (415) 788-5653

- Consulate – Miami: 1101 Brickell Ave. #1003S, Miami, FL 33131; (305) 679-9945/9946/9947/9948 ext. 10, 14, 15; FAX (305) 679-9983
- Consulate – Chicago: 203 N. Wabash Ave. #910, Chicago, IL 60601; (312) 332-1587; FAX (312) 332-4256
- Consulate – New York: 57 Park Ave., New York, NY 10016; (212) 686-3837; FAX (212) 447-6947
- Consulate – Houston: 3013 Fountain View, Suite 210, Houston, TX 77057; (713) 953-9531; FAX (713) 953-9383
- Permanent Mission to the UN: 57 Park Ave., New York, NY 10016; (212) 679-4760; FAX (212) 685-8741

GUINEA, REPUBLIC OF

- Embassy: 2112 Leroy Pl., NW, Washington, D.C. 20008; (202) 986-4300; FAX (202) 986-4800
- Permanent Mission to the UN: 140 E. 39th St., New York, NY 10016; (212) 687-8115/8116/8117; FAX (212) 687-8248

GUINEA-BISSAU, REPUBLIC OF

- Permanent Mission to the UN: 211 East 43rd St., Room 704, New York, NY 10017; FAX (914) 636-3007

GUYANA

- Embassy: 2490 Tracy Pl., NW, Washington, D.C. 20008; (202) 265-6900/6901; FAX (202) 232-1297
- Permanent Mission to the UN: 801 2nd Ave., Suite 501, New York, NY 10017; (212) 527-5828; FAX (212) 573-6225

HAITI

- Embassy: 2311 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 332-4090; FAX (202) 745-7215
- Consulate – Miami: 259 S.W. 13th St., Miami, FL 33131; (305) 859-2003; FAX (305) 854-7441
- Consulate – Chicago: 220 State St., Suite 2110, Chicago, IL 60604; (312) 922-4004; FAX (312) 922-7122
- Consulate – Boston: 545 Boylston St., Suite 201, Boston, MA 02116; (617) 266-3660, FAX (617) 266 4060
- Consulate – New York: 271 Madison Ave., 5th Floor, New York, NY 10016; (212) 697-9767, FAX (212) 681-6991
- Permanent Mission to the UN: 801 2nd Ave., 6th Floor, New York, NY 10017; (212) 370-4840, FAX (212) 661-8698
- Haitian Lawyers Association: c/o Jeff P.H. Cazeau, Weiss Serota Heffman, 2525 Ponce De Leon Blvd., Coral Gables, FL 33134; (305) 854-0800; FAX (305) 854-2323

HOLY SEE

- Consulate – Washington, D.C.: 3339 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 333-7121; FAX (202) 337-4036

HONDURAS

- Embassy: 3007 Tilden St., NW, Suite 4M, Washington, D.C. 20008; (202) 966-7702; FAX (202) 966-9751
- Consulate – Los Angeles: 3550 Wilshire Blvd., Suite 410, Los Angeles, CA 90010; (213) 383-9244; FAX (213) 383-9306
- Consulate – San Francisco: 870 Market St., Suite 449, San Francisco, CA 94102; (415) 392-0076; FAX (415) 392-6726
- Consulate – Chicago: 4506 Fullerton Ave., Chicago, IL 60639; (773) 342-8281/8289; FAX (773) 342-8293
- Consulate – New Orleans: 2 Canal St., Suite 1641, New Orleans, LA 70130; (504) 522-3118/3119; FAX (504) 523-0544
- Consulate – Miami: 7171 Coral Way, Suite 309, Miami, FL 33155; (305) 269-9399/9345/9322; FAX (305) 269-9445
- Permanent Mission to the UN: 866 United Nations Plaza, Suite 417, New York, NY 10017; (212) 752-3370/3371; FAX (212) 223-0498, (212) 751-0403

HUNGARY
- Embassy: 3910 Shoemaker St., NW, Washington, D.C. 20008; (202) 362-6730; FAX (202) 686-6412
- Consulate – Los Angeles: 11766 Wilshire Blvd., Suite 410, Los Angeles, CA 90025; (310) 473-9344; FAX (310) 479-6443
- Consulate – New York: 223 E. 52nd St., New York, NY 10022; (212) 755-5753, (212) 752-0669; FAX (212) 755-5986
- Permanent Mission to the UN: 227 E. 52nd St., New York, NY 10022; (212) 752-0209, 755-5419/4594/6290; FAX (212) 755-5395

ICELAND
- Embassy: 1156 15th St., NW, Suite 1200, Washington, D.C. 20005; (202) 265-6653; FAX (202) 265-6656
- Permanent Mission to the UN: 800 3rd Ave., 36th Floor, New York, NY 10022; (212) 593-2700; FAX (212) 593-6269

INDIA
- Embassy: 2107 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 939-7000; FAX (202) 265-4351
- Consulate – San Francisco: 540 Arguello Blvd., San Francisco, CA 94118; (415) 668-0662; FAX (415) 668-9764
- Consulate – New York: 3 East 64th St., New York, NY 10065; (212) 774-0600; FAX (212) 861-3788
- Consulate – Chicago: 455 N. Cityfront Plaza Dr., Suite 850, Chicago, IL 60611; (312) 595-0405; FAX (312) 595-0416
- Consulate – Houston: 1990 Post Oak Blvd., Suite 600, Houston, TX 77056; (713) 626-2148/2149; FAX (713) 626-2450
- Permanent Mission to the UN: 235 E. 43rd St., New York, NY 10017; (212) 490-9660; FAX (212) 490-9656

INDONESIA, REPUBLIC OF
- Embassy: 2020 Massachusetts Ave., NW, Washington, D.C. 20036; (202) 775-5200; FAX (202) 775-5365
- Consulate – Los Angeles: 3457 Wilshire Blvd., Los Angeles, CA 90010; (213) 383-5126; FAX (213) 487-3971
- Consulate – San Francisco: 1111 Columbus Ave., San Francisco, CA 94133; (415) 474-9571; FAX (415) 441-4320
- Consulate – Chicago: 211 W. Wacker Dr., Chicago, IL 60601; (312) 920-1880; FAX (312) 920-1881
- Consulate – New York: 5 East 68th St., New York, NY 10021; (212) 879-0600
- Consulate – Houston: 10900 Richmond Ave., Houston, TX 77042; (713) 785-1691; FAX (713) 780-9644
- Permanent Mission to the UN: 325 E. 38th St., New York, NY 10016; (212) 972-8333; FAX (212) 972-9780

IRAN
- Iranian Interests Section: 2209 Wisconsin Ave., NW, Washington, D.C. 20007; (202) 965-4990; FAX (202) 965-1073
- Permanent Mission to the UN: 622 3rd Ave., New York, NY 10017; (212) 687-2020; FAX (212) 867-7086

IRAQ
- Iraqi Interests Section: 1801 P St., NW, Washington, D.C. 20036; (202) 483-7500; FAX (202) 462-8815
- Permanent Mission to the UN: 14 East 79th St., New York, NY 10075; (212) 737-4433, FAX (212) 727-9174

IRELAND

- Embassy: 2234 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 462-3939; FAX (202) 232-5993
- Consulate – San Francisco: 100 Pine St., 33rd Floor, San Francisco, CA 94111; (415) 392-4214; FAX (415) 392-0885
- Consulate – Chicago: 400 N. Michigan Ave., Suite 911, Chicago, IL 60611; (312) 337-1868; FAX (312) 337-1954
- Consulate – Boston: Chase Building, 535 Boylston St., Boston, MA 02116; (617) 267-9330; FAX (617) 267-6375
- Consulate – New York: 345 Park Ave., New York, NY 10154; (212) 319-2555; FAX (212) 980-9475
- Permanent Mission to the UN: 1 Dag Hammarskjold Plaza, 885 2nd Ave., 19th Floor, New York, NY 10017; (212) 421-6934; FAX (212) 752-4726

ISRAEL

- Embassy: 3514 International Dr., NW, Washington, D.C. 20008; (202) 364-5500; FAX (202) 364-5423
- Consulate – Los Angeles: 6380 Wilshire Blvd., Suite 1700, Los Angeles, CA 90048; (323) 852-5500; FAX (323) 852-5555
- Consulate – San Francisco: 456 Montgomery St. Suite 2100, San Francisco, CA 94104; (415) 844-7500; FAX (415) 844-7555
- Consulate – Miami: 100 North Biscayne (Yitzhak Rabin) Blvd., Suite 1800, Miami, FL 33132; (305) 358-8111; FAX (305) 371-5034
- Consulate – Atlanta: 1100 Spring St., NW Suite 440, Atlanta, GA 30309; (404) 487-6500; FAX (404) 487-6555
- Consulate – Chicago: 111 East Wacker Dr., Suite 1308, Chicago, IL 60601; (312) 297-4800; FAX (312) 297-4855/4865
- Consulate – Boston: 20 Park Plaza, Suite 1020, Boston, MA 02116; (617) 542-0200; FAX (617) 535-0255
- Consulate – Houston: 24 Greenway Plaza, Suite 1500, Houston, TX 77046; (713) 627-3780; FAX (713) 627-0149
- Permanent Mission to the UN: 800 2nd Ave., New York, NY 10017; (212) 499-5510; FAX (212) 499-5516

ITALY

- Embassy: 3000 Whitehaven St., NW, Washington, D.C. 20008; (202) 612-4400; FAX (202) 518-2154
- Consulate – Los Angeles: 12400 Wilshire Blvd., Suite 300, Los Angeles, CA 90025; (310) 820-0622, (310) 826-6207; FAX (310) 820-0727
- Consulate – San Francisco: 2590 Webster St., San Francisco, CA 94115; (415) 931-4924/292-9210; FAX (415) 931-7205
- Consulate – Miami: 4000 Ponce de Leon Blvd., Suite 590, Coral Gables, FL 31146; (305) 374-6322; FAX (305) 374-7945
- Consulate – Chicago: 500 North Michigan Ave., Suite 1850, Chicago, IL 60611; (312) 467-1550/51/52; FAX (312) 467-1335
- Consulate – Boston: 100 Boylston St., Suite 900, Boston, MA 02116; (617) 722-9201/02/03; FAX (617) 722-9407
- Consulate – Detroit: Buhl Building, 535 Griswold, Suite 1840, Detroit, MI 48226; (313) 963-8560; FAX (313) 963-8180
- Consulate – New York: 690 Park Ave., New York, NY 10021; (212) 737-9100; FAX (212) 249-4945
- Consulate – Philadelphia: Public Ledger Building, 150 S Independence Mall West, Suite 1026, Philadelphia, PA 19106; (215) 592-7329; FAX (215) 592-9808
- Consulate – Houston: 1300 Post Oak Blvd., Suite 660, Houston, TX 77056; (713) 850-7520; FAX (713) 850-9113
- Permanent Mission to the UN: 2 UN Plaza, 24th Floor, New York, NY 10017; (212) 486-9191; FAX (212) 486-1036

IVORY COAST (See COTE D'IVOIRE)

JAMAICA

- Embassy: 1520 New Hampshire Ave., NW, Washington, D.C. 20036; (202) 452-0660; FAX (202) 452-0081
- Consulate – Miami: 25 South East Second Ave., Suite 609, Ingraham Building, Miami, FL 33131; (305) 374-8431; FAX (305) 577-4970
- Consulate – New York and Permanent Mission to the UN: 767 3rd Ave., New York, NY, 10017; (212) 935-7509; FAX (212) 935-7607
- The Jamaican Consulate in New York will make phone calls to Jamaica for you if you are in prison and cannot make the calls yourself. They will probably also assist you if you are being mistreated in prison or if your rights are in some way being violated.

JAPAN

- Embassy: 2520 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 238-6700; FAX (202) 328-2187
- Consulate – Anchorage: 3601 C St., Suite 1300, Anchorage, AK 99503; (907) 562-8424; FAX (907) 562-8434
- Consulate – Los Angeles: 350 South Grand Ave., Suite 1700, Los Angeles, CA 90071; (213) 617-6700; FAX (213) 617-6727
- Consulate – San Francisco: 50 Fremont St., Suite 2300, San Francisco, CA 94105; (415) 777-3533; FAX (415) 777-0518
- Consulate – Atlanta: One Alliance Center, 3500 Lenox Rd., Suite 1600, Atlanta, GA 30326; (404) 240-4300; FAX (404) 240-4311
- Consulate in Honolulu: 1742 Nuuanu Ave. Honolulu, HI 96817; (808) 543-3111; FAX (808) 543-3170
- Consulate – Chicago: Olympia Centre, Suite 1100, 737 North Michigan Ave. Chicago, IL 60611; (312) 280-0400; FAX (312) 280-9568
- Consulate – New Orleans: 639 Loyola Ave. Suite 2050, New Orleans, LA 70113; (504) 529-2101; FAX (504) 568-9847
- Consulate – Boston: Federal Reserve Plaza,14th Floor, 600 Atlantic Ave., Boston, MA 02210; (617) 973-9772/9773/9774; FAX (617) 542-1329
- Consulate – New York: 299 Park Ave., 18th Floor, New York, NY 10017; (212) 371-8222; FAX (212) 319-6357
- Consulate – Portland: Wells Fargo Center, Suite 7200, 1300 SW 5th Ave. Portland, OR 97201; (503) 221-1811; FAX (503) 224-8936
- Consulate – Houston: 1000 Louisiana St. Suite 2300, Houston, TX 77002; (713) 652-2977; FAX (713) 651-7822
- Consulate – Seattle: 601 Union St. Suite 500, Seattle, WA 98101; (206) 682-9107; FAX (206) 624-9097
- Permanent Mission to the UN: 866 United Nations Plaza, New York, NY 10017; (212) 223-4300; FAX (212) 751-1966

JORDAN, HASHEMITE KINGDOM OF

- Embassy: 3504 International Dr., NW, Washington, D.C. 20008; (202) 966-2664; FAX (202) 966-3110
- Permanent Mission to UN: 866 2nd Ave., 4th Fl., New York, NY 10017; (212) 832-9553; FAX (212) 832-5346

KAZAKHSTAN

- Embassy: 1401 16th St., NW, Washington, D.C. 20036; (202) 232-5488; FAX (202) 232-5845
- Permanent Mission to UN: 305 East 47th St., 3rd Floor, New York, NY 10017; (212) 230-1900/1972; FAX (212) 230-1172

KENYA

- Embassy: 2249 R St., NW, Washington, D.C. 20008; (202) 387-6101; FAX (202) 462-3829
- Consulate – Los Angeles: 4801 Wilshire Blvd. Mezzanine Floor, Los Angeles, CA 90010; (323) 939-2408; FAX (323) 939-2412

- Consulate – New York: 866 UN Plaza, Suite 4014, New York, NY 10017; (212) 421-4740; FAX (212) 486-1985
- Permanent Mission to the UN: 866 UN Plaza, Suite 486, New York, NY 10017; (212) 421-4740; FAX (212) 486-1985

KIRIBATI
- Consulate – Honolulu: 95 Nakolo Pl., Room 265, Honolulu, HI 96819; (808) 834-6775; FAX (808) 834-7604

KOREA, REPUBLIC OF
- Embassy: 2450 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 939-5600; FAX (202) 797-0595
- Consulate – Los Angeles: 3243 Wilshire Blvd., Los Angeles, CA 90010; (213) 385-9300; FAX (213) 385-1849
- Consulate – San Francisco: 3500 Clay St., San Francisco, CA 90010; (415) 921-2251; FAX (415) 921-5946
- Consulate – Atlanta: International Tower, 229 Peachtree St. Suite 500, Atlanta, GA 30303; (404) 522-1611; FAX (404) 521-3169
- Consulate – Guam: 125C Tun Jose Camacho St. Tamuning, Guam 96913: (671) 647-6488; FAX (671) 649-1336
- Consulate – Honolulu: 2756 Pali Highway, Honolulu, HI 96817; (808) 595-6109; FAX (808) 595-3046
- Consulate – New York: 335 E. 45th St. 4th Floor, New York, NY 10017; (646) 674-6000, (212) 692-9120; FAX (646) 674-6023
- Consulate – Chicago: NBC Tower, 455 North City Front Plaza Dr., Suite 2700, Chicago, IL 60611; (312) 822-9485; FAX (312) 822-9849
- Consulate – Houston: 1990 Post Oak Blvd., Suite 1250 Houston, TX 77056; (713) 961-0186; FAX (713) 961-3340
- Consulate – Seattle: 2033 Sixth Ave., Suite 1125, Seattle, WA 98121; (206) 441-1011; FAX (206) 441-7912
- Permanent Mission to the UN: 335 E. 45th St., New York, NY 10017; (212) 439-4000; FAX (212) 986-1083

KUWAIT, STATE OF
- Embassy: 2940 Tilden St., NW, Washington, D.C. 20008; (202) 966-0702; FAX (202) 364-2868
- Permanent Mission to the UN: 321 E. 44th St., New York, NY 10017; (212) 973-4300; FAX (212) 370-1733

KYRGYZSTAN (KYRGYZ REPUBLIC)
- Embassy: 2360 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 338-5141; FAX (202) 386-7550

LAO PEOPLE'S DEMOCRATIC REPUBLIC
- Embassy: 2222 S St., NW, Washington, D.C. 20008; (202) 332-6416/6417; FAX (202) 332-4923
- Permanent Mission to the UN: 317 E. 51st St., New York, NY 10022; (212) 832-2734/0095; FAX (212) 750-0039

LATVIA
- Embassy: 2306 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 328-2840; FAX (202) 328-2860
- Permanent Mission to the UN: 333 E. 50th St., New York, NY 10022; (212) 838-8877; FAX (212) 838-8920

LEBANON
- Embassy: 2560 28th St., Washington, D.C. 20008; (202) 939-6300; FAX (202) 939-6324
- Consulate – New York: 9 East 76th St., New York, NY 10021; (212) 744-7905; FAX (212) 794-1510
- Consulate – Detroit: New Center One Building, 3031 West Grand Blvd., Suite 560, Detroit, MI 48202; (313) 758-0753/0754/0755; FAX (313) 758-0756

- Consulate – Los Angeles: 660 South Figueroa St., Suite 1050, Los Angeles, CA 90017; (213) 243-0999/0990
- Permanent Mission to the UN: 866 United Nations Plaza, Room 531-533, New York, NY 10017; (212) 355-5460/5461; FAX (212) 838-2819/6756

LESOTHO, KINGDOM OF
- Embassy: 2511 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 797-5533/5334; FAX (202) 234-6815
- Permanent Mission to the UN: 204 E. 39th St., New York, NY 10016; (212) 661-1690/1691/1692; FAX (212) 682-4388

LIBERIA, REPUBLIC OF
- Embassy: 5201 16th St., NW, Washington, D.C. 20011; (202) 723-0437; FAX (202) 723-0436
- Permanent Mission to the UN: 866 United Nations Plaza, Room 480, New York, NY 10017; (212) 687- 1033/1034; FAX (212) 687-1035/1846

LIBYA
- Permanent Mission to the UN: 309-315 East 48th St., New York, NY 10017; (212) 752-5775; FAX (212) 593-4787

LIECHTENSTEIN
- Embassy: 888 17th St., NW, Suite 1250, Washington, D.C. 20006; (202) 331-0590; FAX (202) 331-3221
- Permanent Mission to the UN: 633 3rd Ave., 27th Floor, New York, NY, 10017; (212) 599-0220; FAX (212) 599-0064

LITHUANIA
- Embassy: 4590 MacArthur Blvd., NW, Suite 200, Washington, D.C. 20007; (202) 234-5860; FAX (202) 328-0466
- Consulate – Chicago: 211 E. Ontario St., Suite 1500, Chicago, IL 60611; (312) 397-0382; FAX (312) 397-0385
- Consulate – New York: 420 5th Ave., 3rd Floor, New York, NY 10018; (212) 354-7840; FAX (212) 354-7911
- Permanent Mission to the UN: 708 3rd Ave., 10th Fl., New York, NY 10017; (212) 983-9474; FAX (212) 983-9473

LUXEMBOURG
- Embassy: 2200 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 265-4171; FAX (202) 328-8270
- Consulate – New York: 17 Beekman Plaza, New York, NY 10022; (212) 935-3589; FAX (212) 935-5896
- Consulate – San Francisco: 1 Sansome St., Suite 830, San Francisco, CA 94014; (415) 788-0816; FAX (415) 788-0985
- Permanent Mission to the UN: 17 Beekman Plaza, New York, NY 10022; (212) 935-3589; FAX (212) 935-5896

MACEDONIA, FORMER YUGOSLAV REPUBLIC OF
- Embassy: 3050 K St., Suite 210, NW, Washington, D.C. 20007; (202) 337-3063; FAX (202) 337-3093
- Permanent Mission to the UN: 866 UN Plaza, Suite 517, New York, NY 10017; (212) 308-8504/8723; FAX (212) 308-8724

MADAGASCAR, DEMOCRATIC REPUBLIC OF
- Embassy: 2374 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 265-5525/5526; FAX (202) 483-7603
- Permanent Mission to the UN: 820 2nd Ave., Room 800, New York, NY 10017; (212) 986-9491/9492/2827; FAX (212) 986-6271

MALAWI
- Embassy: 1156 15th St., NW, Suite 515, Washington, D.C. 20008; (202) 721-0270
- Permanent Mission to the UN: 600 Third Ave., 21st Floor, New York, NY 10016; (212) 949-0180/0181/0182; FAX (212) 599-5021

MALAYSIA
- Embassy: 3516 International Court, NW, Washington, D.C. 20008; (202) 572-9700; FAX (202) 483-7661
- Consulate – New York: 313 E. 43rd St., New York, NY 10017; (212) 490-2722
- Permanent Mission to the UN: 313 E. 43rd St., New York, NY 10017; (212) 986-6310; FAX (212) 490-8576

MALDIVES, REPUBLIC OF
- Permanent Mission to the UN: 800 2nd Ave., Suite 400E, New York, NY 10017; (212) 599-6194/6195; FAX (212) 661-6405

MALI, REPUBLIC OF
- Embassy: 2130 R St., NW, Washington, D.C. 20008; (202) 332-2249; FAX (202) 332-6603
- Permanent Mission to the UN: 111 E. 69th St., New York, NY 10021; (212) 737-4150, (212) 794-1131; FAX (212) 472-3778

MALTA
- Embassy: 2017 Connecticut Ave., NW, Washington, D.C. 20008; (202) 462-3611; FAX (202) 387-5470
- Permanent Mission to the UN: 249 East 35th St., New York, NY 10016; (212) 725-2345; FAX (212) 779-7097

MARSHALL ISLANDS
- Embassy: 2433 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 234-5414; FAX (202) 232-3236
- Permanent Mission to the UN: 800 2nd Ave., 18th Floor, New York, NY 10017; (212) 983-3040; FAX (212) 983-3202

MAURITANIA, ISLAMIC REPUBLIC OF
- Embassy: 2129 Leroy Pl., NW, Washington, D.C. 20008; (202) 232-5700; FAX (202) 319-2623
- Permanent Mission to the UN: 116 East 38th St., New York, NY 10016; (212) 252-0113/0141; FAX (212) 252-0175

MAURITIUS
- Embassy: 4301 Connecticut Ave., NW, Suite 441, Washington, D.C. 20008; (202) 244-1491/1492; FAX (202) 966-0983
- Permanent Mission to the UN: 211 East 43rd St., 15th Floor, New York, NY 10017; (212) 949-0190/0191; FAX (212) 697-3829/953-1233

MEXICO
- Embassy: 1911 Pennsylvania Ave., NW, Washington, D.C. 20006; (202) 728-1600; FAX (202) 728-1698
- Consulate – Albuquerque: 1610 4th St., NW, Albuquerque, NM 87102; (505) 247-2147/4177; FAX (505) 842-9490
- Consulate – Atlanta: 2600 Apple Valley Rd., Atlanta, GA 30319; (404) 266-2233; FAX (404) 266-2309/2302
- Consulate – Austin: 800 Brazos St., Suite 330, Austin, TX 78701; (512) 478-2866; FAX (512) 478-8008
- Consulate – Boston: 20 Park Plaza, Suite 506, Boston, MA 02116; (617) 426-4181, 350-5263/5264/5266/2250/8782; FAX (617) 695-1957
- Consulate – Brownsville: 301 Mexico Blvd. Suite F-2 Brownsville, TX 78520; (956) 542-4431/2051/5182; FAX (956) 542-7267
- Consulate – Calexico: 408 Heber Ave. Calexico, CA 92231; (760) 357-3863/4132; FAX (760) 357-6284
- Consulate – Chicago: 204 S. Ashland Ave, Chicago, IL 60607; (312) 738-2383; FAX (312) 491-9072

- Consulate – Dallas: 8855 N. Stemmons Freeway, Dallas TX 75247; (214) 252-9250/9252/9253; FAX (214) 630-3511
- Consulate – Denver: 5350 Leetsdale Dr., Suite 100, Denver, CO 80246; (303) 331-1110/1112; FAX (303) 331-1872
- Consulate – Detroit: The Penobscot Building, 645 Griswold Ave., 17th Floor, Suite 830, Detroit, MI 48226; (313) 964-4515/4532/4534; FAX (313) 964-4522
- Consulate – Douglas: 1201 F Ave., Douglas, AZ 85607; (520) 364-3107/3142; FAX (520) 364-1379
- Consulate – El Paso: 910 East San Antonio Ave., El Paso, TX 79901, P.O. Box 812; (915) 533-5714, (915) 544-6177; FAX (915) 532-7163
- Consulate – Fresno: 2409 Merced St., Fresno, CA 93721; (559) 233-3065; FAX (559) 233-6156
- Consulate – Houston: 4507 San Jacinto St., Houston, TX 77004; (713) 271-6800, (995) 1225-0218; FAX (713) 271-3201, (713)772-1229
- Consulate – Indianapolis: 39 West Jackson Pl., Suite 103 Indianapolis, IN 46225; (317) 951-0005/4174/1044; FAX (317) 951-0006/4176
- Consulate – Los Angeles: 2401 West 6th St., Los Angeles, CA 90057; (213) 351-6800; FAX (213) 383-7306
- Consulate – Laredo: 1612 Farragut St., Laredo, TX 78040; P.O. Box 659; (956) 723-6369/0990; FAX (956) 723-1741
- Consulate – Miami: 5975 SW 72 St., Suite 101, Miami, FL 33143; (786) 268-4900; FAX (786) 268-4895
- Consulate – Nogales: 571 N. Grand Ave., Nogales, AZ 85621; (520) 287-2521/3381/3386; FAX (520) 287-3175
- Consulate – New York: 27 East 39th St., New York, NY 10016; (212) 217-6400; FAX (212) 217-6493
- Consulate – Omaha: 3552 Dodge St., Omaha, NE 68131-3210; (402) 595-1841; FAX (402) 595-1845
- Consulate – Orlando: 100 West Washington St., Orlando, FL 32801-2315; (407) 422-0514; FAX (407) 422-9633
- Consulate – Oxnard: 3151 West Fifth St., E-100, Oxnard, CA 93030; (805) 984-8738/2162/2673/4105; FAX (805) 984-8747
- Consulate – Philadelphia: 111 South Independence Mall East, Suite 310, Philadelphia, PA 19106; (215) 922-4262; FAX (215) 923-7281
- Consulate – Phoenix: 1990 West Camelback Rd., Suite 110, Phoenix, AZ 85015; (602) 242-7398, (602) 249-2363, (602) 433-2294, (602) 242-8569; FAX (602) 242-2957
- Consulate – Portland: 1234 South West Morrison St., Portland, OR 97205; (503) 274-1442, (503) 478-0435; FAX (503) 274-1540
- Consulate – Raleigh: 336 E Six Forks Rd., Raleigh, NC 27609; (919) 754-0046; FAX (919) 754-1729
- Consulate – Sacramento: 1010 8th St., Sacramento, CA 95814; (916) 441-3287/3065; FAX (916) 441-3147
- Consulate – San Antonio: 127 Navarro St., San Antonio, TX 78205; (210) 227-9145/9156; FAX (210) 227-1817
- Consulate – San Bernardino: 293 North D St., San Bernardino, CA 92401; (909) 889-9836/9837/9808; FAX (909) 889-8285
- Consulate – San Diego: 1549 India St., San Diego, CA 92101; (619) 231-8414; FAX (619) 231-4802/3561
- Consulate – Seattle: 2132 Third Ave., Seattle, WA 98121; (206) 448-3526/6819/8971; FAX (206) 448-4771
- Consulate – San Francisco: 532 Folsom St. San Francisco, CA 94105; (415) 354-1700/1701; FAX (415) 495-3971
- Consulate – San Jose: 540 North First St., San José, CA 95112; (408) 294-3414/3415; FAX (408) 294-4506
- Consulate – Santa Ana: 828 N. BRd.way St. Santa Ana, CA 92701-3424; (714) 835-3069; FAX (714) 835-3472
- Consulate – St. Paul: 797 East 7th St., Saint Paul, MN 55106; (651) 771-5494; FAX (651) 772-4419

- Consulate – Yuma: 600 W. 16th. St., Yuma, AZ 85364; (928) 343-0066/9600/9699; FAX (928) 343-0077
- Permanent Mission to the UN: Two United Nations Plaza, 28th Floor, New York, NY 10017; (212) 752-0220; FAX (212) 688-8862

MICRONESIA, FEDERATED STATES OF
- Embassy: 1725 N St., NW, Washington, D.C. 20036; (202) 223-4383; FAX (202) 233-4391
- Consulate – Guam: Old Hakubotan Bldg., 973 S. Marine Dr., Suite 201, Tamuning, Guam 96911; (671) 646-9154; FAX (671) 649-6320
- Consulate – Hawaii: 3049 Ualena St., Honolulu, HI 96819; (808) 836-4775; FAX (808) 836-6869
- Permanent Mission to the UN: 820 2nd Ave., Suite 17A, New York, NY 10017; (212) 697-8370; FAX (212) 697-8295

MOLDOVA, REPUBLIC OF
- Embassy: 2101 S St., NW, Washington, D.C. 20008; (202) 667-1130; FAX (202) 667-1204
- Permanent Mission to the UN: 573-577 3rd Ave., New York, NY 10016; (212) 682-3523; FAX (212) 682-6274

MONACO
- Embassy: 565 5th Ave, 23rd Floor, New York, NY 10017; (212) 286-0500; FAX (212) 286-1574
- Permanent Mission to the UN: 866 UN Plaza, Suite 520, New York, NY 10017; (212) 832-0721; FAX (212) 832-5358

MONGOLIA
- Embassy: 2833 M St., NW, Washington, D.C. 20007; (202) 333-7117/6214; FAX (202) 298-9227
- Permanent Mission to the UN: 6 E. 77th St., New York, NY 10021; (212) 861-9460/737-3874/472-6517; FAX (212) 861-9464

MOROCCO, KINGDOM OF
- Embassy: 1601 21st St., NW, Washington, D.C. 20009; (202) 462-7979
- Consulate – New York: 10 E. 40th St., 24th Floor, New York, NY 10016; (212) 758-2625; FAX (212) 779-7441
- Permanent Mission to the UN: 866 2nd Ave., 6th and 7th Floors, New York, NY, 10017; (212) 421-1580; FAX (212) 980-1512/412-7826

MOZAMBIQUE, REPUBLIC OF
- Embassy: 1990 M St., NW, Suite 570, Washington, D.C. 20036; (202) 293-7146/7149; FAX (202) 835-0245
- Permanent Mission to the UN: 135 E. 36th St., New York, NY 10022; (212) 644-5965/6800; FAX (212) 644-5972/0528

MYANMAR, THE UNION OF
- Embassy: 2300 S St., NW, Washington, D.C. 20008; (202) 332-3344/4350/4352; FAX (202) 332-4351
- Permanent Mission to the UN: 10 E. 77th St., New York, NY 10021; (212) 535-1310/1311; FAX (212) 737-2421

NAMIBIA, REPUBLIC OF
- Embassy: 1605 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 986-0540; FAX (202) 986-0433
- Permanent Mission to the UN: 135 E. 36th St., New York, NY 10016; (212) 685-2003; FAX (212) 685-1561

NAURU, REPUBLIC OF
- Consulate – Guam: Ada Professional Bldg. Marine Dr., 1st Floor, Agana, Guam 96910; (671) 649-7106/7107
- Consulate – Hawaii: 841 Bishop St., Suite 506, Honolulu, HI 96813; (808) 523-7821
- Permanent Mission to the UN: 800 Second Ave., Suite 400D, New York, NY 10017; (212) 937-0074; FAX (212) 937-0079

NEPAL, KINGDOM OF
- Embassy: 2131 Leroy Pl., NW, Washington, D.C. 20008; (202) 667-4550; FAX (202) 667-5534
- Permanent Mission to the UN: 820 2nd Ave., Suite 17B, New York, NY 10017; (212) 370-3988/3989; FAX (212) 953-2038

NETHERLANDS, THE
- Embassy: 4200 Linnean Ave., NW, Washington, D.C. 20008; (202) 244-5300; FAX (202) 362-3430
- Consulate – Chicago: 303 E. Wacker Dr., Suite 2600, Chicago, IL 60601; (312) 856-0110; FAX (312) 856-9218
- Consulate – Los Angeles: 11766 Wilshire Blvd., Suite 1150, Los Angeles, CA 90025; (310) 268-1598; FAX (310) 312-0989
- Consulate – Miami: 701 Brickell Ave., 5th Floor, Miami, FL 33131; (786) 866-0480; FAX (786) 866-0497
- Consulate – New York: 1 Rockefeller Plaza, 11th Floor, New York, NY 10020; (212) 246-1429; FAX (212) 333-3603
- Permanent Mission to the UN: 235 E. 45th St., 16th Floor, New York, NY 10017; (212) 697-5547; FAX (212) 370-1954

NEW ZEALAND
- Embassy: 37 Observatory Circle, NW, Washington, D.C. 20008; (202) 328-4800; FAX (202) 667-5227
- Consulate – Los Angeles: 2425 Olympic Blvd., Suite 600E, Santa Monica, CA 90404; (310) 566-6555; FAX (310) 566-6556
- Consulate – New York: 222 East 41st St., Suite 2510, New York, NY 10017; (212) 832-4038; FAX (212) 832-7602
- Permanent Mission to the UN: One UN Plaza, 25th Floor, New York, NY 10017; (212) 826-1960; FAX (212) 758-0827

NICARAGUA
- Embassy: 1627 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 939-6570; FAX (202) 939-6542
- Consulate – Los Angeles: 33550 Wilshire Bl., Suite 200, Los Angeles, CA 90010; (213) 252-1170/1171/1174; FAX (213) 252-1177
- Consulate – San Francisco: 870 Market St., Suite 1050, San Francisco, CA 94102; (415) 765-6821; FAX (415) 765-6826
- Consulate – Miami: 8532 S.W. 8 St., Suite 270, Miami, FL 33144; (305) 265-1415; FAX (305) 265-1780
- Consulate – New York: 820 2nd Ave., Suite 802, New York, NY 10017; (212) 983-1981; FAX (212) 989-5528
- Consulate – Houston: 6300 Hillcroft St., Suite 250, Houston, TX 77081; (713) 272-9628/9629; FAX (713) 272-7131
- Permanent Mission to the UN: 820 2nd Ave., 8th Floor, New York, NY 10017; (212) 490-7997; FAX (212) 286-0815

NIGER, REPUBLIC OF
- Embassy: 2204 R St., NW, Washington, D.C. 20008; (202) 483-4224; FAX (202) 483-3169
- Permanent Mission to the UN: 417 E. 50th St., New York, NY 10022; (212) 421-3260/3261/3286; FAX (212) 753-6931

NIGERIA, FEDERAL REPUBLIC OF
- Embassy: 1333 16th St., NW, Washington, D.C. 20036; (202) 986-8400
- Consulate – Atlanta: 8060 Roswell Rd, Atlanta, GA 30350; (770) 394-6261
- Consulate – New York City: 828 2nd Ave., New York, NY 10017; (212) 808-0301
- Permanent Mission to the UN: 828 Second Ave., New York, NY 10017 (212) 953-9130; FAX (212) 697-1970

NORWAY
- Embassy: 2720 34th St., NW, Washington, D.C. 20008; (202) 944-8939; FAX (202) 337-0870
- Consulate – San Francisco: 20 California St., 6th Floor, San Francisco, CA 94111; (415) 986-0766

- Consulate – Houston: 2777 Allen Pkwy., Suite 1185, Houston, TX 77019; (713) 521-2900
- Permanent Mission to the UN: 825 3rd Ave., 39th Fl., New York, NY 10022; (212) 421-0280/0281/0282/0283/0284; FAX (212) 688-0554

OMAN, SULTANATE OF
- Embassy: 2535 Belmont Rd., NW, Washington, D.C. 20008; (202) 387-1980/1981/1982; FAX (202) 387-2186
- Permanent Mission to the UN: 866 UN Plaza, Suite 540, New York, NY 10017; (212) 355-3505/3506/3507; FAX (212) 644-0070

PAKISTAN
- Embassy: 3517 International Court, NW, Washington, D.C. 20008; (202) 243-6500; FAX (202) 686-1534
- Consulate – Los Angeles: 10850 Wilshire Bl., Suite 1250, Los Angeles, CA 90024; (310) 441-5114; FAX (310) 474-4871
- Consulate – Boston: 558 Clapboardtree St., Westwood, MA 02090; (617) 267-9000; FAX (617) 266-6666
- Consulate – Chicago: 333 North Michigan Ave., Suite 728, Chicago, Illinois 60601; (312) 781-1831/1832, (312) 781-1833; FAX (312) 781-1838, (312) 781-1839
- Consulate – New York: 12 E. 65th St., New York, NY 10065; (212) 879-5800; FAX (212) 517-6987
- Permanent Mission to the UN: Pakistan House, 8 E. 65th St., New York, NY 10065; (212) 879-8600; FAX (212) 744-7348

PALAU, REPUBLIC OF
- Embassy: 1701 Pennsylvania Ave., NW, Suite 300, Washington, D.C. 20006; (202) 452-6814; FAX (202) 349-8597

PALESTINE
- Permanent Observer Mission to the UN: 115 E. 65th St., New York, N.Y. 10021; (212) 288-8500; FAX (212) 517-2377

PANAMA
- Embassy: 2862 McGill Terrace, NW, Washington, D.C. 20008; (202) 483-1407; FAX (202) 483-8416
- Consulate – Miami: 5757 Blue Lagoon Dr., Suite 320, Miami, FL 33126; (305) 447-3700; FAX (305) 447-4142
- Consulate – Tampa: Galleria Office Building, 4326 El Prado Bl., Suite 4, Tampa, FL 33629; (813) 251-0316; FAX (813) 831-6685
- Consulate – Honolulu: 1568 Uluhaku Pl., Kailua, Honolulu, HI 96734; (808) 549-6883; FAX (808) 521-5043
- Consulate – New Orleans: 2424 World Trade Center, 2 Canal St., New Orleans, LA 70130; (504) 525-3458/3459; FAX (504) 424-8960
- Consulate – New York: 1212 Ave. of the Americas, 6th Floor, New York, NY 10036; (212) 840-2450; FAX (212) 840-2451
- Consulate – Philadelphia: 124 Chestnut St., Philadelphia, PA 19106; (215) 574-2994; FAX (215) 574-4225
- Consulate – Houston: 24 Greenway Plaza, Suite 1307, Houston, TX 77046; (713) 622-4451/4459; FAX (713) 622-4468
- Consulate – San Diego: 402 West BRd.way Way, Suite 670, San Diego, CA 92101; (619) 235-4441; FAX (619) 235-4442
- Permanent Mission to the UN: 866 UN Plaza, Suite 4030, New York, NY 10017; (212) 421-5420/5421; FAX (212) 421-2694

PAPUA NEW GUINEA
- Embassy: 1779 Massachusetts Ave., NW, Suite 805, Washington, D.C. 20036; (202) 745-3680; FAX (202) 745-3679
- Consulate – Fallbrook: 1308 Banyan Dr., Fallbrook, CA 92028; (760) 731-0436; FAX (760) 731-0472
- Permanent Mission to the UN: 201 East 42nd St., Suite 405, New York, NY 10017 (212) 557-5001; FAX (212) 557-5009

PARAGUAY

- Embassy: 2400 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 483-6960/6961/6962; FAX (202) 234-4508
- Consulate – Los Angeles: 6033 West Century Blvd., Suite 985, Los Angeles, CA 90045; (310) 417-9500; FAX (310) 417-9520
- Consulate – Miami: 25 South East 2nd Ave., Suite 705, Miami, FL 33131; (305) 374-9090; FAX (305) 374-5522
- Consulate – New York: 211 East 43rd St., Suite 2101, New York, NY 10017; (212) 692-9442; FAX (212) 682-9443
- Permanent Mission to the UN: 211 East 43rd St., Suite 400, New York, NY 10017; (212) 687-3490/3491; FAX (212) 818-1282

PERU

- Embassy: 1700 Massachusetts Ave., NW, Washington D.C. 20036; (202) 833-9860/9861/9862/9863/9864/9865/9866/9867/9868/9869; FAX (202) 659-8124
- Consulate – Atlanta: 4360 Chamblee Dunwoody Rd., Suite 580, Atlanta, GA 30341; (678) 336-7010, (800) 701-3919; FAX (678) 990-1920
- Consulate – Los Angeles: 3450 Wilshire Bl., Suite 1005, Los Angeles, CA 90036; (213) 252-5910/9795/8599; FAX (213) 352-8130
- Consulate – San Francisco: 870 Market St., Suite 1067, San Francisco, CA 94102; (415) 362-5185/5647/7136
- Consulate – Miami: 444 Brickell Ave., Suite M135, Miami, FL 33131; (305) 374-1305; FAX (305) 381-6027
- Consulate – Chicago: 180 N. Michigan Ave., Suite 1830, Chicago, IL 60601; (312) 853-6173/6174; FAX (312) 704-6969
- Consulate – Boston: 20 Park Plaza, Suite 511, Boston, MA 02116; (617) 338-2227; FAX (617) 338-2742
- Consulate – New York: 241 East 49th St., New York, NY 10017; (646) 735-3828/3847; FAX (646) 765-3866
- Consulate – Houston: 5177 Richmond Ave., Suite 695, Houston, TX 77056; (713) 355-9571/9438; FAX (713) 355-9377
- Permanent Mission to the UN: 820 2nd Ave., Suite 1600, New York, NY 10017; (212) 687-3336; FAX (212) 972-6975

PHILIPPINES, REPUBLIC OF

- Embassy: 1600 Massachusetts Ave., NW, Washington, D.C. 20036; (202) 467-9300; FAX (202) 467-7614
- Consulate – Los Angeles: 3600 Wilshire Bl., Suite 500, Los Angeles, CA 90010; (213) 639-0980, Emergency Tel.: 213-268-9990 (after hours); FAX (213) 639-0990
- Consulate – San Francisco: Philippine Center Bldg., 447 Sutter St., 6th Fl., San Francisco, CA 94108; (415) 433-6666; FAX (415) 421-2641
- Consulate – Agana: Suite 601-2, ITC Bldg., Marine Dr., Tamuning, Guam 96913; (671) 646-4620/4630, FAX (671) 649-1868
- Consulate – Honolulu: 2433 Pali Hwy., Honolulu, HI 96817; (808) 595-6316; FAX (808) 595-2581
- Consulate – Chicago: 30 N. Michigan Ave., Suite 2100, Chicago, IL 60602; (312) 332-6458; FAX (312) 332-3657
- Consulate – New York: Philippine Ctr., 556 5th Ave., New York, NY 10036; (212) 764-1330; FAX (212) 382-1146
- Consulate – Saipan: Marianas Businesss Plaza, 5th Floor, P.O. BOX 500731CK SAIPAN; MP 96950 CNMI; (670) 234-1848, (670) 235-8360; FAX (670) 234-1849
- Permanent Mission to the UN: Philippine Ctr., 556 5th Ave., 5th Floor, New York, NY 10036; (212) 764-1300/1301/1302/1303/1304 or (212) 704-7322; FAX (212) 840-8602

POLAND, REPUBLIC OF
- Embassy: 2640 16th St., NW, Washington, D.C. 20009; (202) 234-3800; FAX (202) 328-6271
- Permanent Mission to the UN: 9 E. 66th St., New York, NY, 10021; (212) 744-2506; FAX (212) 517-6771
- Consulate – Los Angeles: 12400 Wilshire Blvd., Suite 555, Los Angeles, CA 90025; (310) 442-8500; FAX (310) 442-8515
- Consulate – Chicago: 1530 N. Lake Shore Dr., Chicago, IL 60610; (312) 337-8166; FAX (312) 337-7841/7476
- Consulate – New York: 233 Madison Ave., New York, NY 10016; (646) 237-2100; (212) 561-8160 FAX (646) 237-2105
- Polish American Immigration & Relief Comm., Inc.: 180 2nd Ave., New York, NY 10003; (212) 254-2240; FAX (212) 254-2240

PORTUGAL
- Embassy: 2012 Massachusetts Ave., Washington, D.C., 20008; (202) 328-8610/9025/8789; FAX (202) 462-3726
- Consulate – Los Angeles: 1801 Ave. of the Stars, Suite 400, Los Angeles, CA 90067; (310) 277-1491
- Consulate – San Francisco: 3298 Washington St., San Francisco, CA 94115; (415) 346-3400; FAX (415) 346-1440
- Consulate – Boston: 1 Exeter Pl., Floor 7, Boston, MA 02116; (617) 536-8740; FAX (617) 536-2503
- Consulate – New Bedford: 628 Pleasant St., Room 218/225, New Bedford, MA 02740; (508) 997-6151; FAX (508) 992-1068
- Consulate – Newark: Main Floor, The Legal Ctr., One Riverfront Plaza, Newark, NJ 07102; (973) 643-4200; FAX (973) 643-3900
- Consulate – New York: 630 5th Ave., Suite 310, New York, NY 10111; (212) 246-4580; FAX (212) 459-0190
- Consulate – Providence: 56 Pine St., 6th Floor, Providence, RI 02903; (401) 272-2003; FAX (401) 273-6247
- Consulate – Philadelphia: 7950 Loretto Ave., Philadelphia, PA 19111; (215) 745-2889; FAX (215) 745-2867
- Consulate – Houston: 700 Louisiana, Suite 4200, Houston, TX 77002; (713) 759-1188; FAX (713) 230-0016
- Permanent Mission to the UN: 866 2nd Ave., 9th Floor, New York, NY 10017; (212) 759-9444; FAX (212) 355-1124

QATAR
- Embassy: 2555 M St., NW, Washington, DC 20037; (202) 274-1600/1603; FAX (202) 237-0061
- Consulate – Houston: 1900 Post Oak Blvd., Suite 810, Houston, TX 77056; (713) 355-8221; FAX (713) 968-9841
- Permanent Mission to the UN: 809 United Nations Plaza, 4th Floor, New York, NY 10017; (212) 486-9335/9336; FAX (212) 758-4952, (212) 308-5630

ROMANIA
- Embassy: 1607 23rd St., NW, Washington, D.C. 20008; (202) 332-4848, (202) 387-6901; FAX (202) 232-4748
- Consulate – Los Angeles: 11766 Wilshire Blvd., Suite 560, Los Angeles, CA 90025; (310) 444-0043
- Consulate – Chicago: 737 N. Michigan Ave., Suite 1170, Chicago, IL 60611; (312) 573-1315
- Consulate – New York: 200 E. 38th St., 3rd Floor, New York, NY 10016; (212) 682-9120; FAX (212) 972-8463
- Permanent Mission to the UN: 573-577 3rd Ave., New York, NY 10016 (212) 682-3273/3274; FAX (212) 682-9746

RUSSIAN FEDERATION
- Embassy: 2650 Wisconsin Ave., NW, Washington, D.C. 20007; (202) 298-5700; FAX (202) 298-5735
- Consular Division of the Embassy: 2641 Tunlaw Rd., NW, Washington, D.C. 20007; (202) 939-8907; FAX (202) 483-7579

- Consulate – Seattle: 2323 Westin Building, 2001 6th Ave., Seattle, WA 98121; (206) 728-1910; FAX (206) 728-1871
- Consulate – San Francisco: 2790 Green St., San Francisco, CA 94123; (415) 202-9800; FAX (415) 929-0306
- Consulate – Houston: 1333 West Loop South, Suite 1300, Houston, TX 77027; (713) 337-3300; FAX (713) 337-3305
- Consulate – New York: 9 E. 91st St., New York, NY 10128; (212) 348-0926; FAX (212) 831-9162
- Permanent Mission to the UN: 136 East 67th St., New York, NY 10021; (212) 861-4900/4901/4902; FAX (212) 628-0252

RWANDA, REPUBLIC OF
- Embassy: 1714 New Hampshire Ave., NW, Washington, D.C. 20009; (202) 232-2882; FAX (202) 232-4544
- Consulate – Chicago: 666 Dundee Rd., Suite 1401, Northbrook, IL 60062; (708) 205-1188
- Permanent Mission to the UN: 124 East 39th St., New York, NY, 10016; (212) 679-9010/9023/9024; FAX (212) 679-9133

SAINT KITTS AND NEVIS
- Embassy: 3216 New Mexico Ave., NW, Washington, D.C. 20016; (202) 686-2636; FAX (202) 686-5740
- Consulate – Dallas: 6336 Greenville Ave. Dallas, TX 75206
- Consulate – Atlanta: 644 Antone St., NW, Atlanta, GA 30318
- Permanent Mission to the UN: 414 East 75th St., 5th Floor, New York, NY 10021; (212) 535-1234; FAX (212) 535-6854

SAINT LUCIA
- Embassy: 3216 New Mexico Ave. NW, Washington, D.C. 20016; (202) 364-6792/6793/6794/6795; FAX (202) 364-6725
- Consulate – Los Angeles: 2250 Century Hill, Los Angeles, CA 90067; (310) 557-9000
- Consulate – New York: 800 2nd Ave., Suite 900E, New York, NY 10017; (212) 697-9360; FAX (212) 697-4993
- Consulate – Miami: 1101 Brickel Ave., Suite 1602, Miami, FL 33131; (305) 523-6380; FAX (305) 523-6383
- Permanent Mission to the UN: 800 2nd Ave., Suite 400J, New York, NY 10017; (212) 697-9360/9361; FAX (212) 697-4993

SAINT VINCENT & THE GRENADINES
- Embassy: 3216 New Mexico Ave. NW, Washington, D.C. 20016; (202) 364-6730/6736; FAX (202) 364-6736
- Permanent Mission to the UN: 801 2nd Ave., 21st Fl., New York, NY 10017; (212) 687-4490/4491; FAX (212) 949-5946

SAMOA
- Embassy: 800 2nd Ave., Suite 400D, New York, NY 10017; (212) 599-6196/6197; FAX (212) 599-0797
- Permanent Mission to the UN: 800 2nd Ave., Suite 400J, New York, NY 10017; (212) 599-6196/6197; FAX (212) 599-0797

SAO TOME AND PRINCIPE
- Embassy and Permanent Mission to the UN: 400 Park Ave., 7th Floor, New York, NY 10022; (212) 317-0533; FAX (212) 317-0580
- Consulate – Atlanta: 512 Means St., Suite 305, Atlanta, GA 30318; (404) 221-0203; FAX (404) 221-1006

SAUDI ARABIA
- Embassy: 601 New Hampshire Ave. NW, Washington, D.C. 20037; (202) 342-3800; FAX (202) 337-4084
- Consulate – Los Angeles: 2045 Sawtelle Blvd., Los Angeles, CA 90025; (310) 479-6000; FAX (310) 479-2752

- Consulate – New York: 866 United Nations Plaza, Suite 480, New York, NY 10017; (212) 752-2740; FAX (212) 983-4895
- Consulate – Houston: 5718 Westheimer Rd., Suite 1500, Houston, TX 77057; (713) 785-5577; FAX (713) 785-1163
- Permanent Mission to the UN: 809 United Nations Plaza, 10th and 11th Floor, New York, NY 10017; (212) 557-1525; FAX (212) 983-4895

SENÉGAL
- Embassy: 2112 Wyoming Ave. NW, Washington, D.C. 20008; (202) 234-0540/0541; FAX (202) 332-6315
- Consulate –New York: 271 West 125th St., Suite 412, New York, NY 10027; (917) 493-8950; FAX (917) 493-8953
- Consulate – Houston: Stone Crest International, 3602 S. McGregor Wa.., Houston, TX 77021; (713) 748-5016; FAX 713-782-3495
- Permanent Mission to the UN: 238 E. 68th St., New York, NY 10021; (212) 517-9030/9031/9032; FAX (212) 517-3032.
- If you are near New York and have an emergency, contact the UN Permanent Mission. They can provide you with interpreters and other assistance on the scene.

SERBIA AND MONTENEGRO
- Embassy: 2134 Kalorama Rd., NW, Washington, D.C. 20008; (202) 332-0333; FAX (202) 332-3933
- Consulate – Chicago: 201 East Ohio St., Suite 200, Chicago, IL 60611; (312) 670-6707; FAX (312) 670-6787
- Permanent Mission to the UN: 854 5th Ave., New York, NY 10021; (212) 879-8700; FAX (212) 879-8705

SEYCHELLES, REPUBLIC OF
- Embassy: 800 2nd Ave., Suite 400C, New York, NY 10017; (212) 972-1785; FAX (212) 972-1786
- Consulate – Seattle: 3620 S.W. 309th St., Federal Way, Seattle, WA 98023; (253) 874-4579; FAX (253) 838-2787
- Permanent Mission to the UN: 800 2nd Ave., Suite 400C, New York, NY 10017; (212) 972-1785; FAX (212) 972-1786

SIERRA LEONE, REPUBLIC OF
- Embassy: 1701 19th St. NW, Washington, D.C. 20009; (202) 939-9261; FAX (202) 483-1793
- Permanent Mission to the UN: 245 E. 49th St., New York, NY 10017; (212) 688-1656/4985; FAX (212) 688-4924

SINGAPORE, REPUBLIC OF
- Embassy: 3501 International Pl. NW, Washington, D.C. 20008; (202) 537-3100; FAX (202) 537-0876
- Consulate – San Francisco: 595 Market St., Suite 2450, San Francisco, CA 94105; (415) 543-0474/4775; FAX (415) 543-4788
- Consulate – New York: 231 E. 51st St., New York, NY 10022-6520; (212) 223-3331; FAX (212) 826-5028
- Permanent Mission to the UN: 231 East 51st St., New York, NY 10022; (212) 826-0840/0841/0842/0843/0844; FAX (212) 826-2964

SLOVAKIA (REPUBLIC OF SLOVAK)
- Embassy: 3523 International Court NW, Washington D.C., 20008; (202) 237-1054; FAX (202) 237-6438
- Consulate – Washington D.C.: 3525 International Court NW, Washington D.C. 20008; (202) 237-1054; FAX (202) 237-6438
- Consulate – New York: 801 2nd Ave., 12th Floor, New York, NY 10017; (212) 286-8434; FAX (212) 286-8439
- Consulate – Los Angeles: 10940 Wilshire Blvd., Suite 2030, Los Angeles, CA 90024; (310) 209-1253; FAX (310) 209-1261
- Permanent Mission to the UN: 801 2nd Ave., 12th Floor, New York, NY 10017; (212) 286-8880/8401/8418/8452; FAX (212) 286-8419

SLOVENIA
- Embassy: 2401 California St., NW, Washington, D.C. 20008; (202) 667-5363; FAX (202) 386-6602
- Consulate – New York: 600 3rd Ave., 21st Fl., New York, NY 10016; (212) 370-3006; FAX (212) 370-3581
- Consulate – Cleveland: 55 Public Square, Suite 945, Cleveland, OH 44113; (216) 589-9220; FAX (216) 589-9210
- Permanent Mission to the UN: 600 3rd Ave., 24th Floor, New York, NY 10016; (212) 370-3007/1831; FAX (212) 370-1824

SOMALI DEMOCRATIC REPUBLIC
- Permanent Mission to the UN: 425 East 61st St., Suite 702, New York, NY 10065; (212) 688-9410/5046; FAX (212) 759-0651

SOUTH AFRICA
- Embassy: 3051 Massachusetts Ave. NW, Washington, D.C. 20008; (202) 232-4400; FAX (202) 265-1607
- Consulate – Washington, D.C.: 4301 Connecticut Ave., NW, Suite 220, Washington, D.C. 20008; (202) 274-7991/2; FAX 202-244-9417
- Consulate – Chicago: 200 South Michigan Ave., 6th Fl., Chicago, IL 60604; (312) 939-7929; FAX (312) 939-2588
- Consulate – New York: 333 East 38th St., 9th Fl., New York, NY 10016; (212) 213-4880; FAX (212) 213-0102
- Consulate – Los Angeles: 6300 Wilshire Blvd., Suite 600, Los Angeles, CA 90048; (323) 651-0902; FAX (323) 651-5969
- Permanent Mission to the UN: 333 East 38th St., 9th Fl., New York, NY 10016; (212) 213-5583; FAX (212) 265-1607

SPAIN
- Embassy: 2375 Pennsylvania Ave. NW, Washington, D.C. 20037; (202) 728-2330; FAX (202) 728-2302
- Consulate – Los Angeles: 5055 Wilshire Blvd., Suite 860, Los Angeles, CA 90036; (323) 938-0158 FAX (323) 938-0112
- Consulate – San Francisco: 1405 Sutter St., San Francisco, CA 94109; (415) 922-2995/2996; FAX (415) 931-9706
- Consulate – Miami: 2655 Le Jeune Rd., Suite 203, Coral Gables, FL 33134; (305) 446-5511/5512/5513; FAX (305) 446-0585
- Consulate – Chicago: 180 N. Michigan Ave., Suite 1500, Chicago, IL 60601; (312) 782-4588/4589; FAX (312) 782-1635
- Consulate – New Orleans: 2102 World Trade Ctr., New Orleans, LA 70130; (504) 525-4951; FAX (504) 525-4955
- Consulate – Boston: 31 St. James Ave., Suite 905, Boston, MA 02116; (617) 536-2506/2527; FAX (617) 536-8512
- Consulate – New York: 150 East 58th St., Floors 30-31, New York, NY 10155; (212) 355-4080/4081/4082/4085/4090; FAX (212) 644-3751
- Consulate – Houston: 1800 Bering Dr., Suite 660, Houston, TX 77057; (713) 783-6200/6205; FAX (713) 783-6166
- Consulate – Puerto Rico: Apartado Postal 9243, Santurce, PR 00908; (787) 758-6090/6142/6279
- Permanent Mission to the UN: One Dag Hammarskjöld Plaza, 245 East 47th St., 36th Floor, New York, NY 10017; (212) 661-1050; FAX (212) 949-7247

SRI LANKA
- Embassy: 2148 Wyoming Ave. NW, Washington, D.C. 20008; (202) 483-4025/4028; FAX (202) 232-7181
- Consulate – Los Angeles: 3250 Wilshire Blvd., Suite 1405, Los Angeles, CA 90010; (213) 387-0210; FAX (213) 387-0216

- Consulate – New York: 630 3rd Ave., 20th Fl., New York, NY 10017; (212) 986-7040; FAX (212) 986-1838
- Permanent Mission to the UN: 630 3rd Ave., 20th Fl., New York, NY 10017; (212) 986-7040/7041/7042/7043; FAX (212) 986-1838

SUDAN, REPUBLIC OF
- Embassy: 2210 Massachusetts Ave. NW, Washington, D.C. 20008; (202) 338-8565; FAX (202) 667-2406
- Consulate – Washington, D.C.: 1729 Wisconsin Ave. NW, Washington D.C. 20007; (202) 333-4735
- Permanent Mission to the UN: 305 E. 47th St., 4th Floor, New York, NY 10017; (212) 573-6033; FAX (212) 573-6160

SURINAME, REPUBLIC OF
- Embassy: 4301 Connecticut Ave. NW, Suite 460, Washington, D.C. 20008; (202) 244-7488/7590/7591/7592; FAX (202) 244-5878
- Consulate – Miami: 6303 Blue Lagoon Dr., Suite 325, Miami, Fl 33126; (305) 265-4655; FAX (305) 265-4599
- Permanent Mission to the UN: 866 UN Plaza, Suite 320, New York, NY 10017; (212) 826-0660/0661/0662/0663; FAX (212) 980-7029

SWAZILAND, KINGDOM OF
- Embassy: 1712 New Hampshire Ave., Washington, D.C. 20009; (202) 234-5002; FAX (202) 234-8254
- Permanent Mission to the UN: 408 East 50th St., New York, NY 10022; (212) 371-8910; FAX (212) 754-2755

SWEDEN
- Embassy: 2900 K St.. NW, Washington, D.C. 20007; (202) 467-2600; FAX (202) 467-2699
- Consulate – Los Angeles: 10940 Wilshire Blvd., Suite 700, Los Angeles, CA 90024; (310) 445-4008; (310) 824-4700; FAX (310) 473-2229
- Consulate – New York: 1 Dag Hammerskjold Plaza, 885 2nd Ave., 45th Fl., New York, NY 10017; (212) 583-2550; FAX (212) 583-2599
- Consulate – San Juan: Menaco Building, 2nd & 3rd Floors, Rd. 550, No. 5, Luchetti Industrial Park, Marginal Oeste Park,Bayamon, San Juan, PR 00936; (787) 778-2377; FAX (787) 778-2365/2378
- Consulate – 120 Montgomery St., Suite 2175, San Francisco, CA 94104; (415) 788-2631; FAX (415) 788-6841
- Permanent Mission to the UN: One Dag Hammarskjöld Plaza, 885 2nd Ave., 46th Floor, New York, NY 10017; (212) 583-2500; FAX (212) 832-2549

SWITZERLAND
- Embassy: 2900 Cathedral Ave. NW, Washington, D.C. 20008; (202) 745-7900; FAX (202) 387-2564
- Consulate – Los Angeles: 11766 Wilshire Blvd., Suite 1400, Los Angeles, CA 90025; (310) 575-1145
- Consulate – San Francisco: 456 Montgomery St., Suite 1500, San Francisco, CA 94104; (415) 788-2272; FAX (415) 788-1402
- Consulate – Atlanta: 1275 Peachtree St., N.E., Suite 425, Atlanta, GA 30309; (404) 870-2000; FAX (404) 870-2011
- Consulate – Chicago: 737 N. Michigan Ave., Suite 2301, Chicago, IL 60611; (312) 915-0061/4500; FAX (312) 915-0388
- Consulate – New York: 633 3rd Ave., 30th Floor, New York, NY 10017; (212) 599-5700; FAX (212) 599-4266
- Permanent Mission to the UN: 633 3rd Ave., 29th Fl., New York, NY 10017; (212) 286-1540; FAX (212) 286-1555

SYRIA (SYRIAN ARAB REPUBLIC)
- Embassy: 2215 Wyoming Ave. NW, Washington, D.C. 20008; (202) 232-6313; FAX (202) 234-4585
- Permanent Mission to the UN: 820 2nd Ave., 15th Floor, New York, NY 10017; (212) 661-1313; FAX (212) 983-4439

TAIWAN
- Taipei Economic and Cultural Representative Office in the United States: 4201 Wisconsin Ave. NW, Washington, D.C. 20016; (202) 895-1800; FAX (202) 363-0999
- Taipei Economic and Cultural Office in Atlanta: 1180 W. Peachtree St., N.E. Suite 800, Atlantic Center Plaza, Atlanta, GA 30309; (404) 870-9375; FAX (404) 870-9376
- Taipei Economic and Cultural Office in Boston: 99 Summer St., Suite 801, Boston, MA 02110; (617) 737-2050; FAX (617) 737-1684
- Taipei Economic and Cultural Office in Chicago: Two Prudential Plaza, 57th Floor, 180 North Stetson Ave., Chicago, IL 60601; (312) 616-0100; FAX (312) 616-1490
- Taipei Economic and Cultural Office in Guam: Bank of Guam Building, 111 Chanlan Santo Papa Rd., Suite 505, Hagatna, GU 96910; (671) 472-5865; FAX (671) 472-5869
- Taipei Economic and Cultural Office in Honolulu: 2746 Pali Highway, Honolulu, HI 96817; (808) 595-6347; FAX (808) 595-6542
- Taipei Economic and Cultural Office in Houston: 11 Greenway Plaza, Suite 2006, Houston, TX 77046; (713) 626-7445; FAX (713) 626-1202
- Taipei Economic and Cultural Office in Missouri: 3100 BRd.way, Suite 800, Kansas City, MO 64111; (816) 531-1298; FAX (816) 531-3066
- Taipei Economic and Cultural Office in Los Angeles: 3731 Wilshire Blvd., Los Angeles, CA 90010; (213) 389-1215; FAX (213) 389-1676
- Taipei Economic and Cultural Office in Miami: 2333 Ponce de Leon Blvd., Suite 610, Coral Gables, FL 33134; (305) 443-8917; FAX (305) 442-6054
- Taipei Economic and Cultural Office in New York, 1 E. 42nd St., 4th Fl., New York, NY 10017; (212) 317-7300; FAX (212) 754-1549
- Taipei Economic and Cultural Office in San Francisco: 555 Montgomery St., Suite 501, San Francisco, CA 94111; (415) 362-7680; FAX (415) 362-5382
- Taipei Economic and Cultural Office in Seattle: One Union Square, Suite 2020, 600 University St., Seattle, WA 98101; (206) 441-4586; FAX (206) 441-4320

TAJIKISTAN, REPUBLIC OF
- Embassy: 1005 New Hampshire Ave. NW, Washington, D.C. 20037; (202) 223-6090; FAX (202) 223-6091
- Permanent Mission to the UN: 216 E. 49th St., 4th Floor, New York, NY 10017; (212) 207-3315; FAX (212) 207-3855

TANZANIA, UNITED REPUBLIC OF
- Embassy: 2139 R St. NW, Washington, D.C. 20008; (202) 939-6125/6127; FAX (202) 797-7408; E-MAIL ubalozi@tanzaniaembassy-us.org
- Permanent Mission to the UN: 201 East 42nd St., Suite 1700, New York, NY 10017; (212) 972-9160; FAX (212) 682-5232

THAILAND
- Embassy: 1024 Wisconsin Ave. NW, Suite 401, Washington, D.C. 20007; (202) 944-3600; FAX (202) 944-3611
- Consulate – Los Angeles: 611 N. Larchmont Bl., Los Angeles, CA 90004; (213) 962-9574/9577; FAX (323) 962-2128; E-mail Thai-la@mindspring.com
- Consulate – New York: 351 E. 52nd St., New York, NY 10022; (212) 754-1770; FAX (212) 754-1907
- Consulate – Chicago: 700 North Rush St., Chicago, IL 60611-2504; (312) 664-3129; FAX (312) 664-3230; E-MAIL thaichicago@ameritech.net
- Permanent Mission to the UN: 351 East 52nd St., New York, NY 10022; (212) 754-2230; FAX (212) 688-3029; E-mail thailand@un.int

TOGO, REPUBLIC OF
- Embassy: 2208 Massachusetts Ave. NW, Washington, D.C. 20008; (202) 234-4212/4213; FAX (202) 232-3190
- Permanent Mission to the UN: 112 East 40th St., New York, NY 10016; (212) 490-3455/3456; FAX (212) 983-6684

TONGA, KINGDOM OF
- Consulate – San Francisco: 360 Post St., Suite 604, San Francisco, CA 94108; (415) 781-0365; FAX (415) 781-3964
- Permanent Mission to the UN: 250 East 51st St., New York, NY 10022; (917) 369-1025; FAX (917) 369-1024; E-mail tongaunmission@aol.com

TRINIDAD AND TOBAGO
- Embassy: 1708 Massachusetts Ave. NW, Washington, D.C. 20036; (202) 467-6490; FAX (202) 785-3130; E-mail info@ttembwash.com
- Consulate – Miami: 1000 Brickell Ave., Suite 800, Miami, FL 33131-3047; (305) 374-2199; FAX (305) 374-3199; E-MAIL ttmiami@worldnet.att.net
- Consulate – New York: 733 3rd Ave., Suite 1716, New York, NY 10017-3204; (212) 682-7272; FAX (212) 986-2146; E-mail ttcgny@idt.net
- Permanent Mission to the UN: 820 Second Ave., 5th Floor, New York, NY 10017; (212) 697-7620/7621/7622/7623; FAX (212) 682-3580; E-mail tto@un.int

TUNISIA
- Embassy: 1515 Massachusetts Ave. NW, Washington, D.C. 20005; (202) 862-1850; FAX (202) 862-1858
- Permanent Mission to the UN: 31 Beekman Pl., New York, NY 10022; (212) 751-7503/7534/5069; FAX (212) 751-0569

TURKEY, REPUBLIC OF
- Embassy: 1714 Massachusetts Ave. NW, Washington, D.C. 20036; (202) 659-8200; FAX (202) 659-0744
- Consulate – Los Angeles: 4801 Wilshire Blvd., Los Angeles, CA 90010; (213) 937-0118; FAX (213) 932-0061
- Consulate – San Francisco: 3401 Sacramento St., San Francisco, CA 94102; (415) 922-9222
- Consulate – Chicago: 360 N. Michigan Ave., Suite 1405, Chicago, IL 60601; (312) 263-0644; FAX (312) 263 1295
- Permanent Mission to the UN: 821 UN Plaza, 10th Floor, New York, NY 10017; (212) 949-0150; FAX (212) 949-0086

TURKMENISTAN
- Embassy: 2207 Massachusetts Ave., NW, Washington, D.C. 20008; (202) 588-1500; FAX (202) 588-0697
- Permanent Mission to the UN: 866 UN Plaza, Suite 424, New York, NY 10017; (212) 486-8908; FAX (212) 486-2521

UGANDA, REPUBLIC OF
- Embassy: 5911 16th St. NW, Washington, D.C. 20011; (202) 726-7100/7101/7012; FAX (202) 726-1727
- Permanent Mission to the UN: 336 East 45th St., New York, NY 10017; (212) 949-0110/0111/0112/0113; FAX (212) 687-4517

UKRAINE
- Embassy: 3350 M St. NW, Washington, D.C. 20007; (202) 333-0606; FAX (202) 333-0817
- Consulate – Chicago: 10 E. Huron St., Chicago, IL 60611; (312) 642-4388; FAX (312) 642-4385
- Consulate – New York: 240 E. 49th St., New York, NY 10017; (212) 371-5690; FAX (212) 371-5547
- Permanent Mission to the UN: 220 East 51st St., New York, NY 10022; (212) 759-7003; FAX (212) 355-9455

UNITED ARAB EMIRATES
- Embassy: 1255 22nd St. NW, Suite 700, Washington, D.C. 20037; (202) 243-2400; FAX (202) 243-2432
- Permanent Mission to the UN: 305 East 47th St., 7th Floor, New York, NY 10017; (212) 371-0480; FAX (212) 371-4923

UNITED KINGDOM OF GREAT BRITAIN & NORTHERN IRELAND

- Embassy: 3100 Massachusetts Ave. NW, Washington, D.C. 20008; (202) 588-6500; FAX (202) 588-7870
- Consulate – Los Angeles: 11766 Wilshire Blvd., Suite 1200, Los Angeles, CA 90025; (310) 481-0031; FAX (310) 481-2960
- Consulate – San Francisco: 1 Sansome St., Suite 850, San Francisco, CA 94104; (415) 617-1300; FAX (415) 434-2018
- Consulate – Denver: World Trade Center, 1675 BRd.way, Suite 1030, Denver, CO 80202; (303) 592-5200
- Consulate – Miami: Brickell Bay Office, 1001 Brickell Bay Dr., Suite 2800, Miami, FL 33131; (305) 374-1522; FAX (305) 374-8196
- Consulate – Atlanta: Georgia Pacific Centre, 133 Peachtree St. N.E., Atlanta, GA 30303; (404) 954-7700; FAX (404) 954-7702
- Consulate – Chicago: 400 N. Michigan Ave., 13th Floor, Chicago, IL 60611; (312) 970-3800; FAX (312) 970-3852
- Consulate – New York: 845 3rd Ave., New York, NY 10022; (212) 745-0200; FAX (212) 754-3062
- Consulate – Seattle: 900 4th Ave., Suite 3001, Seattle, WA 98164; (206) 622-9255
- Permanent Mission to the UN: One Dag Hammarskjöld Plaza, 885 2nd Ave., New York, NY 10017; (212) 745-9200; FAX (212) 745-9316
- Consulate – New York: 801 Second Ave, 20th Floor, New York, NY 10017; (212) 754-7403; FAX (212) 838-9812
- Permanent Mission to the UN: 866 UN Plaza, Suite 326, New York, NY 10017-7671; (212) 486-4242; FAX (212) 486-7998

URUGUAY

- Embassy: 1913 I St. NW, Washington, D.C. 20006; (202) 331-1313; FAX (202) 331-8645; Consular Section: (202) 331-4219
- Consulate – Los Angeles: 429 Santa Monica Blvd., Suite 400, Santa Monica, CA 90401; (310) 394-5777; FAX (310) 394 5140
- Consulate – Miami: 1077 Ponce De Leon Bldg., Coral Gables, FL 33134; (305) 443-9764/7453; FAX (305) 443-7802
- Consulate – New York: 420 Madison Ave, 6th Floor, New York, NY 10017; (212) 753 8191/8192; FAX (212) 753 1603
- Permanent Mission to the UN: 866 UN Plaza, Suite 322, New York, NY 10017; (212) 752-8240; FAX (212) 593-0935

UZBEKISTAN, REPUBLIC OF

- Embassy: 1746 Massachusetts Ave. NW, Washington, D.C. 20036; (202) 887-5300; FAX (202) 293-6804
- Consulate – New York: 801 Second Ave., 20th Floor, New York, NY 10017; (212) 754-7403; FAX (212) 838-9812, (212) 754-6178

VENEZUELA

- Embassy: 1099 30th St. NW, Washington, D.C. 20007; (202) 342-2214; FAX (202) 342-6820
- Consulate – San Francisco: 311 California St., Suite 620, San Francisco, CA 94104; (415) 347-3323; FAX (415) 955-1970
- Consulate – Chicago: 20 N. Wacker Dr., Suite 1925, 19th fl., Chicago, IL 60606; (312) 236-9655/9659; FAX (312) 580-1010
- Consulate – New Orleans: World Trade Center, 2 Canal St., Suite 2300, New Orleans, LA 70130; (504) 524-6700, (504) 522-3284; FAX (504) 522-7092
- Consulate – Boston: 545 Boylston St., 3rd Floor, Boston, MA 02116; (617) 266-9475/9368; FAX (617) 266-2350
- Consulate – New York: 7 E. 51st St., New York, NY 10022; (212) 826-1660; FAX (212) 644-7471
- Consulate – Puerto Rico: Edf. Mercantil Plaza, PISO 6 Ponce De Leon Ave., Suite 601, Hato Rey, San Juan, Puerto Rico 00918; (787) 766-4250/4251/4255

- Consulate – Houston: 2925 Briar Park Dr., Suite 900, Houston, TX 77027; (713) 974-0028/9002; FAX (713) 974-1413
- Permanent Mission to the UN: 335 East 46th St., New York, NY 10017; (212) 557-2055; FAX (212) 557-3528

VIETNAM, SOCIALIST REPUBLIC OF
- Embassy: 1233 20th St. NW, Suite 400, Washington, D.C. 20036; (202) 861-0737; FAX (202) 861-0917
- Consulate – San Francisco: 1700 California St., Suite 430, San Francisco, CA 94109; (415) 922-1707; FAX (415) 922-1848
- Permanent Mission to the UN: 866 UN Plaza, Suite 435, New York, NY 10017; (212) 644-0594; (212) 644-5732

WESTERN SAMOA [See SAMOA]

YEMEN
- Embassy: 2319 Wyoming Ave., NW, Washington, D.C. 20008; (202) 965-4760; FAX (202) 337-2017
- Permanent Mission to the UN: 413 East 51st St., New York, NY 10022; (212) 355-1730/1731; FAX (212) 750-9613

YUGOSLAVIA, FORMER S.F. REPUBLIC OF [See SERBIA AND MONTENEGRO]

ZAIRE (See DEMOCRATIC REPUBLIC OF CONGO)

ZAMBIA, REPUBLIC OF
- Embassy: 2419 Massachusetts Ave. NW, Washington, D.C. 20008; (202) 265-9717
- Permanent Mission to the UN: 237 East 52nd St., New York, NY 10022; (212) 888-5770; FAX (212) 888-5213

ZIMBABWE, REPUBLIC OF
- Embassy: 1608 New Hampshire Ave. NW, Washington, D.C. 20009; (202) 332-7100; FAX (202) 483-9326
- Permanent Mission to the UN: 128 East 56th St., New York, NY 10022; (212) 980-9511/5084; FAX (212) 308-6705